1934

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LAW REPORTS

Supreme Court of Canada

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ARMAND GRENIER, K.C.
S. EDWARD BOLTON

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1934

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. LYMAN POORE DUFF C.J., P.C., G.C.M.G.
" THIBAUDEAU RINFRET J.
" JOHN HENDERSON LAMONT J.
" LAWRENCE ARTHUR CANNON J.
" OSWALD SMITH CROCKET J.
" FRANK JOSEPH HUGHES J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. HUGH GUTHRIE K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. MAURICE DUPRÉ K.C.

87923—1½

ERRATA

Page 38, at footnote (5), [1889] should be [1899].

Page 55, at footnote (1), 280 should be 282.

Page 61, at the 28th line, strike out 29.

Page 106, at footnote (1), 197 should be 199.

Page 127, at footnote (1), 468 should be 68.

Page 254, at the 30th line, strike out (3), and footnote (3) should form part of footnote (2).

Page 259, footnote (2) should be (1918) Q.R. 56 S.C. 54.

Page 259, at footnote (3), 40 should be 50.

Page 275, footnote (1) should be (1892) Q.R. 1 S.C. 443.

Page 446, footnote (1) should be (1933) Q.R. 54 K.B. 414.

Page 450, footnote (3) should be (1893) Q.R. 3 Q.B. 280.

Page 520, at the 33rd line, (1) should be (2), and second footnote (1) should be (2).

Page 521, footnote (1) should be (1932) 57 Can. Cr. Cas. 151.

Page 525, at the 21st line, (1) should be (2), at the 33rd line, (2) should be (3), at the 42nd line, (1) should be (4); and second footnote (1) should be (2), footnote (2) should be (3) and third footnote (1) should be (4).

Page 526, at the 12th line, (2) should be (1), at the 16th line (3) should be (2), at the 27th line (1) should be (3) and at the 36th line (1) should be (4); and first footnote (2) should be (1), footnote (3) should be (2), footnote (1) should be (3) and second footnote (2) should be (4).

Page 586, at footnote (2), (1887) should be (1877).

Page 608, at the 38th line, (1) should be (3); and second footnote (1) should be (3).

Page 618, at the 12th line, (1) should be (2); and second footnote (1) should be (2).

Page 619, at the 38th line, (1) should be (2); and second footnote (1) should be (2).

Page 629, at the 25th line, (1) and (2) refer to footnote (1) and (2) at page 628.

Page 639, at the 35th line, (1) should be (2); and second footnote (1) should be (2).

Page 635, in margin, above " May 2," insert *Feb. 14, 15.

Page 636, counsel for appellants should be: *W. S. Gray K.C.* and *D. K. MacTavish* for the appellant, The Attorney-General for Alberta.—*D. K. MacTavish* for the appellant plaintiff.

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF THE PREVIOUS VOLUME OF THE SUPREME COURT REPORTS.

Canadian Electrical Association v. *Can. Nat. Rys.* ([1932] S.C.R. 451). Appeals dismissed, 12th July, 1934.

Canadian Pacific Ry. Co. v. *Can. Nat. Ry. Co.* ([1934] S.C.R. 305). Leave to appeal granted, 19th July, 1934.

Carmichael v. *City of Edmonton* ([1933] S.C.R. 650). Leave to appeal refused, 21st July, 1934.

Colpron v. *Canadian National Railway Co.* ([1934] S.C.R. 189). Leave to appeal refused, 10th May, 1934.

Lewis v. *Nisbet & Auld Ltd.* ([1934] S.C.R. 333). Leave to appeal refused, 17th July, 1934.

Lightning Fastener Co. v. *Colonial Fastener Co.* ([1933] S.C.R. 377). Appeal allowed, 31st May, 1934.

London Loan and Savings Co. of Canada v. *Brickenden* ([1933] S.C.R. 257). Appeal dismissed with costs, 10th May, 1934.

O'Connor v. *Waldron* ([1932] S.C.R. 183). Appeal allowed, 8th November, 1934.

Reference re *Refund of dues paid under s. 47 (f) of Timber Regulations* ([1933] S.C.R. 616). Leave to appeal granted, 21st June, 1934.

Reference re *s. 17 of The Alberta Act* ([1927] S.C.R. 364). Petition for special leave to appeal, summoned under rule 58, dismissed, 21st June, 1934.

Robertson v. *Quinlan* ([1934] S.C.R. 550). Leave to appeal refused, 16th November, 1934.

Winnipeg Electric Co. v. *The City of Winnipeg* ([1934] S.C.R. 173). Leave to appeal granted, 5th June, 1934.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

TABLE OF CASES CITED

A

B

B—*Concluded*

C

C—*Concluded*

F—*Concluded*

G

H

H—*Concluded*

I

J

K

L

L—*Concluded*

M

Mc

N

O

P

P—*Concluded*

Q

R

S

T

V

W

Y

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

WILLIAM D. HOGG (DEFENDANT).....APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION, ADMINISTRATOR OF THE ESTATE OF LADY ELIZABETH MARY HOWLAND (PLAINTIFF) ..... RESPONDENT.

1933

*June 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trustee—Liability for interest on uninvested balances in his hands—Passing accounts—Res judicata—Surrogate Courts Act, R.S.O., 1927, c. 94, s. 65 (1), (3).

The judgment of the Court of Appeal for Ontario, [1932] O.R. 641, holding that the defendant was liable to pay interest on certain uninvested balances of trust funds held by him for the late Lady H., and directing a reference to take an account of the sum properly chargeable for interest, was affirmed. It was held that the plaintiff's claim for interest had not become *res judicata* by the judgment of the Judicial Committee of the Privy Council in *Campbell* v. *Hogg*, [1930] 3 D.L.R. 673 (on an appeal in former proceedings which began by petition filed by the present defendant in the proper Surrogate Court in Ontario for the passing of his accounts), as that judgment (as interpreted in the present judgment) did not dispose of the matter of interest now in question except to hold that in the proceedings then before the court there was no jurisdiction to charge interest on uninvested balances in the hands of such a trustee as was the defendant. (In this connection, s. 65 (1), (3), of the *Surrogate Courts Act*, R.S.O., 1927, c. 94, considered).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1).

The action was tried before Jeffrey J. (2) who held that the plaintiff (administrator of the estate of the late Lady

*PRESENT:—Duff C.J. and Lamont, Smith, Crocket and Hughes JJ.

(1) [1932] O.R. 641; [1932] 4 D.L.R. 465.

(2) His judgment is noted in (1932) 41 Ont. W.N. 102.

1933

HOGG v. THE TORONTO GENERAL TRUSTS CORP.

Howland) should recover from the defendant the sum of $17,520.40, as being interest, computed at the statutory rate, half yearly, with rests, on the sum of $7,027.34, this latter sum being the amount found by the Judicial Committee of the Privy Council (1) to be then remaining in the defendant's hands as trustee for the late Lady Howland (which finding of the Judicial Committee was made on an appeal in former proceedings which began by petition filed by the present defendant in the proper Surrogate Court in Ontario for the passing of his accounts).

The Court of Appeal (2) vacated and set aside the judgment of Jeffrey J., but (by a majority) ordered and adjudged that it be referred to the Master of the Court at Toronto to take an account of such sum as the Master might properly find the defendant chargeable with in respect of interest or compound interest on the moneys amounting to the said sum of $7,027.34, and that the plaintiff recover from the defendant the amount found due by the Master forthwith after the confirmation of his report.

The defendant appealed to the Supreme Court of Canada. The question for determination by this Court was whether or not the defendant's plea of *res judicata* (by reason of the said former proceedings and the said judgment of the Judicial Committee of the Privy Council therein) was a good answer to the claim for interest made by the plaintiff in the present action.

R. V. Sinclair K.C. for the appellant.

W. J. Elliott K.C. for the respondent.

The judgment of the court was delivered by

HUGHES J.—The facts and circumstances preceding the bringing of this action are set forth fully in the report of the judgment of the Court of Appeal for Ontario (2). The learned trial judge, Mr. Justice Jeffrey, had given judgment in favour of the respondent for $17,520.40 as interest on various funds of the late Lady Elizabeth Mary Howland remaining during certain years in the hands of the appellant, who had formerly, during her lifetime, acted for her in connection with investments.

(1) *Campbell* v. *Hogg,* [1930] 3 D.L.R. 673.
(2) [1932] O.R. 641; [1932] 4 D.L.R. 465.

The defendant appealed to the Court of Appeal for Ontario, which Court (1) vacated the judgment of the learned trial judge and ordered a reference to the Master of the Supreme Court of Ontario to take an account of such sum as the Master might properly find the appellant chargeable with in respect of interest or compound interest on the money, amounting to $7,027.34, mentioned in the pleadings as having been found in the hands of the appellant by the judgment of the Judicial Committee of the Privy Council (*Campbell* v. *Hogg* (2)).

From the judgment of the Court of Appeal the defendant appealed to this Court.

The appellant contended before us that, by the judgment of the Judicial Committee of the Privy Council, it was found that sums aggregating $7,027.34 remained in the hands of the appellant and a claim for interest on the respective sums aggregating that amount was *res judicata.*

Section 65, subsection 1, of the *Surrogate Courts Act,* R.S.O., 1927, chapter 94, is as follows:

65. (1) Where an executor, administrator, trustee, under a will of which he is an executor, or a guardian, has filed in the proper surrogate court an account of his dealings with the estate, and the judge has approved thereof, in whole or in part, if he is subsequently required to pass his accounts in the Supreme Court such approval, except so far as mistake or fraud is shown, shall be binding upon any person who was notified of the proceedings taken before the surrogate judge, or who was present or represented thereat, and upon every one claiming under any such person.

Section 65, subsection 3, of the same Act is as follows:

(3) The judge, on passing the accounts of an executor, administrator or such a trustee, shall have jurisdiction to enter into and make full enquiry and accounting of and concerning the whole property which the deceased was possessed of or entitled to, and the administration and disbursement thereof in as full and ample a manner as may be done in the Master's office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting subject to appeal.

There is no doubt that a Master has in Ontario frequently charged interest on uninvested balances against an executor under an administration order. *Inglis* v. *Beaty* (3); *In re Honsberger* (4).

But the appellant has not made clear to us how he, in the capacity in which he acted, comes within the wording

(1) [1932] O.R. 641; [1932] 4 D.L.R. 465.
(2) [1930] 3 D.L.R. 673.
(3) (1878) 2 Ont. A.R., 453.
(4) (1885) 10 Ont. R., 521.

1933

HOGG v. THE TORONTO GENERAL TRUSTS CORP.

Hughes J.

of section 65, subsection 1, "trustee, under a will of which he is an executor," or of subsection 3, "such a trustee."

The judgment of the Judicial Committee of the Privy Council, in *Campbell* v. *Hogg* (1), *supra,* held, in our opinion, that the surrogate judge had no jurisdiction to charge interest on uninvested balances in the hands of such a trustee as was the appellant.

The following passages occur in the judgment of the Judicial Committee:

At page 683:

> But having said so much, their Lordships, while expressing no opinion upon the extent of the jurisdiction or range of topics that may be included in s. 65 (3) of the Surrogate Courts Act, are clear that in the present proceedings no sums ought to be charged against Mr. Hogg beyond those which it was admitted or proved that he had received. Except upon admission he may not, for instance, in these proceedings be charged with interest on uninvested balances or with any sum in the nature of damages.

At page 692:

> * * * Interest on uninvested balances is not chargeable in these proceedings. Mr. Hogg will in the result remain accountable for the net amount of principal and that only.
>
> (3) The Dumas, Vaillancourt and Campbell mortgage moneys. These have already been referred to. As uninvested balances they are all three brought into charge in the account. No claim for interest upon them as such, is, as has been observed, competent in these proceedings.

And at page 701:

> Their Lordships have now dealt with all the points raised by the appellant which were not abandoned or disposed of during the hearing. They say now nothing of her charge that on the capital which, it is said, appears on his account to have been in his hands, Mr. Hogg is short on an average of $700 a year in his interest. This remains a mere allegation, not worked out by reference to the account. Even however if to any extent a *prima facie* case with reference to that interest or to any part of it could be made, no relief in these proceedings could on the evidence be given for the reason explained in an earlier part of this judgment.

We are of opinion that the above language, notably that on page 692, goes to the question of jurisdiction and that therefore the claim for interest is not *res judicata.*

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. V. Sinclair.*

Solicitors for the respondent: *Elliott, Hume, McKague & Anger.*

(1) [1930] 3 D.L.R. 673.

A. M. MORRISON AND ANOTHER (DEFENDANTS) ..... } APELLANTS;

AND

EAST KOOTENAY RUBY CO. LTD. (PLAINTIFF) ..... } RESPONDENT.

1933
*Oct. 4.
*Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Statute—Interpretation—Mining—Forfeiture of leases—Sections 110 and 114 of the Placer-mining Act, R.S.B.C., 1924, c. 169—Whether irreconcilable.

Sections 110 and 114 of the *Placer-mining Act,* R.S.B.C., 1924, c. 169, are not irreconcilable and there is no conflict between them. Each one of these sections has its respective application according to the circumstances of each case. Section 110 imparts a statutory declaration of forfeiture in certain well defined cases of breach therein specified; while section 114 covers all other cases of non-performance or non-observance. In cases of forfeiture specifically mentioned in section 110, the lease is *ipso facto* void: the necessity of a declaration by the Gold Commissioner approved by the Minister of Mines is excluded, as absolute forfeiture operates automatically.

APPEAL from the decision of the Court of Appeal for British Columbia, affirming on an equal division the judgment of the Supreme Court, D. A. Macdonald J. (1) and maintaining the respondent's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

H. A. Beckwith for the appellant.

Geo. F. Henderson K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—This action was tried upon a special case stated by the parties.

The main point involved is whether the respondent, who holds by assignment a placer lease in the mining division of Atlin Lake, has forfeited its rights under the lease, so that the ground became open to re-location by the appellants.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

(1) [1933] 1 W.W.R. 460.

1933

MORRISON v. EAST KOOTENAY RUBY CO. LTD.

Rinfret J.

The trial judge in the Supreme Court held that there was no forfeiture (1). In the Court of Appeal, his decision stood affirmed on an equal division of the judges.

The lease was made on the 30th day of September, 1922, by the Gold Commissioner for the Atlin Lake Mining Division as lessor. It provided that the lessee should pay a yearly rent in advance to the Mining Recorder; that he would

> observe, make, and keep all and singular the provisions, payments, conditions, and stipulations of the said *Placer-mining Act* and amending Acts, and other the laws for the time being in force in the province in relation to mining.

It was granted upon the express condition that the lessee would work and mine for the precious metals upon the premises demised and would expend two hundred and fifty dollars at least in each and every year during the continuance of the term, and further would

> satisfy the Mining Recorder that such development-work has been done by the affidavit of the lessee or his agent setting out a detailed statement of the work done, and shall obtain from the said Mining Recorder a certificate of such work having been done, and shall record the same before the expiration of each and every year of the term hereby demised.

The respondent did not pay any rent, did not expend the sum of two hundred and fifty dollars, or any sum, in the development-work, and consequently did not satisfy the Mining Recorder that the development-work had been done, as required by the lease, did not obtain from the Mining Recorder any certificate of work and did not have any recorded.

As a result, on the 1st of October, 1930, the Gold Commissioner issued a certificate that the lessee was in default; and thereupon the Mining Recorder cancelled the record of the lease and noted the cancellation on the copy of the said lease on file. After the cancellation, the lessee made several attempts to pay the rent; but the Mining Recorder, the Gold Commissioner and the Minister of Mines in turn refused to accept it, on the ground that it had not been paid in time. The Minister of Mines has not formally declared the lease forfeited or approved any forfeiture thereof; but he has, at all times adopted the attitude that, by reason of the lessee's default, the lease automatically became forfeited and void, and the Minister had no power to act in the matter. The question for the opinion of the

(1) [1933] 1 W.W.R. 460.

court is whether the lease has been forfeited under the circumstances.

The decision turns upon the interpretation of subsection 5 of section 110 of the *Placer-mining Act* (R.S.B.C., 1924, c. 169), which reads as follows:

(5) If the development-work required by this section is not done in any year, or if the lessee fails to obtain or record the certificate required in any year, or if the annual rental payable under the lease or any part thereof remains unpaid after the day on which it becomes payable, the lease shall be deemed forfeited and the demised premises shall be deemed vacant and abandoned without any re-entry, declaration or forfeiture, or other act on the part of the lessor, Gold Commissioner, or otherwise, any rule of law or equity to the contrary notwithstanding. Upon receipt of a certificate from the Gold Commissioner that the lessee is in default in respect of the doing or recording of development-work in respect of the lease, or that the annual rental in respect of the lease is in default, the Mining Recorder, in whose office a copy of the lease is filed shall cancel the record of the lease and note the cancellation on the copy of the lease on file.

It is clear that the parties intended the lease to be entered into under the authority of that section. The material provisions of the section are reproduced verbatim in the lease of which they are made an express condition.

It is to be noted that, by force of the statute, in the event of certain specified defaults, "the lease shall be deemed forfeited," "the demised premises shall be deemed vacant and abandoned," "without any re-entry," without "any declaration of forfeiture," without any "other act on the part of the lessor * * * or otherwise," "any rule of law or equity to the contrary notwithstanding."

In our view, the enactment so worded provides for an absolute forfeiture operating automatically. Immediately upon the happening of any of the specified breaches, the lease is *ipso facto* void, without any necessity for a declaration or for any further act to be done by anybody. The words used by the legislature show, we think, the clear intention to exclude the rule laid down in *Davenport* v. *The Queen* (1).

The lessee is not left without means of relief or of reinstatement, but the manner in which relief may be granted or reinstatement may be obtained is specifically dealt with in other sections of the statute. It is not apparent that power is given to grant it otherwise. Suffice it to say that,

(1) (1877) 3 App. Cas. 115, at 129.

1933

MORRISON v. EAST KOOTENAY RUBY CO. LTD.

Rinfret J.

in the premises, the lessee has not brought himself within the conditions essentially required to obtain reinstatement and we are not dealing with an application for relief.

In this case, we may go further and we may say that there were, on behalf of the lessor, unequivocal acts evincing his intention to avoid the lease (*Roberts* v. *Davey*) (1). The Gold Commissioner (who was actually the lessor) issued his certificate that the lessee was in default. The Mining Recorder thereupon cancelled the record and noted the cancellation on the copy of the lease on file. The Mining Recorder promptly returned to the lessee the money remitted for rental, as not having been paid on time. From then on, the lessee was explicitly notified of the stand taken by the lessor. Later, the money for rental was tendered to the Minister of Mines, who received it subject to the acceptance of the Gold Commissioner. The Gold Commissioner ruled that the same was not paid in time and that the lease had, by reason of the lessee's delay, lapsed and become void. The tendered money was thereupon returned to the lessee. It is conceded that the Minister

> has at all times adopted the attitude that, by reason of plaintiff's default, the said lease automatically became forfeited and void and that the Minister had no power to act in the matter.

Should it be held that the respondent's default did not absolutely determine the lease, and only made it voidable at the election of the landlord, yet we would think that by the acts just enumerated the landlord has unequivocally indicated his intention and he has exercised his option.

It remains to consider the effect of subsection 1 of section 114 of the *Placer-mining Act* reading as follows:

> 114. (1) Subject to the provisions of subsection (2), on the non-performance or non-observance of any convenant or condition in any lease, the lease shall be declared forfeited by the Gold Commissioner, subject to the approval of the Minister of Mines, unless good cause is shown to the contrary. After any such declaration of forfeiture, the mining ground shall be open for location by any free miner. No lease shall be declared forfeited, except in accordance with this section.

It was argued that this is a case to which this subsection applies and, if so, that the Minister of Mines has not given his approval.

We are unable to accede to the argument.

(1) (1833) 4 B. & Ad. 664.

Subsection 1 of section 114 provides generally for all cases of

non-performance or non-observance of any covenant or condition in any lease.

It enacts that, in all such cases, there must be a declaration of forfeiture, "subject to the approval of the Minister of Mines." Only after such declaration, shall the mining ground "be open for location by any free miner."

Subsection 5 of section 110 is restricted to forfeitures arising out of the particular breaches of covenant therein specified. It deals explicitly with the question of declaration and it says that, in the cases specifically mentioned, no declaration of forfeiture shall be required. It operates therefore as an exception. And it must be so or else—if subsection 1 of section 114 was held to be an absolute rule applying in every case—subsection 5 of section 110 would never come into operation. We do not find any conflict between the two sections. Section 110 imparts a statutory declaration of forfeiture in certain well defined cases of breach. Section 114 covers all other cases of non-performance or non-observance. In the latter cases, there must be "a declaration by the Gold Commissioner, subject to the approval of the Minister of Mines." And the enactment says that wherever a declaration of forfeiture is required, that declaration must be "in accordance with this section." But, in the particular cases provided for by subsection 5 of section 110, the necessity for a declaration is excluded. It says there is to be a forfeiture without declaration.

It may be further pointed out that, in the terms of the statute, the provisions of section 110 apply only to "leases issued on or after the first day of July, 1920, pursuant to" the *Placer-mining Act*. (R.S.B.C., 1924, c. 169.)

Our conclusion is that the appeal ought to be allowed and that the question must be answered in the affirmative. Accordingly judgment shall be entered for the defendants dismissing the plaintiff's action, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *H. A. Beckwith.*

Solicitors for the respondent: *Crease & Crease.*

1933

*Mar. 21, 22, 23, 24.
*June 28.

*Oct. 3.
*Dec. 22.

IN THE MATTER OF THE MECHANICS' LIEN ACT, ONTARIO

THE HONOURABLE FRANK CARREL (MORTGAGEE) ..... APPELLANT;

AND

ALBERT A. HART (LIEN CLAIMANT).. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Mortgages—Priority as between lien and mortgage—Priority as between lien and mortgagee's expenditure in completing building—Lien chargeable as general lien against several buildings—Mechanics' Lien Act, R.S.O., 1927, c. 173, ss. 5, 32 (2), 7 (3), 13 (1).

Respondent, who had a contract "to do the brickwork and supply the bricks for five" adjoining detached duplex houses at a price of "$4,080 per building or a total of $20,400 for the complete contract," performed it and registered a lien, under the *Mechanics' Lien Act*, R.S.O., 1927, c. 173, for the balance due him. Subsequently, one of the houses, hereinafter called the "corner house," being in an unfinished state, appellant, who held a mortgage, originally made to one R., on the property, started foreclosure proceedings and, under a writ of possession, went into possession of it and completed it, a covenant in his mortgage entitling him to complete it and to add the cost thereof to his mortgage debt. A question arose as to priority between his cost of completion and respondent's lien. Also a question arose as to priority between respondent's lien and a certain mortgage on the corner house lot, made and registered prior to commencement of the building, to one W., assigned to one A., and, after the trial herein, assigned to appellant. This mortgage, while held by A., was, on the making of the mortgage to R. above mentioned, postponed, under an agreement by A., to the mortgage to R., which mortgage to R. (assigned to appellant) was that on which appellant, as aforesaid, took proceedings and went into possession of, and completed, the corner house.

Held (1) On construction of respondent's contract, as a whole, it showed the intention of the parties thereto to treat it as one entire contract covering all the buildings.

(2) Respondent's lien was chargeable against all the land, irrespective of the work and materials which went into each building. In applying the Act the court may and should have regard to the contract under which the work or materials claimed for were provided; and where the parties by their contract have treated several buildings upon contiguous lots belonging to the same owner as upon one property, the lien claimant is entitled to have the lien applied as a general lien upon all the land. However difficult it may be to find a satisfactory basis for this principle in the words of the Act itself (i.e., in s. 5, the controlling section, which creates the right of lien; if the lien were for supply of material only, the right to maintain it as a general lien upon all the buildings

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

would exist under s. 32 (2)), the principle has been so long and so generally recognized that it must now be taken as settled law. (*Ontario Lime Assn.* v. *Grimwood,* 22 Ont. L.R. 17; *Polson* v. *Thomson,* 29 D.L.R. 395, at 401, and other cases, cited and discussed).

(3) Respondent's lien (extending to the amount owing him for work and material on all the buildings) had priority over appellant's claim for cost of said completion. The intention of the Act, as disclosed by ss. 7 (3) and 13 (1), was clearly to limit the security of a registered mortgage, as against lien claims, to the actual value of the property as at the time the first lien arose, and to exclude from the operation of that security all payments and advances made thereunder by the mortgagee after such lien claims have been registered. And the payments and advances so excluded would include the cost of completion in question.

(4) Respondent, though not having brought an action to enforce his own lien, could, to hold his lien in its priority, rely upon the statement of claim of another lien claimant whose claim was dismissed.

(5) The said mortgage to W., assigned to A. and later to appellant, had priority over respondent's lien; such priority was not lost by the said agreement of postponement of it to the mortgage to R. (On this point, the judgment of the Court of Appeal was reversed; Crocket J. dissenting).

Except as above stated, the judgment of the Court of Appeal, Ont., [1932] O.R. 617, was affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1), in so far as it allowed the present respondent's claim for a lien under the *Mechanics' Lien Act,* R.S.O. 1927, c. 173, and held that such lien had priority over moneys expended by the present appellant (a mortgagee) in the completion of a certain building, and in so far as (by its formal judgment, as settled) it gave to the said lien priority over a certain mortgage, formerly held by one Albrechtsen, and acquired, since the commencement of the action, by the present appellant.

The material facts of the case are sufficiently stated in the judgments now reported.

The judgment of this Court was first delivered on June 28, 1933, and it was directed that the appeal be dismissed with costs; but the reasons for judgment did not deal with one of the matters in issue (the question of priority between the respondent's lien and the said mortgage formerly held by Albrechtsen) and this matter was later brought up by way of a motion to vary the judgment, and judgment on this motion was delivered on December 22, 1933, granting the motion and varying the judgment so that in respect

(1) Sub. nom. *Boake* v. *Guild,* [1932] O.R. 617; [1932] 4 D.L.R. 217.

1933

CARREL v. HART.

of the issue raised by the motion the appeal was allowed; the appellant to have half of his costs of appeal to this Court. (Crocket J. dissented on the question dealt with on the motion).

The present report gives in the following order: the reasons for judgment as first delivered, the statement of the motion, and the reasons for judgment (on the further issue) delivered on the motion.

S. A. Hayden and *Woods Walker* for the appellant.

R. Kellock and *H. P. Edge* for the respondent.

In the judgment first delivered, reasons were delivered by Smith J. and by Crocket J.; the Chief Justice and Rinfret and Lamont JJ. concurring with each.

SMITH, J. (concurred in by Duff C.J. and Rinfret and Lamont JJ.)—The respondent's lien is for a balance owing under a contract by respondent to do the brickwork and supply the bricks for five four-family duplex houses. The appellant had advanced, on a first mortgage of the corner duplex numbered 2 and 4, the sum of $6,500, and also held a third mortgage on the whole five duplexes for $10,511.53, for which amounts it is admitted the appellant has priority over the lien of the respondent.

The owner ran short of funds before the buildings were completed, and further work was abandoned. Duplex 2 and 4 being, as winter approached, in such an incomplete state, including the lack of any heating plant, that it was in danger of being greatly damaged during winter if left in this uncompleted state, and being also incapable of producing revenue, the appellant completed the building at a cost of $12,500. Before this expenditure, the respondent's lien, which was subject to the mortgages to the amount mentioned, was practically worthless.

The judgment appealed from holds that the respondent's lien attaches to the value added to the building by appellant's expenditure in priority to the portion of appellant's mortgage represented by this expenditure, which was expressly authorized in such event by the terms of the mortgage. Respondent's priority over this part of the mortgage moneys extends not only to the amount owing to him for work done and material supplied for this duplex 2 and 4,

but to the amount owing him for work done and material supplied on the other buildings as well. A more inequitable result, I think, it would be difficult to conceive. It is, however, a result brought about by express statutory enactment, coupled with the appellant's failure to be guided by the provisions of the statute.

Long before commencing work for completion of the building, the appellant had brought an action for foreclosure of his mortgages, by which he could have obtained immediate possession. In this action the lienholders could have been made parties as subsequent encumbrancers, and on proper proof of danger of destruction of his security by delay, the court would have given him protection, perhaps by giving him immediate foreclosure or sale. He saw fit, however, to take the remedy into his own hands, disregarding the terms of the statute, with the result that his expenditure enures to the benefit of the respondent, instead of to himself. It is with regret that I find myself forced to the conclusion that the judgment giving the respondent the benefit of the appellant's expenditure of $12,500 is in accordance with the provisions of the statute. I can find no ground for differing from the reasoning of Mr. Justice Grant in the Court of Appeal and from that of my brother Crocket.

I therefore agree that the appeal must be dismissed with costs.

CROCKET, J. (concurred in by Duff C.J. and Rinfret and Lamont JJ.)—This appeal involves the question of the validity of a contractor's lien purporting to be registered by the respondent under the provisions of the *Mechanics' Lien Act*, c. 173, R.S.O., 1927, for work and materials provided in the construction of a row of 5 four-family detached duplex houses in the city of Toronto, and also the question of its priority in respect of an expenditure of approximately $12,000 made by the appellant, to complete one of the houses, after going into possession of the same as mortgagee.

The work and materials claimed for were done and furnished by Hart under a contract entered into by him in September, 1929, with one Guild, a builder, whereby he agreed to do the brick work and supply the brick on and

1933

CARREL v. HART.

Crocket J.

for the five houses at a price of "$4,080 per building or a total of $20,400 for the complete contract," as a letter of September 15 confirming the contract stated it, exclusive of brick and labour for mantels and garages, which was left to be arranged by the architect.

Guild's wife had a few weeks before purchased from one Watt and taken in her name the deed of the land on which it was proposed to erect the five houses. It was situated on the north side of Castle View avenue, and included 31 feet 9 inches of lot No. 3, and the whole of lots 4, 5, 6, 7 and 8, running easterly to Spadina road, having a total frontage of 253 feet 9 inches on Castle View avenue, and a uniform depth of approximately 106 feet. For the purpose of the duplexes building scheme it seems that the land was subdivided into five new lots, the side-lines of which overlapped the side-lines of the original lots, and that the most easterly of the new lots, with which the appellant's mortgages are here particularly concerned, and upon which the duplex, 2-4, was built, comprised 7 feet 9 inches of the original lot No. 7 and the whole of lot No. 8, with a right of way over a driveway between it and the adjoining lot on the west.

Mrs. Guild, having paid part of the purchase price of the land in cash, gave Watt five separate mortgages for $3,612.50 each, presumably one on each of the five lots as subdivided for the building scheme. Four of these mortgages were transferred to one Arthur, and the fifth, covering the corner or most easterly lot, was assigned to one Albrechtsen. Building loans were arranged on mortgages on the four westerly houses, two with the Canada Life Assurance Company for $22,000 each, and two with Confederation Life Assurance Association for $18,000 each, Arthur waiving in favour of these his four $3,612.50 mortgages. On the corner lot Mrs. Guild gave a second mortgage to one Alberta Gibbons for $6,500, which was transferred subsequently to the appellant.

In October the Guilds procured the incorporation of City Duplexes Limited, which took over all these properties from Mrs. Guild and assumed all outstanding obligations thereon, Guild continuing, however, as before to manage the undertaking. Finding the moneys available under the mortgages already mentioned insufficient to enable it to meet the

rapidly increasing claims, City Duplexes Limited, on February 25, 1930, when all five houses were in various stages of construction—the four westerly more nearly completed than the most easterly building, 2-4,—executed a mortgage covering the latter property as well as the four adjoining lots to one Florence Ready to secure a further loan of $10,000. The appellant shortly afterwards acquired this mortgage, Albrechtsen waiving in its favour his $3,612.50 mortgage on this lot and building.

Hart went to work immediately upon entering into his brick contract, which called for its completion on or before February 1, 1930, starting with the most westerly building and proceeding with the others in their order, west to east. There were some delays, occasioned by the weather, and others which it appears were chiefly caused by the difficulties which the Guilds and City Duplexes Limited were having in financing the undertaking, with the result that about the middle of May, although the four westerly houses were substantially completed, and Hart had finished the brickwork under his contract on the house 2-4, there remained a considerable amount of work to be done in the latter in order to complete it. Several liens had been registered against the whole property and at this juncture negotiations took place between the different mortgagees, lien claimants and other creditors with a view to securing the outstanding indebtedness to the various creditors. These negotiations proved abortive on account of Arthur, who held the second mortgages on the four westerly lots, refusing to enter into the arrangement which was proposed.

Arthur subsequently, on June 11, went into possession of these houses as mortgagee and the same day Hart registered his lien against the estate of Mr. and Mrs. Guild and of Watt, Albrechtsen, Arthur, City Duplexes Limited and Mortgage Discount Limited, in the entire parcel of land which Mrs. Guild had purchased from Watt and which the lien claim described as the easterly 31 feet 9 inches of lot No. 3 and lots Nos. 4, 5, 6, 7 and 8.. It claimed a balance due of $12,200 for work done on brick contract for City Duplexes Limited and R T. Guild on or before May 15, 1930.

At that time the $6,500 secured by the Gibbons mortgage had been fully advanced and approximately $8,500

1933
CARREL
v.
HART.
Crocket J.

of the $10,000 secured by the Ready mortgage, both of which were now held by the appellant. The latter started foreclosure proceedings, and about the same time, it appears, City Duplexes Limited went into bankruptcy. Negotiations were then entered into by some of the lien claimants with the appellant's solicitor, with a view to the completion of the corner building, 2-4. These negotiations also fell through, and on August 12, 1930, the appellant went into possession of this house under a writ of possession obtained in his foreclosure action. He proceeded to complete the building and expended approximately $12,000 for that purpose, notwithstanding the prior registration of Hart's and other liens. It is in respect only of this $12,000 expenditure and of Hart's lien that the question of priority arises.

On the trial of the respondent's and several other lien claims in a consolidated action before the Assistant Master of the Supreme Court, under the provisions of the *Mechanics' Lien Act,* the appellant relied upon four main objections: first, that the respondent's lien was not registered within time; second, that in the course of the negotiations referred to he had waived his lien or estopped himself by his conduct in connection therewith from relying upon it as against the appellant; third, that the lien was not chargeable as a general lien against all or any of the buildings or lots without proof of the particular balances which were or may have been due the claimant in respect of each separate house; and, fourth, that, in any event, the lien was subject to the expenditure which the appellant had made for the completion of the house, 2-4, after he had gone into possession in exercise of his rights as assignee of the Ready mortgage.

The Master found against the first two objections, but disallowed the lien on the ground that the work and materials were not done and furnished under an entire contract, within the meaning of sec. 32, subsec. 2, of the Act, and were therefore not chargeable against all or any of the buildings without proof of the balances which were due in respect of each of the five buildings.

The respondent appealed to the Court of Appeal, which sustained the lien and held that it was entitled to priority

over the moneys expended by the present appellant for the completion of the house, 2-4, as mortgagee in possession.

The same grounds which were taken before the Master and the Court of Appeal were argued before this Court.

As to the lien not being registered within time, the Master found that Hart performed work under his contract on the house, 14-16, on May 14, 1930, and on the house, 2-4, on May 17, within thirty days of the registration of his lien. This finding, involving as it did, a consideration of the good faith of the claimant, is a finding upon what is peculiarly a question of fact, which we think, in the circumstances, should be regarded as conclusive.

The second ground was disposed of during the argument, the Court stating its opinion that there was no evidence, either of a waiver of the lien on the part of the respondent, or of an estoppel against him in connection with the futile negotiations above referred to.

The third ground involves two questions: first, whether the contract under which Hart provided the work and materials was an entire contract for a gross price for the brick and brick work for all the five houses; and, second, if it were such a contract, whether the lien was maintainable for the general balance due thereunder upon all or any of the houses and lots without proof of the particular balances which were due in respect of the different buildings.

We think that the Court of Appeal rightly construed the contract between Guild and Hart, as evidenced by the letter of September 15, 1929, as a single contract for the brickwork and the supply of bricks upon and for all the five buildings at a total price of $20,400, exclusive of brick or labour for mantels and garages, which were to be dealt with as extras and arranged by the architect.

The appellant's counsel, in support of his contention that the contract was severable in respect of the five houses, mainly relied upon the inclusion in the price sentence of the figures and words "$4,080 per building" and the following passage:—

* * * and the terms of payment will be as I receive the second draw on the Permanent Trust mortgages which are being placed on the different buildings as they are erected.

together with the fact that the mortgages which were arranged for building loans with Canada Life Assurance

1933

CARREL v. HART.

Crocket J.

Company and Confederation Life Assurance Association were separate mortgages on the four westerly buildings.

It will be observed that the figures and words "$4,080 per building," in the price sentence are immediately followed by the words and figures "or a total of $20,400 *for the complete contract*"; also, that Hart's contract is expressly stated in the first sentence of the letter to be a contract "to do the brick work and supply the bricks for 5 four-family duplexes," and that Hart also undertakes to have "all brick work completed on said contract" on or before February 1, 1930. The letter clearly shews, in my opinion, that the intention of the parties was to treat the contract as one entire contract covering all five buildings.

Was, then, Hart's lien for work and material provided under such a contract upon and for all five houses, a lien which was chargeable under the *Mechanics' Lien Act*, against all or any of the buildings, irrespective of the work and materials which went into each?

There can be no doubt that if the lien were for the supply of material only, Hart would have the right under sec. 32, subsec. 2, of the present Act to have his lien maintained as a general lien upon all the buildings. This subsection, however, is distinctly limited to entire contracts for the supply of material only, and cannot in itself be relied upon to support a lien claimed under an entire contract for the performance of work as well as the supply of material. The respondent does not pretend to rely upon this subsection, but claims that sec. 5 of the Act—the controlling section, which creates the right of lien—itself contemplates a general or joint lien in such a case as well as a separate lien enforceable against the particular property in which the work or material claimed for have been incorporated in cases where the work is done or the materials are furnished under separate contracts with different owners.

Omitting words that have no bearing on the question under consideration, this section reads as follows:—

5. Unless he signs an express agreement to the contrary * * * any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, * * * of any erection, building, * * *, or the appurtenances to any of them for any owner, contractor, or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the estate or interest of the owner in the erection, building, * * *, and appurten-

ances and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used.

There is no trouble in construing this section as applicable to the construction of a single building, or to any number of single buildings as separate undertakings, but when one endeavours to apply it to the construction of several separate buildings under a single contract and in such circumstances as we have in this case, I confess that I cannot find any very satisfactory basis for doing so in the language of the enactment itself.

It is only when one looks beyond the section to the contract between the parties that any support can be found for the proposition contended for. Yet there is no reference in the section to any other agreement than that mentioned in the first line, viz: the agreement by which the person to whom the lien is given may waive it. It is true that there can be no liability on the part of anyone for the price of work or materials without a contract, either express or implied, and that so far as the estate or interest of the owner is concerned, its liability to the lien depends, under clause (*c*) of the interpretation section of the Act, upon the work or materials being done or furnished at his request, though, once this liability attaches, it passes to all persons whose rights are subsequently acquired through him. It is also true that on the trial of a lien claim against the estate of the owner there must be proof of a request on the part of the owner sought to be charged. To this extent it is necessary for the Master or Judge trying the claim to look to the contract between the parties, but whether he is to look to it for the purpose of determining whether, if there be the necessary request to create the lien, the lien is to be applied as a severable or a general lien, is the problem that presents the real difficulty.

No one, I think, can seriously challenge the proposition that the form and effect of the lien must be found in the statute itself by which the lien is created or the proposition that the lien is enforceable only against such property, and only in such manner and under such limitations as the statute provides. The intention of the parties, as evidenced by the contract between them, clearly cannot change the intent of the Act and cannot, in my opinion, be considered for the purpose of ascertaining the form and effect

1933

CARREL v. HART.

Crocket J.

of the lien unless the Act itself makes the form and effect of the lien depend upon the form and effect of the contract. In this view the crucial question is: Does the section give a lien, the character and scope of which is determinable according to the form of the contract under which the work or materials are provided? Whether it does or does not do so, there is an impressive line of United States cases, notably in New York and Massachusetts, in which under similar statutes courts have brought lien claims in circumstances similar to those obtaining in the case at bar within the terms of the statute creating the lien by reference to the form and terms of the contracts between the parties. The trend of judicial opinion in Canada for many years past has undoubtedly been to follow these United States decisions in this regard. It may be said, too, that in both countries the courts have shewn a growing tendency to turn away from the proposition that a statute creating such a right of lien must be strictly construed, whether the provisions in question relate to the creation of the lien or to its enforcement.

Although it was the decision of a single judge (Middleton J.) on a chambers motion to vacate a lien, *Ontario Lime Association* v. *Grimwood* (1) appears to be the leading Canadian case on the question of the application of a general lien to several separate buildings belonging to the same owner for material furnished under an entire contract. That decision has not only been uniformly followed in the courts of Ontario, but the principle as there enunciated was embodied in the revision of the *Mechanics' Lien Act* thirteen years afterwards in the precise language used by that learned judge in his reasons for judgment, and is found in sec. 32, subsec. 2, of the present Act, already referred to. The case is quoted in the great majority of mechanics' lien cases which have since come before the courts of the other provinces. The decision was unanimously approved by the Court of Appeal of Manitoba in *Polson* v. *Thomson* (2), in 1916, and has nowhere, as far as I can discover, been disapproved or questioned.

The principle, as it was put by Middleton J., was that where one owner enters into an entire contract for the supply of material to be used upon several buildings, the

(1) (1910) 22 Ont. L.R. 17. (2) 29 D.L.R. 395, at 401.

claimant can ask to have his lien follow the form of his contract and that it be for an entire sum upon all the buildings, and that if the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building the onus is upon him to shew the facts which must be peculiarly within his own knowledge. "From the nature of the contract," His Lordship held, "the onus is shifted." Manifestly the decision proceeded from a consideration of the contract between the parties as well as of the language of the section itself.

In his reasons the learned judge referred to three United States cases, viz: *Livingston* v. *Miller* (1); *Wall* v. *Robinson* (2); and *Lewis* v. *Saylors* (3), in all of which the same principle was applied. *Livingston* v. *Miller* (1) was a decision of the Supreme Court of New York, expressly holding that a mechanics' lien for materials furnished for the erection of several houses for a gross sum attached to all the buildings. In *Wall* v. *Robinson* (2), several buildings were built on one parcel of land, consisting, as here, of several lots, upon which the claimant performed labour under an entire contract for an entire price. The Massachusetts court held that the case was "within the purpose of the statute and the intention of the Legislature" because "the parties by their contract have connected the several buildings and treated them as one estate." The reason stated by the Massachusetts court seems to be the only logical ground upon which a general lien upon several separate buildings can be harmonized with the language of sec. 5 of the Ontario Act, and I have no doubt that Middleton J., in maintaining the lien, as he did, in the *Ontario Lime* case (4) as a general lien upon four separate houses, treated them as one property for the same reason.

The only difference between the language of sec. 5 of the present Act, as I have quoted it, and the language of sec. 6 of the Act of 1910, which Middleton, J., was required to construe, together with sec. 8, subsec. 1, is that the words "the estate or interest of the owner in," did not appear in

(1) (1863) 16 Abbott's P.R., 371.
(2) (1874) 115 Mass., 429.
(3) (1887) 73 Iowa, 504.
(4) (1910) 22 Ont. L.R. 17.

1933

CARREL v. HART.

Crocket J.

sec. 6. They were contained, however, in sec. 8, subsec. 1, of the former statute which read:—

> The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

so that sec. 6 and subsec. 1 of sec. 8 of the former Act were precisely identical in their effect with sec. 5 of the present Act.

It is true that the contract in *Ontario Lime Association* v. *Grimwood* (1) was a contract for materials only and that the principle affirmed by the decision is consequently confined to entire contracts for materials. The basis as well as the effect of the decision, however, clearly was that the words of the controlling section of the statute are to be interpreted in the light of the contract between the parties and that where the parties have, by entering into an entire contract, treated several buildings and lots as one property for the purpose of such contract, the courts may treat them likewise. If this be a correct exposition of the law, then manifestly the entire contract principle must apply quite as fully to entire contracts for the performance of labour or for the performance of labour and the furnishing of material, as to entire contracts for the supply of material only. The suggestion of greater difficulty on the part of the material dealer in identifying his material with the different buildings than on the part of one who contracts to provide labour in proving the value of the labour performed upon each house, does not touch the root of the principle of the decision. In *Polson* v. *Thomson* (2), in which, as already mentioned, the Manitoba Court of Appeal in 1916 expressly approved the decision of Middleton, J., the lien was for work, as it was also in the Massachusetts case of *Wall* v. *Robinson* (3) above cited, in which the entire contract principle was acted upon as far back as 1874.

The late Mr. Justice Grant, who wrote the reasons for the judgment now on appeal, refers to a case of *Morris* v. *Tharle* (4), in which the former Chancery Division of the Supreme Court of Ontario sustained a lien which seems to

(1) (1910) 22 Ont. L.R. 17.
(2) 29 D.L.R. 395.
(3) 115 Mass. 429.
(4) (1893) 24 Ont. R. 159.

have been registered against two separate buildings for materials supplied for both of them. The only question argued in that case was whether the plaintiff, who had supplied the contractor with a variety of materials on a number of separate orders, was entitled to claim as upon one general account and thus avail himself of the delivery of the material upon the last order within 30 days of the registration of his lien to bring his whole account within the lien. The evidence shewed that before any of the materials were ordered the contractor had promised the plaintiff that he would get from him all material of the kinds in which the plaintiff dealt which he should require for the erection of the two houses. The Divisional Court (Boyd, C., and Ferguson, J.), on appeal from a contrary decision of Meredith, J., held, notwithstanding neither the quantities nor the prices of the different materials were defined until the different orders were given, and though the contractor's promise was not legally binding, that all deliveries were referable to an entire transaction for the supply of materials for the buildings in question, applying to the case the principle of a running bill with a tradesman as expounded by Pollock, C.B., in *In re Aykroyd* (1). Although the case cannot be said to have expressly decided that a general lien could be maintained upon two separate houses belonging to the same owner for material supplied for use in their construction, for the reason that this question was not considered, the fact that it was not mooted either by counsel or in the reasons of the two eminent judges who took part in the judgment, notwithstanding the lien under review was a general lien claiming a general balance on two separate houses, has much significance. Moreover, the case does decide that in applying the Act the courts should have regard to the contract between the parties, under which the materials claimed for are furnished, and to the dealings between them in reference thereto.

Grant, J.A., also refers in his reasons to the judgment of the Appeal Court of Saskatchewan delivered by Lamont,

(1) (1847) 1 Ex. 479.

1933
CARREL
v.
HART.
Crocket J.

J., in *Whitlock* v. *Loney* (1), which was approved in *Fulton Hardware Co.* v. *Mitchell* (2), and which considered the question as to whether the materials claimed for in the lien under review were delivered under separate and distinct agreements or as upon a continuous account—practically the same question dealt with in *Morris* v. *Tharle* (3)—and for the same purpose, viz: to enable the plaintiff, by virtue of a delivery of materials under the last agreement within the prescribed 30 days of the registration of the lien, to bring earlier deliveries and his whole account within the lien. The Saskatchewan Court of Appeal held that the plaintiff was entitled to recover the general balance due upon the whole account and sustained the lien for the entire balance.

That the courts in applying the statute by which such liens are created may and should have regard to the contracts between the parties under which the work or materials claimed for are provided, must, I think, now be taken as settled law. However difficult it may be to find a satisfactory basis for it in the words of the statute itself, the principle of applying the lien created by the Act as a general lien upon several buildings and lots belonging to the same owner as upon one property where the parties have by their contract so treated them—in cases at least where the lots are contiguous—has been so long and so generally recognized that it cannot at this time well be reversed. The respondent's lien must therefore be sustained.

There remains the question of priority as between the lien and the appellant's claim in respect of the moneys expended by him in completing the house 2-4 after he went into possession of it as assignee of the Ready Mortgage.

Sec. 7, subsec. 3, of the Act provides that where land, upon or in respect of which any work is performed or materials are furnished to be used, is encumbered by a prior mortgage existing in fact before any lien arises, such mortgage shall have priority over all liens under the Act to the extent of the actual value of such land at the time the first lien arose, such value to be ascertained by the judge or officer having jurisdiction to try the action, while

(1) (1917) 38 D.L.R. 52. (2) (1923) 54 Ont. L.R. 472.
(3) (1893) 24 Ont. R. 159.

sec. 13, subsec. 1, provides that the lien shall have priority over all judgments, executions, assignments, etc., issued or made after such lien arises and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien.

The intention of the Act, as disclosed by these two sections, was clearly to limit the security of a registered mortgage as against lien claims to the actual value of the property as at the time the first lien arose, and to exclude from the operation of that security all payments and advances made thereunder by the mortgagee after such lien claims have been registered.

Counsel for the appellant contended that the moneys expended in completing the house were not payments or advances within the meaning of sec. 13, subsec. 1, not having been made on account of the principal amount stated in the mortgage. The section does not say on account of the principal sum but on account of any conveyance or mortgage, and has the same effect, it seems to me, as if it had used the word " under " or the words " upon the security of." Payments and advances on account of the principal amount stated in the mortgage would unmistakeably be barred from priority in respect of the lien. To interpret the section as barring payments and advances made on account of the principal amount for which the mortgage is expressed to be a security, but not as barring payments or advances made under a covenant giving the mortgagee the right in certain contingencies to undertake the completion of the house for his own protection and to add the cost of doing so to his mortgage debt, would give a result which could hardly be said to accord with reason.

The fact that the moneys were paid by the appellant for the completion of the house in order to protect his security, while undoubtedly entitling him under the mortgage covenant on which he relies to add them to his mortgage debt as a further charge upon the land, would not in any event avail to give him priority over the liens for such payments in the face of the provisions of sec. 7, subsec. 3. This section, as already pointed out, limits the security of a prior registered mortgage as regards all liens to the actual value

1933

CARREL v. HART.

Crocket J.

of the land at the time the first lien arose. The Appellate Division of the Supreme Court of Ontario expressly and, we think, rightly so held in *Inglis* v. *Queen's Park Plaza Co. Ltd.* (1).

I therefore agree with the opinion of the Appeal Court that the respondent's lien is entitled to priority over the appellant's claim for this expenditure.

As to the objection that the respondent, not having brought an action to enforce his own lien, could not rely upon the statement of claim of another lien claimant (one Dorsy), which was dismissed by the Master, to hold his own lien, we think that Grant, J.A., in his reasons satisfactorily disposes of this also.

The appeal should be dismissed with costs.

Subsequently the appellant moved for an order that, in so far as it affirmed the judgment of the Court of Appeal, which by a paragraph in its formal judgment gave the respondent priority over the prior mortgage originally held by Albrechtsen, the judgment delivered by this Court be varied, and that the appellant as prior mortgagee, having since the commencement of the action acquired the prior mortgage held by Albrechtsen on No. 2-4 Castleview Avenue, be found to be prior to the claim of the respondent, and to this extent the appeal be allowed.

The paragraph in the formal judgment of the Court of Appeal, above referred to, read as follows:

AND THIS COURT DOTH FURTHER DECLARE that the said Defendant, The Honourable Frank Carrel, having acquired since the commencement of this action by way of assignment a mortgage held by the Defendant, Oluf Albrechtsen, on the said corner building known as No. 2-4 Castleview Avenue, shall be entitled as a prior mortgagee to priority to the claims of all persons entitled to liens to the extent of his said mortgage, save and except the liens of Enoch Crummy, James Fiddes and Albert J. Jackson, trading as Fiddes & Jackson, and Albert A. Hart, whose said liens shall have priority over this said mortgage.

S. A. Hayden for the motion.

R. Kellock contra.

The judgment of the majority of the court (Duff C.J. and Rinfret, Lamont and Smith JJ.) was delivered by

(1) [1932] O.R. 110.

SMITH J.—The appellant moves to vary the reasons for judgment of this Court delivered the 28th of June, 1933, in so far as they affirmed the judgment of the Court of Appeal for Ontario, which, by paragraph 1 (6) thereof, gave to the respondent Hart priority over the prior mortgage originally held by one Albrechtsen, assigned to the appellant since the commencement of this action.

The respondent Hart's claim to a lien is in respect of his contract entered into by him on September 20, 1929, to do brick work and supply brick for five double duplex houses on the north side of Castleview Avenue, which were numbered from east to west as 2-4, 6-8, 10-12, 14-16 and 18-20.

One Millie Guild purchased the land from one Watt and gave the mortgage registered No. 24677 W. A., dated 29th October, 1929, to one Alberta Gibbons, for $6,500, covering the corner lot, numbered 2-4, only. This mortgage was assigned on the same day to the appellant, and on the same day Millie Guild made a mortgage on No. 2-4, registered No. 24681 W. A., to William W. Watt, which mortgage was assigned by Watt on the 5th November, 1929, to one Oluf Albrechtsen.

At the same time Millie Guild made four separate mortgages on the other four buildings to William W. Watt, her vendor, and these four mortgages were all assigned to one Arthur.

A joint stock company called City Duplexes, Limited, was then formed, and the whole property, subject to these mortgages, was transferred by Millie Guild to the company; and on the 13th December, 1929, this company made a mortgage to Luiggi Agnaluzzi and others, which mortgage covered the whole property, and was for $3,055. On the 25th February, 1930, they made another mortgage on the whole property to one Florence Ready, for $10,000, and this mortgage was assigned on the same day to Discount Limited, and again, on the same day, to the appellant.

The Albrechtsen mortgage, subsequent to the original judgment herein, namely, on the 19th February, 1932, was assigned to the appellant.

Building loans were obtained on the westerly four houses by two mortgages to the Canada Life Assurance Co. for $22,000 each, and two with the Confederation Life Assurance Co. for $18,000 each, to which mortgages Ernest

1933

CARREL v. HART.

Smith J.

Arthur postponed his four mortgages referred to, and Albrechtsen, by a similar agreement, dated the 25th day of February, 1930, postponed his mortgage to the $10,000 mortgage given to Florence Ready on that date.

There was a provision in the Ready mortgage by which the mortgagee was entitled to make advances beyond the $10,000 for completion of the building in case the mortgagor should fail to complete same; and under this provision the appellant, as assignee of the mortgage, completed the building, advancing for that purpose some $12,500.

The Assistant Master had held that the respondent Hart was not entitled to any lien, but this was reversed in the Court of Appeal, which also held that Hart's lien had priority over the $12,500 advanced for completion of the building subsequent to the filing of the first lien, which judgment has been upheld by the judgment of this Court referred to.

The Court of Appeal also held, as stated above, that Hart's lien had priority over the Albrechtsen mortgage assigned to the appellant.

The appeal to this Court included an appeal against this finding of the Court of Appeal, but was not dealt with in the judgment handed down on the 28th June last.

This Albrechtsen mortgage and the four mortgages given to Watt and assigned to Arthur were all made and registered prior to the commencement of the building, and the learned Assistant Master holds that they were such, and that Arthur was entitled to priority to all the lien holders for his four mortgages, to the amount of $765.63 for each of the four parcels covered by his mortgages; and that Albrechtsen's mortgage on No. 2-4 is a prior mortgage, entitled to priority to all lien holders save Enoch Crummy and Fiddes & Jackson Ltd., to the amount of $8,600. He gives no reason for giving priority to Crummy's and Fiddes & Jackson Ltd.'s liens over the Albrechtsen mortgage. Having held that the respondent had no lien, he, of course, did not deal with the question of priority as between Hart and the Albrechtsen mortgage. His reasons for giving priority to Crummy and Fiddes & Jackson Limited deal entirely with the question of their priority over the appellant as to the $12,500 advanced for completion of the building.

There can be no doubt that the Albrechtsen mortgage, like the Gibbons mortgage for $6,800 and the Ready Mortgage for $10,000, were all prior mortgages originally, and entitled to priority over all liens; and the only ground upon which it is urged that its priority over Hart was lost is because of the agreement made by Albrechtsen postponing it to the Ready mortgage.

The same objection was raised to the four mortgages on the other properties that were assigned to Arthur; and as to them the point is dealt with in the Court of Appeal in the reasons of Mr. Justice Grant, as follows:—

"(2) The learned Assistant Master erred in law in finding that the four mortgages of the mortgagee Arthur were prior to the lien holders to the extent of the value of the lands at the time the first lien arose."

I have carefully read and considered the argument advanced in support of this point in the appeal, but am unable to give effect to it. I think the law is quite clear, and too well established to justify any interference with it at this time. The mortgages held by Arthur were given back to Watt the vendor to secure part of the purchase price of the land; Watt postponed his mortgages to mortgages which were given to The Canada Life Assurance Company and The Confederation Life Assurance Company which companies advanced moneys to enable buildings to be erected, but the postponements were not given for any other purpose, nor could they have any effect such as is contended for by this appellant. As to all other parties the mortgages held by Arthur stood just as they had stood originally and, in the absence of any evidence to the contrary, their postponement was for the benefit of those only who were thereby made first mortgagees upon the respective properties. It would be unjust and inequitable to find otherwise unless there was evidence establishing it; and no Court would hold otherwise unless the statute made it perfectly clear that such was intended. Upon this point, therefore, the appeal should be disallowed.

It is argued that this reasoning does not apply to the Albrechtsen mortgage, because of the advances made under the Ready mortgage to complete the building. I am quite unable to agree with this contention. The question of how the matter would have stood as between Albrechtsen and the appellant as assignee of the Ready mortgage is not involved in the question of priority as between Albrechtsen and Hart. Albrechtsen had priority from the first over Hart's lien, and he never surrendered any priority to Hart.

I can see no distinction between the effect of the agreement by Albrechtsen and the agreement by Arthur. In neither case did these agreements confer any priority on Hart, who was no party to them, and who had no lien at the time they were made.

1933

CARREL v. HART.

Smith J.

For these reasons, I am of opinion that the appeal upon this branch of the case should be allowed, and the motion for the amendment of the judgment granted.

CROCKET J. (dissenting on the question now dealt with) —This is a motion to vary the judgment of this Court, delivered on June 28th last, so as to reverse that portion of the formal judgment of the Ontario Court of Appeal, which declares that the lien of the respondent, Hart, shall have priority over a mortgage which the appellant, Carrel, acquired by assignment from one, Albrechtsen, after the trial and pending the appeal to the Ontario Court of Appeal.

As between Carrel and Hart, the argument in the Appeal Court, as in this Court, was principally directed to two main questions: first, the validity of the Hart lien, and second, the priority as between the lien and payments made by Carrel to the amount of over $12,000, under the terms of a mortgage acquired by him, as assignee, from one, Florence Ready, and registered prior to the lien—payments made by him after the registration of the lien for the completion of a building on the land described.

In its reasons for judgment, written by the late Mr. Justice Grant, there was no reference to the question of priority as between these payments and the Albrechtsen mortgage, but this point was argued by counsel on the settlement of the minutes of judgment before the Chief Justice of Ontario and Mr. Justice Masten, and decided in the respondent's favour by the inclusion in the formal judgment of the declaration objected to.

There is no doubt that the Albrechtsen mortgage, which was for $3,612.50, and originally made in favour of one Watt, and subsequently assigned by Watt to Albrechtsen, was registered before Hart's lien, and also before the Ready mortgage, and that up to February 25, 1930, the Albrechtsen mortgage was an encumbrance on the land prior to both the lien and the Ready mortgage. On that date, however, Albrechtsen executed an instrument under seal, by which he waived the priority to which he was then undoubtedly entitled, in favour of the Ready mortgage. By that instrument, which is called an Agreement Postponing

Mortgage, and was registered on March 3rd—two days after the registration of the Ready mortgage—Albrechtsen covenanted and agreed with Ready that the Ready mortgage "shall be an encumbrance upon the said lands prior to" his mortgage "in the same manner and to the same effect as if it had been dated and registered prior to the said firstly mentioned mortgage," and, in order to effectuate the same, he purported to grant and release unto Ready, in fee simple, all the land described therein with habendum to Ready, her heirs and assigns, subject only to a reservation of his right, as mortgagee of the equity of redemption subsequent to the Ready mortgage. By this document, therefore, he distinctly waived the priority to which he had been previously entitled, in favour of the Ready mortgage, whether in the hands of Ready or Carrel, as her assignee, or of any subsequent purchaser.

It is not questioned that as between the parties this document divested Albrechtsen of the priority to which he was entitled previously over the Ready mortgage, but it is contended that it was an agreement intended only for the benefit of the parties and one which could not enure to the benefit of subsequent lien-holders.

In my view the document operated to give to Ready and her assigns the right to have all claims under her or their mortgage satisfied in full before the Albrechtsen mortgage should rank upon the estate; and, as the Ready mortgage acquired by Carrel contained a provision making all advances which might be made by the mortgagee for the completion of the building part of the indebtedness under that mortgage, and as such, chargeable upon the land, Carrel thereby obtained the right to charge the land as against Albrechtsen and his assigns, not only with the $10,000 principal sum stated in the mortgage, but with the $12,000 (odd) which he advanced thereunder for the completion of the building. When, therefore, Carrel acquired from Albrechtsen his mortgage after the trial and pending the appeal, he acquired no priority that he did not at that time already possess, that having been fully secured to him by the so-called postponement agreement of February 25, 1930, and the assignment to him of the Ready mortgage. The only estate which Albrechtsen then had to convey was an estate subsequent to the Ready mortgage.

1933

CARREL v. HART.

Crocket J.

The Ontario Court of Appeal held, and this Court affirmed its decision distinctly in that regard, that, Hart's lien having been filed before the payment of the $12,000 (odd) house completion moneys, he was entitled to priority over these advances under s. 13, subs. 1, of the *Mechanics' Lien Act*.

This Ready mortgage was also an encumbrance upon the land prior, in point of registration, to the Hart lien, but only to the extent of moneys which had been advanced prior to registration and notice of the lien claim. Hart by registration of his lien undoubtedly became entitled to rank for his lien immediately after the moneys which had actually been advanced under the Ready mortgage and before the moneys which were advanced thereunder after the registration of the lien. Was Carrel, by subsequently acquiring the Albrechtsen mortgage, entitled to divest the lien-holder of his priority over the $12,000 (odd) advance made by him under the terms of the Ready mortgage after registration and notice of the lien, to the extent of the full amount due under the Albrechtsen mortgage, in the face of the fact that when he took over the assignment of the latter mortgage it stood upon the records as a mortgage subsequent to the Ready mortgage? In my opinion he is not, and Hart's lien should have priority, not only over all advances made under the prior registered Ready mortgage after registration of the lien, but over the Albrechtsen mortgage, whose priority had been completely waived, in favour of the Ready mortgage, and the assignment of which conveyed to Carrel nothing but the right to rank upon the land after the Ready mortgage which he already possessed.

I think that the declaration in the formal judgment of the Appeal Court that the Hart lien should have priority over the Albrechtsen mortgage is right and that the motion should be refused with costs.

Appeal allowed in respect of issue raised by the motion; otherwise appeal dismissed. Appellant to have half of his costs of appeal to this Court.

Solicitor for the appellant: *Roy Henderson.*

Solicitor for the respondent: *H. Percy Edge.*

1933

*Oct. 4, 5.
*Dec. 22.

HOME INSURANCE COMPANY OF NEW YORK AND UNITED STATES FIDELITY AND GUARANTY COMPANY (DEFENDANTS) ..... } APELLANTS;

AND

LENA LINDAL AND JOHN BEATTIE (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEALS FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Insurance—Automobile—Statutory condition No. 5—Exception of liability when driver intoxicated—Applicability to insured—Action by injured person, a passenger against insurer under section 180 of Alberta Insurance Act—Whether public policy prevents injured person recovering when insured driver was intoxicated—Contract—Illegality—Public policy—Contract of indemnity against criminal act—Effect of estoppel of insurer—Alberta Insurance Act, 1926, c. 31, ss. 179, 180, 254—Criminal Code, s. 285 (4)—Alberta Vehicles and Highway Traffic Act, 1924, c. 31, s. 59.

The respondent Lindal, who was injured in an accident while being driven by the respondent Beattie in his motor car, sued him for damages. The respondent Beattie was insured under a "combination policy" issued by the two appellant companies, under which he was insured by one company with respect to legal liability for bodily injuries or death and by the other with respect to damage to his car. The respondent Beattie had given notice of the accident to the appellant companies, which made a full investigation and, after unsuccessful efforts to reach a settlement with the respondent Lindal, undertook the defence of the action against the respondent Beattie, which action was maintained for $1,636.05 and $353.40 costs. After a return of *nulla bona*, the respondent Lindal brought an action against the appellant companies under section 180 of *The Alberta Insurance Act*, 1926, c. 31. The respondent Beattie also brought action against the appellant companies, claiming to be indemnified from the Lindal judgment and also for the damage suffered to his automobile. In both actions the appellant companies alleged that the respondent Beattie was intoxicated and contended therefore that, under statutory condition No. 5 of the *Alberta Insurance Act*, they were relieved from liability. The trial judge, Ives J., before whom both actions were tried together, found that the respondent Beattie was intoxicated and he dismissed both actions; but that judgment was reversed by a majority of the Appellate Division.

Held, Crocket J. dissenting, that this appeal should be allowed and the respondents' actions dismissed.

Statutory condition 5 of schedule *d.* of the *Alberta Insurance Act*, 1926, c. 31, provides that the insurer under an automobile insurance policy shall not be liable under the policy "while the automobile * * * is being driven by * * * an intoxicated person."

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

Held, that this condition, as to intoxication, does not apply to the insured himself.

Held, also that the fact, that respondent Beattie's act occurred while he was "manifestly" intoxicated when driving his automobile at the time of the accident, as found by the trial judge, constituted a violation of section 285 (4) of the Criminal Code sufficient to prevent him from recovering, on ground of public policy. Crocket J. dissenting.

Held also, Crocket J. dissenting, that section 179 of the *Insurance Act* of Alberta has no application to contracts for indemnity in respect of losses occasioned by violating some provisions of a Dominion statute, (in this case, respondent Beattie violated section 285 (4) of the Criminal Code providing penalties for driving an automobile when intoxicated). The Alberta legislation does not directly validate a contract of indemnity which would otherwise be invalid because the insurer has proposed to insure against an act or the consequences of an act that would be a criminal offence under the Criminal Code, or under the criminal law of the Dominion prevailing throughout Canada as distinguished from the penal laws of the province.

Held, also, that the appellant companies, by undertaking the defence of the action brought by the respondent Lindal against the respondent Beattie were not estopped from denying liability on the policies although they had full knowledge of the circumstances surrounding the accident. The real foundation of the appellants' defence was not, that the policy was not in full force and effect, but that they never contemplated indemnifying the respondent Beattie for liability arising through his own criminal act. Crocket J. expressing no opinion.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Ives J., and maintaining the respondent's actions with costs.

The material facts of the cases and the questions at issue are stated in the above head-note and in the judgments now reported.

Thomas N. Phelan K.C. for the appellants.

N. D. Maclean K.C. for the respondent Lindal.

S. Bruce Smith for the respondent Beattie.

The judgment of the majority of the Court, Duff C.J. and Rinfret, Lamont and Smith JJ. was delivered by

LAMONT J.—About 3 a.m. on the 15th day of March, 1932, in the city of Edmonton, the respondent, Lena Lindal, was a passenger in an automobile owned and driven by the respondent, John Beattie, when the automobile came into collision with a street railway standard. As a result

(1) [1933] 1 W.W.R. 334.

of the collision Miss Lindal was very seriously injured and the car badly damaged. Miss Lindal brought an action for damages against Beattie for the injuries she had suffered, alleging that her injuries were caused by his negligence. She recovered a judgment against him for $1,636.05, and costs which were taxed at $353.40. Execution was issued against Beattie but it was returned by the sheriff unsatisfied.

At the time the accident took place Beattie carried automobile insurance in the form of a combination policy with the Home Insurance Company, New York, and the United States Fidelity & Guaranty Company, Baltimore. By this policy the latter company agreed to indemnify him against all loss or damage which he should become legally liable to pay for bodily injuries caused to any person by the ownership, maintenance or use of the automobile, up to the amount mentioned in the policy. The Home Insurance Company agreed to indemnify him against collision damage to his automobile.

When her execution was returned by the sheriff unsatisfied, Miss Lindal commenced an action, under section 180 of the *Alberta Insurance Act*, against the United States Fidelity & Guaranty Company, to recover the sum of $2,005.20, the amount of her judgment, interest and costs. At the same time Beattie brought an action against both insurance companies in which he claimed from the Home Insurance Company the sum of $525 for collision damages to his car, and from the Fidelity & Guaranty Company the sum necessary to relieve and indemnify him against his liability to Lena Lindal. The companies set up that they were not liable because Beattie had committed a breach of statutory condition 5 of the policy, which reads as follows:—

> Risks not covered: 5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age limit fixed by law, or, in any event, under the age of 16 years, or by an intoxicated person.

By section 254 of the *Insurance Act* of 1926, this statutory condition, along with others, is deemed to be a part of every contract of insurance in force in Alberta.

These two actions were tried together before Mr. Justice Ives who, on the evidence, held that at the time of the accident Beattie was driving his car while in an intoxicated

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

Lamont J.

condition, and, not only was he intoxicated, but, by reason of the quantity of alcohol which he had consumed, he was unable to drive a motor car with safety. These findings, in the light of the learned judge's reasons, clearly involve, as we think, the conclusion that the accident was due to Beattie's intoxication. On the above findings the trial judge held that the accident was not a risk insured against, and he dismissed both actions. From his judgment an appeal was taken to the Appellate Division of the Supreme Court of Alberta, which reversed the judgment (Clarke and McGillivray JJ. dissenting) (1). The majority of the court held that both plaintiffs were entitled to recover. From the judgment of the Appellate Division the companies now appeal to this court.

That respondent Beattie was in an intoxicated condition when driving his automobile at the time of the accident the trial judge found on conflicting evidence. The view of the judge as to the relative weight to be ascribed to the testimony of different witnesses ought not to be disturbed on appeal in the absence of the gravest reasons. In this case the reasons advanced on behalf of the appellants have not satisfied us that the finding ought to be set aside.

The appellants contend that Beattie's driving his automobile while intoxicated relieves them from liability for two reasons: (1) that, under statutory condition 5, such risk was not covered by the policy, and (2) if covered, the claim for indemnity is unenforceable as being contrary to public policy.

The exclusion from liability, under statutory condition 5, is only " while the automobile, with the knowledge, consent or connivance of the insured, is being driven by * * * an intoxicated person." This is not apt language to describe an act done by the insured himself. It is, however, just the language one would expect to be used if the intention was to exclude liability where the automobile was being driven by a third person with the permission of the insured. Apart from the inaptness of the language there is, we think, another difficulty. To exclude liability, the automobile, when driven by an intoxicated person, must be driven with the knowledge of the insured. If statutory condition 5 is construed so as to include the insured himself, we should

(1) [1933] 1 W.W.R. 334.

have this remarkable result: that, if the insured were so intoxicated as not to know what he was doing, the condition would not apply owing to the insured's want of knowledge; while, if he were but slightly intoxicated, he would know that he was driving and the condition would be applicable. In our opinion condition 5 is not to be construed as applicable to the insured.

The appellants' second contention is that they are exempt from liability because the peril insured against was brought into operation by a wrongful act of the insured, which constituted a violation of the criminal law, and that, under these circumstances, it would be contrary to public policy for the court to assist the respondent in securing indemnity for an illegal act.

Section 285 (4) of the Criminal Code reads as follows:

> Everyone who while intoxicated * * * drives any motor vehicle or automobile * * * shall be guilty of an offence and liable upon summary conviction for the first offence to a term of imprisonment not exceeding thirty days and not less than seven days, for a second offence to a term of imprisonment not exceeding three months and not less than one month, and for each subsequent offence to a term of imprisonment not exceeding one year and not less than three months.

The respondents do not dispute that if the liability arose from a wrongful act of the insured, intentionally or wilfully done, the insured is not entitled to be indemnified against its consequences. They do, however, contend that it is only an intentional wrongful act on the part of the insured that will bar his right to indemnity. Mere negligence, however gross, no matter to what criminal consequences it may expose the insured, is, they contend, not sufficient, for one of the objects of insurance is to protect the insured against the consequences of negligence. For that reason it is said the doctrine of public policy has no application where the liability arises not from the wilful act of the insured but from his negligence.

Does the fact that Beattie's act constituted a violation of the Criminal Code prevent him from recovering on grounds of public policy?

There are two cases in which the question has been answered in the negative: *Tinline* v. *White Insurance As-*

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

Lamont J.

sociation (1), and *James* v. *British Insurance Company* (2). On the other hand the question is answered in the affirmative in *O'Hearn* v. *York Insurance Company* (3), which was a case of an insured who while driving his car on the public highway in an intoxicated condition and at an excessive rate of speed, struck and injured a man who died as the result of his injuries. The insured was convicted of an offence under section 285 of the Criminal Code, and the judge at the trial of the action, which he brought against the insurance company for indemnity, found that he had been guilty of the offence. Both the trial judge and the Court of Appeal, in that case, held that the insured should not be indemnified against the consequences of his own criminal act. Reference was there made to the case of *Lundy* v. *Lundy* (4), where this court held that no devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and, that in applying this rule, no distinction can be made between a death caused by murder and one caused by manslaughter. Chief Justice Strong, in giving judgment, said as follows:—

> The principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong. Then surely an act for which a man is convicted of manslaughter and sentenced to a long term of imprisonment was a wrongful, illegal and formerly * * * a felonious act.

The principle which, in our opinion, is applicable to the present case is that stated by Kennedy J. in *Burrows* v. *Rhodes* (5), as follows:—

> It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.

In the recent case of *Haseldine* v. *Hoskins* (6), Scrutten L.J. says as follows:—

> It will be noticed that Kennedy J., used two phrases "manifestly unlawful," or "the doer of it knows it to be unlawful." These two phrases must mean two different things, because if the first phrase means that the act is manifestly to the man who does it unlawful, there was no need to use the second phrase, "or the doer of it knows it to be unlawful." I

(1) [1921] 3 K.B. 327.
(2) [1927] 2 K.B. 311.
(3) 51 O.L.R. 130.
(4) (1895) 24 Can. S.C.R. 650.
(5) [1889] 1 Q.B., at 828.
(6) (1933) 102 L.J. K.B. 44.

think that the learned judge is clearly meaning such an act, that there can be no doubt that it is unlawful.

It is, therefore, sufficient to bring in the doctrine of public policy that Beattie should have been "manifestly" intoxicated while driving his automobile at the time of the accident. On this point the judgment of the learned trial judge leaves no doubt.

The learned judge described Beattie's action as follows:—

> Admittedly the street conditions were most dangerous—that is his own evidence—slippery, old winter ice, snowing and sleeting heavily, with only the view that under such conditions the operation of his windshield wiper afforded him. Yet he was going at the rate of thirty miles per hour when there was no need for such speed. He insisted on passing a car going in the same direction which had not obeyed his horn signal to turn out, as he admits, although he had only that block to travel before himself leaving that street. Such conduct constitutes such a degree of reckless carelessness that it may be inferred the actor was not in a normal condition.

It was, however, contended on the part of the respondents that, whatever may have been the rule as to public policy in former times, public policy in Alberta permits an insurer to agree to indemnify the insured against loss or damage for which he may become liable by reason of driving his automobile while intoxicated. By section 179 of the *Insurance Act* of Alberta, 1926, it is provided:—

> It shall be lawful for an insurer to contract to indemnify an insured against financial loss occasioned by reason of liability to a third person, whether or not the loss has been caused by the insured through negligence or while violating the provisions of any municipal by-law or any Act of this legislature.

Prior to the passing of this section the legislature of Alberta had, by section 22 (2) of the *Motor Vehicle Act,* 1911-12, enacted, with certain prescribed penalties, the following:—

> 22 (2). No intoxicated person shall drive or operate a motor vehicle in any place.

This provision, with a slightly altered phraseology, has continued on the statute book ever since and it is now found as section 59 of the *Vehicles and Highway Traffic Act,* chapter 31 of 1924.

From 1921 the material part of section 285 (4) of the Criminal Code has been in force, and, it is not questioned that it is valid legislation of the Dominion Parliament.

The respondents contend that the effect of this legislation is to make inapplicable, in Alberta, the doctrine of public policy in circumstances such as we are here con-

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

Lamont J.

cerned with. It is, therefore, necessary to consider what effect must be given to these sections of provincial Acts, especially in view of the legislation of section 285 (4) of the Criminal Code.

We think the contention of the respondents ought to be rejected for this reason: first of all, it does not appear to be open to doubt that the phrase "Act of this legislature" in section 179 of the *Insurance Act* imports legislation which is legally operative. No doubt, in enacting section 22 (2) of 1911-12, and in prescribing penalties in respect of the violation of it, the Alberta legislature was creating an offence which, in view of the decisions of the Privy Council in *Rex* v. *Nat. Bell Liquors* (1), and *Naden* v. *The King* (2), is properly described as a criminal offence: provided, of course, that the legislation was operative.

In 1921, however, as already stated, the Dominion Parliament passed legislation adding a section to the Criminal Code in terms almost identical with those of the provincial enactment (section 22 (2)) and making it a criminal offence, in the strictest sense, to drive an automobile while in a state of intoxication. The effect of this legislation by Parliament was to supersede existing provincial legislation, which was legislation in the same field; and thereafter, as long, at all events, as the Dominion legislation should remain in force, the provincial legislation would necessarily be inoperative. The Dominion legislation has remained in force until the present day. There was not, therefore, at the time of the accident, or at the date of the policy, an Act of the provincial legislature in force, within the meaning of section 179 of the *Insurance Act,* prohibiting the driving of a motor vehicle while in a state of intoxication.

This point was not taken in argument, and that is regrettable, because on all questions touching the validity of provincial legislation it is the practice of this court to invite the Attorney-General of the province to present such considerations as he thinks right upon the matter under consideration. It is not necessary, however, that the judgment should be put upon this ground, and, therefore, we do not think it proper to delay judgment for the purpose of hearing the Attorney-General.

(1) [1922] 2 A.C. 128. (2) [1926] A. C. 482.

In our view the effect of section 179 of the *Alberta Insurance Act* is this: Contracts by an insurer to indemnify an insured against financial loss occasioned by reason of liability to a third person, shall be recognized by the law as binding, notwithstanding the fact: 1st, "that the loss has been occasioned by the insured while violating the provisions of any municipal by-law or an Act of the legislature" of Alberta. That is to say, a contract for indemnity is not illegal on the ground of public policy because the right of indemnity extends to losses so occasioned or arising under such circumstances. To that extent the rule which strikes contracts with invalidity on grounds of public policy is modified, but to no greater extent. The statute has no application to contracts for indemnity in respect of losses occasioned by violating the provisions of the Criminal Code. Nothing of the kind is expressed and nothing of the kind can be implied.

It follows that the Alberta legislation does not directly validate a contract of indemnity which would otherwise be invalid because the insurer has professed to insure against an act or the consequences of an act that would be a criminal offence under the Criminal Code or under the criminal law of the Dominion prevailing throughout Canada as distinguished from the penal laws of the provinces.

It might be argued, however, that the Alberta legislation is evidence establishing the conclusion—upon which the courts ought to act—that a contract of indemnity against a crime, or the consequences of it, where the crime consists simply in driving an automobile while in a state of intoxication, is not a contract opposed to public policy. To that there appears to us to be two answers: The first is, that by the legislation of 1921, already mentioned, such conduct had become a criminal offence under the Criminal Code. This legislation was a part of the criminal law of the Dominion on the very subject with which the Alberta Legislature was dealing in passing section 179 of the Insurance Act of 1926. Notwithstanding this fact, the section is carefully restricted, in so far as it specifically refers to legislation, to "the provisions of * * * any Act of this Legislature." In view of this, it would not, we think, be an admissible inference that the Legislature contemplated the modification of the doctrine of public policy in the wide sense contended for.

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

Lamont J.

The second reason is this: the rule as formulated by Mr. Justice Kennedy in the passage already quoted above from his judgment in *Burrows* v. *Rhodes* (1), although it may be said that, in its origin, it merely exemplified the power of the court to refuse to enforce contracts on the ground that they infringed some dictate of public policy, is a long settled rule. And we do not think it is now competent to the courts to refuse to give effect to it in the absence of direct legislative sanction or, at all events, of such legislation as should demonstrate the intention of the Legislature that such contracts should no longer be regarded as exceptions to the general principle of freedom of contract.

Two other points require to be noticed. The first is that the appellants do not, in their pleadings, allege that Beattie's act was illegal as being contrary to public policy, and it is contended, therefore, that they are precluded from relying on Beattie's intoxication. The rule upon this point, as stated by Lord Moulton in *N.W. Salt Co.* v. *Electrolytic Alkali Co.* (2), is:—

> If the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

In this case the act which constituted the illegality was Beattie's driving his automobile when he was intoxicated. That he was driving his automobile at the time of the accident he admits. That he was then intoxicated was expressly set up in the pleadings and the court was entitled to assume that it had before it in evidence all the relevant surrounding circumstances relating to his intoxication. If on that point Beattie, when before the trial court, did not put in all his relevant evidence, the responsibility must be laid at his door. We think, therefore, that Beattie's admission and the proof made at the trial, irrespective of the argument before the Appellate Division, where the question was raised, were sufficient to justify the court in passing upon Beattie's act as being illegal on the ground of public policy.

The other point is that by undertaking the defence of the action brought by Lindal against Beattie, with full

(1) [1899] 1 Q.B. 816. (2) [1914] A.C. 461.

knowledge of the circumstances surrounding the accident, they are estopped from denying liability on the policy.

This argument was strongly pressed upon us but, however effective it might be in some cases, we do not think it can prevail against the defence that Beattie's act constituted a crime and that to permit the recovery of indemnity in this case would be to give effect to an illegality. If the defence here had been that the appellants were denying liability on the ground that the policy was not binding on them because Beattie had made a material misrepresentation or had failed to fulfil some condition precedent to liability, it might be argued that, having undertaken Beattie's defence in the action brought against him by Lena Lindal for damages for personal injuries, they could not, afterwards, be held to deny their liability under the policy. That, however, is not this case. The real foundation of the defence in this case is not, that the policy was not in full force and effect, but that it never contemplated indemnifying Beattie for liability arising through his own criminal act.

The appellants here were insisting that they were entitled under the policy to conduct Beattie's defence. Suppose that Beattie had said to them that he would agree to their conducting his defence, but only on condition that they would not raise against him, when he would sue for indemnity, any defence based upon his intoxication or his criminal act; and suppose further that the appellants had given him an undertaking in writing to that effect; of what avail would that have been to Beattie? Even in the absence of an allegation that Beattie's act was illegal or criminal, once such illegality or criminality were brought to the attention of the court, it would be the duty of the judge, even of his own motion, to refuse, on grounds of public policy, to enforce indemnity and he should dismiss the action. If an express undertaking would not be enforceable, we are of opinion that conduct, whether by way of estoppel, waiver or election, cannot preclude the appellants from denying liability.

The appeal should be allowed, the judgment below set aside, and the judgment of the trial judge restored. The appellants are entitled to their costs throughout.

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

CROCKET J. (dissenting).—I regret that I have to differ from my brethren in their conclusion that s. 179 of the *Alberta Insurance Act* does not contemplate a loss caused by the insured while violating that provision of the *Alberta Motor Vehicles Act,* which prohibits the driving of a motor vehicle by a person who is intoxicated, because at the time of the passage of the former statute the Criminal Code contained a provision declaring that every one who while intoxicated drives any motor vehicle shall be guilty of an offence and liable upon summary conviction to a term of imprisonment.

It is no doubt true, as held in my brother Lamont's judgment, that the incorporation in the Criminal Code of this provision renders the prohibition of the Alberta statute inoperative, so far at least as concerns a prosecution for the imposition of the penalty fixed by the Alberta statute for that offence against the provincial Act; but I do not think that this fact can fairly be said to read that portion of s. 59, which enacts the prohibition against the driving of a motor vehicle by an intoxicated person, entirely out of the provincial *Motor Vehicles Act* as if it had been expressly repealed or never been enacted. Notwithstanding that it may be inoperative so far as prosecutions for the imposition of the penalties prescribed by the penalties section of the Alberta statute are concerned, it still remains in that statute as an unrepealed enactment, and one which is not now held to be void. It is, therefore, one, which I think the legislature must be held to have had in contemplation with all other prohibitions of the *Motor Vehicles Act,* when it passed its *Insurance Act* in 1926. Section 179 of this Act deals entirely with the validity of motor insurance contracts for the indemnification of a motor vehicle owner against loss occasioned by reason of his liability to a third person—a liability which can only be created by negligence or some other wrongful act on the part of the owner or on the part of one for whose acts he is responsible. It expressly declares that it shall be lawful for an insurer to contract to indemnify the owner against such loss, notwithstanding that it has been caused by him through negligence or while he was violating any of the provisions of any municipal by-law or any of the provisions of any Act of the legislature. It in no manner concerns or contem-

plates the subject of prosecutions for criminal negligence or of prosecutions for violation of any of the provisions of either the provincial *Motor Vehicles Act* or of the Criminal Code, and refers to the violation of " the provisions of any municipal by-law or any Act of this legislature," solely for the purpose of indicating the wrongful and illegal acts in respect of which an insurance company may lawfully contract to indemnify a motor vehicle owner. The fact that the Dominion Parliament had provided in the Criminal Code that every one who drives a motor vehicle while intoxicated, and thus does something which the *Alberta Motor Vehicles Act* prohibits, shall be guilty of an offence under the Code and liable to a gaol sentence, cannot, it seems to me, fairly be taken to exclude the act of the owner in driving a motor vehicle while intoxicated from the purview of s. 179 of the provincial *Insurance Act,* any more than the fact of gross or criminal negligence rendering the driver of a motor vehicle liable to prosecution and conviction for manslaughter, if such negligence on his part causes the death of another, can be taken to exclude gross or criminal negligence from the purview of that section. The thing done remains from the point of view of the intention of the provincial legislature just as much a thing which falls within the prohibitory provisions of the *Motor Vehicles Act* as it did before.

I find it impossible to believe that s. 179 of the provincial *Insurance Act* did not contemplate any and all degrees of negligence, whether that negligence should constitute an offence under the Criminal Code or not, and that it did not also contemplate all prohibitory provisions of provincial statutes, irrespective of whether the violation of any of those provisions would constitute an offence against the Criminal Code. The clear purpose of the enactment, in my view, was to make it lawful for an insurance company to contract to indemnify an owner of a motor vehicle against liability to third persons by reason of all or any such acts of negligence and all or any such wrongful and illegal acts as those described in the prohibitory provisions of the Alberta *Motor Vehicles Act* or in any other Act of the Alberta legislature or in any by-law of any municipality within the province, quite irrespective of whether the violation of any such prohibitory provisions constituted an

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

Crocket J.

offence under the Criminal Code or not. To give the language any other meaning, it seems to me, is tantamount to reading into the section a proviso that it shall not apply to any of those acts of negligence or prohibited acts if they were acts which were then or might subsequently be prohibited by the Criminal Code as well, and, with all deference, I cannot think that the mere fact that the section makes no mention of the Criminal Code has the same effect as if the Legislature had incorporated such an express proviso in the enactment.

To give the section such a construction would render of little value these insurance policies and all other similar policies, by which insurance companies specially agree to indemnify motor vehicle owners against losses caused by their own negligence or illegal acts, and for which they receive from the insured a special premium, and I have no doubt that this was the particular consideration which led the Alberta Legislature to enact the legislation in question.

I construe the section as comprehending not only all degrees of negligence but all acts which the legislature has itself expressly prohibited and declared to be illegal or which any municipality within the province by by-law has prohibited, and hold, therefore, that the Legislature of Alberta has in effect declared that it shall be lawful in that province for an insurer to contract to indemnify a motor vehicle owner against liability to third persons, notwithstanding such liability may be the result of his driving the vehicle while intoxicated.

If I am right in this view it follows as a consequence that no Court can properly declare to be unlawful within the province of Alberta on grounds of public policy, these insurance contracts which the legislature has itself declared shall be lawful. The Legislature has settled, so far as the province of Alberta is concerned, any question of public policy which may be involved in the passage of the enactment referred to.

I only wish to add that I entirely agree with the observations of Harvey, C.J., regarding the finding which the learned trial judge made as to Beattie being intoxicated, viz: that he did not direct his mind to the consideration of whether Beattie was liable criminally, and that on the evidence before him no judge or jury would have felt justified in convicting him of a crime. The trial judge's finding is

1933

HOME INSURANCE CO. v. LINDAL AND BEATTIE.

Crocket J.

based on what he believed to be the weight of evidence, and disregards the fact that the doctor whom the police called to examine Beattie and who examined him less than an hour after the accident, swore that he was sober.

The passage quoted in the majority opinion of this Court from the trial judge's reasons as apparently the principal ground of the finding of intoxication, while it no doubt discloses strong evidence of negligence on the part of Beattie, is by no means conclusive as to the fact of his having been intoxicated.

I would dismiss the appeal with costs.

Appeals allowed with costs.

Solicitors for the appellants: *Wood, Buchanan & Macdonald.*

Solicitors for the respondent Lindal: *Maclean, Short & Kane.*

Solicitors for the respondent Beattie: *Parlee, Freeman, Smith & Massie.*

THE NEW REGINA TRADING COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN CREDIT MEN'S TRUST ASSOCIATION (DEFENDANT) ..... RESPONDENT.

1933

* Oct. 13.
* Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Bankruptcy—Bankruptcy of tenant—Right of landlord to priority for three months' rent—Bankruptcy Act, R.S.C., 1927, c. 11, s. 126—Landlord and Tenant Act, R.S. Sask., 1930, c. 199, ss. 42 to 48.

The effect of section 126, of the *Bankruptcy Act,* R.S.C. 1927, c. 11, is that in Saskatchewan the rights of a landlord on the bankruptcy of a tenant are governed by sections 42 to 48 of the *Landlord and Tenant Act,* R.S.S., 1930, c. 199.

Under the circumstances of this case the appellant, as landlord, was not entitled on the distribution of the property of his tenant, bankrupt, to a prior claim for money equal to three months' rent at the rate prescribed in the lease under the provisions of the above provincial Act.

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* PRESENT:—Duff C.J. and Rinfret, Lamont, Crocket and Hughes JJ.

1933

NEW REGINA TRADING CO. v. CAN. CREDIT MEN'S TRUST ASS.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge (2), Taylor J., and dismissing the appellant's action.

The trial judge awarded the appellant the sum of $5,250 for three months' rent out of the assets of the Regina Trading Company, Limited, bankrupt, in the hands of the respondent as trustee, in priority to the claims of all other creditors.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

E. K. Williams K.C. for the appellant.

F. L. Bastedo K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—As the appellant has abandoned its claim for damages the only question left for determination in this appeal is whether the appellant, as landlord, is entitled to enforce against the respondents a claim for money equal to three months' rent at the rate prescribed in the lease under the provisions of the *Landlord and Tenant Act* of Saskatchewan, being chapter 199, R.S.S. 1930.

The relevant facts are as follows:—

The appellant is the owner of a four-storey store building in the city of Regina. On the 22nd day of December, 1927, it leased its building and premises (except a small portion not material here) to the Regina Trading Company, Limited, for five years and two months, at a rental of $25,000 for the first year, and increasing each year. By a subsequent agreement the rent for the year commencing December 1st, 1931, was fixed at $21,000. On April 10th, 1931, the Regina Trading Company made a voluntary assignment for the benefit of its creditors and the respondent was appointed trustee in bankruptcy. The respondent (hereinafter called the trustee) took possession and proceeded to dispose of the assets. As the Regina Trading Company had known that an assignment for the benefit of its creditors was imminent and had decided to assign to the said trustee, the trustee, prior to April 10th, had been seeking to find a purchaser. It found a Mr. Cohen who was willing to buy both stock and fixtures at a price and on terms acceptable

(1) [1933] 1 W.W.R. 492. (2) [1932] 2 W.W.R. 692.

to the trustee. The Trading Company then assigned, the trustee was duly appointed and the goods sold to Cohen who took possession, under the trustee, on April 14th, and commenced, on the 16th, to conduct a sale of the bankrupt stock on the premises.

At the time the stock and fixtures were sold to Cohen he was informed by the trustee that he might occupy the appellant's premises free of rent until April 30th, 1931, as the rent to that date had been paid in advance. In addition there was a further verbal agreement between them to the effect that if the trustee was obliged to retain possession of the premises for the months of May, June and July, Cohen would take over the premises and pay the rent for that period.

On learning that Cohen was about to conduct a sale of bankrupt stock on its premises, the appellant, by letter, notified the trustee that it objected to this being done and stated that it would hold the trustee liable for any loss which it might sustain as a result of Cohen's occupation. To this the trustee, on April 17th, replied, and its letter in part reads as follows:—

With regard to the present occupation of the premises, we think you will readily understand that unless the purchaser of the stock could dispose of at least a considerable portion of it in the premises it would be impossible for us, as trustees, to get rid of the stock at all, so that from a practical standpoint if a reasonable offer could be expected for the assets the disposition of a considerable portion of them in the building itself was requisite.

On April 22nd the trustee gave the appellant the following notice:—

We beg to give you statutory notice of our intention to vacate the premises on 31st July, 1931.

On April 24th the appellant's solicitor wrote the trustee saying:—

We have plans under way now for the converting the Trading Company building, so that we can get it in shape to rent in sufficient time to protect ourselves against loss. Under these circumstances, we shall require possession the first of next month.

As the Canadian Credit Men's Trust Association has disposed of the stock some time ago, we take the position that you are no longer entitled to remain in possession, and having disclaimed the lease you are not entitled to sublet to Cohen or any any other person. The real intention of the Act is to give the landlord a chance to make such changes as might be necessary and get new tenants, so that the landlord might as far as possible protect himself from loss by reason of the tenant having gone into liquidation.

1933

NEW REGINA TRADING CO. v. CAN. CREDIT MEN'S TRUST ASS.

Lamont J.

> We wish to notify you, therefore, that if the premises are not vacated and made available for the workmen to start in on the first of next month, we shall hold you liable.

On April 28th the trustee notified Cohen that he must vacate the premises not later than midnight April 30th, and, on the following day, he wrote the appellant saying:—

> With reference to your letter of the 24th April containing notice to quit the Regina Trading Company premises as of the end of this month, we beg to confirm the fact, of which we believe you are already aware, that pursuant thereto we are having possession of the premises delivered up at that time.
>
> The under-tenants have been notified according and we are not responsible for any over-holding on their part.
>
> To put the matter in another way and to assure you of our intention as above, we hereby disclaim the lease.

On April 28th, after Cohen had received notice to vacate the premises on April 30th, he wrote to the appellant's solicitor that it would inconvenience him somewhat to vacate the premises on April 30th and he made an offer to pay $150 for the use of the premises for an additional two days (that is May 1st, and 2nd) in which to carry on business, and the right, until May 9th, to enter and remove his fixtures. This offer was accepted in writing and the money paid over. The appellant then demanded from the trustee the sum of $5,250, being three months' rent for the building at the rate due under the lease and agreement. This being refused the appellant brought this action.

At the trial judgment was given in favour of the appellant for the amount sued for. On appeal that judgment was set aside (Haultain C.J. dissenting) and the action dismissed with costs. Against that dismissal this appeal is brought.

Section 126 of the *Bankruptcy Act* (R.S.C. 1927, c. 11) provides that when a receiving order or an assignment is made against or by any lessee, under that Act the same consequences shall ensue as to the rights and priorities of his landlord as would have ensued under the laws of the province in which the demised premises are situated, if the lessee, at the time of such receiving order or assignment, had been a person entitled to make, and had made, a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. It is, therefore, to the *Landlord and Tenant Act,* as enacted by the Saskatchewan legislature, that we must look for the rights and priorities of a landlord in that province.

The provisions of the Act applicable in case of the bankruptcy of a tenant are sections 42 to 48 inclusive. The scheme of these provisions is to afford the landlord whose tenant has become bankrupt some protection in respect of unpaid rent and, at the same time, secure to the other creditors an equitable distribution of the bankrupt's property. This the legislature provides for by enacting that when a receiving order or an assignment is made by or against a lessee under the *Bankruptcy Act* and there is at the date of the order or assignment rent in arrear, and the lessee has goods and chattels on which the landlord has distrained, or is entitled to distrain, the landlord's right to realize his rent by distress ceases and the trustee in bankruptcy is entitled to take possession of all the lessee's property, but, in the distribution of that property, the trustee shall pay to the landlord, in priority to all other debts, an amount not exceeding the value of the distrainable assets and not exceeding three months' rent *accrued due prior to the date of the receiving order or assignment* and the costs of the distress, if any (s. 42). If there is, at the date of the order or assignment, more than three months' rent due, the landlord may prove as a creditor for the excess (s. 43). Section 44 and section 45 (1) and (2), read as follows:—

44. The landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of the lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of said lease.

45. (1) The trustee shall be entitled to continue in occupation of the leased premises for so long as he shall require the premises for the purposes of the trust estate.

(2) The trustee may surrender possession at any time, but the landlord shall be entitled to receive three months' notice in writing of the trustee's intention to surrender possession or three months' rent in lieu thereof, such three months to end with the last day of a calendar month. After the trustee surrenders possession, such of the landlord's rights as are based upon the actual occupation by the trustee shall cease.

Section 46 deals with the right of the trustee to retain the leased premises for the unexpired part of the term and his right, upon the observance of certain conditions, to assign the lease.

Section 47, in part, reads:—

47. The trustee shall have the further right, at any time before giving notice of intention to surrender possession, to disclaim any such lease, and his entry into possession of the leased premises and their occupation by him while required for the purposes of the trust estate shall not be

1933

NEW REGINA TRADING CO. v. CAN. CREDIT MEN'S TRUST ASS.

Lamont J.

deemed to be evidence of an intention on his part to elect to retain the premises nor affect his right to disclaim or to surrender possession pursuant to the provisions of this and the preceding sections.

In the case before us the rent was paid in advance until April 30th, sections 42 and 43 have, therefore, no application. The appellant, while relying chiefly on section 45 (2), makes the following contentions:—

1. That when the bankrupt stock was sold to Cohen the premises were no longer required for the purposes of the trust estate and the trustee had, therefore, no right to continue in possession or to give the possession to Cohen.

2. That when the trustee surrendered possession of the premises on April 30th, the appellant was entitled to three months' notice of its intention to surrender, or three months' rent in lieu thereof, and, as the notice was not given, the appellant was entitled to three months' rent.

3. That, in any event, the trustee was liable on the covenant in the lease to pay the rent by reason of the privity of estate between the trustee and the landlord and the case of the *North-west Theatre Company* v. *MacKinnon,* (1) was cited in support thereof.

In our opinion these contentions cannot be maintained. As to the first it may well be that if, upon the sale of the goods of the bankrupt, there is no agreement express or implied that the purchaser, as part of the bargain, is to be entitled to sell a portion of the goods of the bankrupt on the premises, the trustee would have no authority to put the purchaser in possession. With that question we are not concerned here. Where, however, the trustee in order to induce an offer of a higher price for the goods does agree that the purchaser shall be allowed a limited time to sell the stock or a portion thereof on the bankrupt tenant's premises, such agreement, we think, may reasonably be considered as being for the benefit of the trust estate. Under section 45 (1), therefore, the trustee was entitled to continue in possession and permit the purchaser to sell the bankrupt stock for the time agreed upon.

The second and third contentions must fail because the facts necessary to support them are wanting. Under section 45 (2) the landlord is to have three months' notice of surrender of possession, or three months' rent in lieu thereof.

(1) (1915) 52 Can. S.C.R. 588.

The object of this provision is to give the landlord, on the bankruptcy of his tenant, three months to secure another tenant without loss of rent. If the notice is given the trustee remains in occupation and pays rent. If the notice is not given, three months' rent is paid out of the bankrupt's estate in lieu thereof. Liability for this rent, however, is predicated on the fact that the notice has not been given.

Now the fact is that on April 22nd, 1931, the trustee did give notice of its intention to vacate on July 31st, but the appellant refused to permit the trustee to remain in possession, and demanded that possession be given up on April 30th. The trustee acquiesced and surrendered possession on that day. This surrender of possession, therefore, resulted from a notice by the landlord to vacate and a compliance therewith by the trustee, and was followed by the landlord not only itself taking possession of the premises but of re-leasing them to Cohen. It is true that the trustee did not give three months' notice of an intention to surrender possession on April 30th. That was impossible when it obtained possession only on April 14th. In our opinion the provision for the payment of three months' rent in lieu of a notice of intention to surrender, provided for by section 45 (2), has no application when possession is surrendered pursuant to a notice to quit on the part of the landlord, or by reason of an agreement between the parties.

The privity of estate which, it is argued, arose between the trustee and the landlord on the acceptance by the trustee of the assignment and rendered the trustee liable for the rent for the unexpired portion of the lease, can have no effect, even assuming the privity to exist, where the trustee disclaims the lease as provided by the statute or the landlord, expressly or by some unequivocal act, accepts a surrender thereof. It is established law that delivery of possession by the tenant to the landlord and the landlord's acceptance of possession, effects a surrender of the lease by operation of law. Here we think that the demand for possession by the landlord, and his putting Cohen in possession for two days for a monetary consideration, after the trustee had not only agreed to vacate but had actually vacated, is a sufficiently unequivocal act to constitute an acceptance of the surrender of the lease. *Phené*

1933

NEW REGINA TRADING CO. v. CAN. CREDIT MEN'S TRUST ASS.

Lamont J.

v. *Popplewell and Another* (1), *Oastler* v. *Henderson* (2). It might further be pointed out that by its letter of April 24th the appellant acknowledges that the trustee had disclaimed the lease. The formal disclaimer appears in the trustee's letter of April 29th, but, evidently, the appellant had received notice thereof by April 24th.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Barr, Stewart & Cumming.*

Solicitors for the respondent: *MacKenzie, Thom, Bastedo & Jackson.*

1933

*Oct. 10, 12
*Dec. 22

THE CONTINENTAL CASUALTY COMPANY (DEFENDANT) ..... APPELLANT;

AND

AMY B. CASEY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Insurance, accident—Cause of death—Combination of injury and disease—Misrepresentation in the application as to age—Not a warranty and not promissory—Whether an election by insurance company to treat policy as valid—Whether provision as to age limit should be printed in red ink—The Alberta Insurance Act, 1926, c. 31, sections 266, 267 and statutory condition 2—The Accident and Sickness Policy Act, Alta., 1923, c. 48, s. 8—Alberta Insurance Act Amendment Act, 1929, c. 62, s. 10.

The action was brought by the respondent, the daughter of the assured and named beneficiary, against the insurer, the appellant company, on a policy of insurance commonly called an accident policy. On the 11th day of December, 1931, the assured fell from a platform, was seriously injured, his leg being broken, and was removed to hospital; later on, a condition of uraemia ensued which resulted in his death on the 23rd of December, 1931. At the time of the accident, the assured was 70 years of age. The application for the insurance was made six years before and his age was stated then to be 54. One of the "miscellaneous provisions" (No. 5) at the end of the policy provided: "The insurance under this policy shall not cover any person under the age of 18 years or over the age of 65 years." The trial judge dismissed

(1) (1862) 12 C.B. (N.S.) 334. (2) [1877] 2 Q.B.D. 598.

*PRESENT:—Duff C.J. and Lamont, Smith, Cannon and Hughes JJ.

the action, which judgment was reversed by a majority judgment of the Appellate Division, which awarded to the respondent the sum of $7,675, interests and costs.

Held, reversing the judgment of the Appellate Division ([1933] 1 W.W.R. 282), that the appeal should be allowed and the respondent's action dismissed; miscellaneous provision No. 5 of the policy is, under the circumstances of the case, a bar to the claim of the respondent.

Per Duff C.J. and Lamont, Smith and Hughes JJ.—The assured had made a material misrepresentation as to his age in the application for insurance as found by the trial judge, which finding was not disturbed by the Appellate Court, but, under the circumstances of this case, this material misrepresentation made by the assured was not available to the appellant company as a defence to the action—Statutory provision 2 printed in the policy and section 267 and statutory condition 2, schedule E of the *Alberta Insurance Act,* 1926. The misrepresentation by the assured was not a warranty and was not promissory.

Under the circumstances of this case and the documents and letters fyled at the trial, there was no election by the appellant company to treat the insurance policy as valid—*Scarf* v. *Jardine,* 7 App. Cas. 345); and therefore the appellant did not waive by election miscellaneous provision 5 of the policy.

As to the ground raised by the respondent that miscellaneous provision 5 came within section 8 of the *Accident and Sickness Policy Act,* Alberta, 1923, c. 48, and therefore "shall be printed in conspicuous type * * * and in red ink," *held* that miscellaneous provision 5 is a clause limiting and defining the risk rather than a variation of the statutory conditions.

The enactment of section 4 of the *Accident and Sickness Policy Act,* Alberta, 1923, does not preclude the parties to an insurance contract from exercising the right they otherwise would have possessed to define or limit the risk in the manner set out in miscellaneous provision 5; in other words, this section 4 does not curtail the contracting powers of the parties in such a way as to prevent them from defining or limiting the risk, "the event insured against," by providing that it shall not include events happening, after a fixed date or after the insured shall have reached a certain age.

However, the cause of death must be held to have been within the wording of the policy; but even if it was not so, the loss would probably be covered by the wide wording of section 4 of the 1923 Act already referred to.

CANNON J., concurring in the conclusion that the respondent's action should be dismissed, was of the opinion that the assured, being 70 years old when the accident happened, was outside the scope of the contract on which the action was based.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J. (2) and maintaining the respondent's action on an accident policy.

(1) [1933] 1 W.W.R. 280. (2) [1932] 3 W.W.R. 551.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

V. Evan Gray K.C. and *F. A. Brewin* for the appellant.

Robert S. McKay for the respondent.

The judgment of Duff C.J. and Lamont, Smith and Hughes JJ. was delivered by

HUGHES J.—This action was brought by the named beneficiary against the insurer on a policy of insurance commonly called an accident policy. The assured was Arthur C. Casey, the father of the beneficiary.

On the 11th day of December, 1931, the assured fell from a platform. He was seriously injured and was removed to hospital where he died on the 23rd day of December, 1931. At the time of the accident the assured was seventy years of age.

Some of the material provisions of the policy are as follows:

The Continental Casualty Company

General office: Chicago, Illinois. Head office for Canada, Toronto.

Hereinafter called the Company

In consideration of the agreements and statements contained in the application herefor and the payment of an annual premium of $25 as therein provided, does on this 13th day of June, A.D. 1925, hereby insure Mr. Arthur C. Casey (hereinafter called the insured), in class....select of the Company, as a manager, Alazhar Temple, office and travelling duties only, in the principal sum of seventy-five hundred dollars with weekly indemnity of twenty-five dollars, and promises to pay to him or his beneficiary Amy B. Casey his daughter the respective indemnities hereinafter provided.

The insurance given by this policy is against loss of life, limb, limbs, sight or time resulting from personal bodily injury (suicide or self-destruction while either sane or insane not included), which is effected solely and independently of all other causes by the happening of a purely accidental event, all in the manner and to the extent hereinafter provided.

Specific Indemnity

Part I.

If injury such as before described shall at once after the occurrence of the accidental event wholly and continuously disable the insured from performing each and every duty pertaining to his occupation, and if during the period of such total and continuous disability any one of the following losses shall result to the insured necessarily and solely from the injury, the Company will pay the indemnity hereinafter provided, and in addition will pay said weekly indemnity for the period of the preceding

disability; or, if any one of said losses shall result to the insured necessarily and solely from such injury within one hundred and eighty days from the occurrence of the accidental event causing the injury, then the Company will pay the indemnity hereinafter provided irrespective of disability preceding the loss.

A. For loss of life said principal sum
And in addition all premium previously paid on this policy

Miscellaneous provisions

No. 1. No agent has authority to change this policy or to waive any of its provisions. No assignment of this policy or of any claim arising thereunder and no waiver or change of any of its provisions, definitions or limits shall be valid unless approved in writing by an executive officer of the Company and such approval endorsed hereon.

5. The insurance under this policy shall not cover any person under the age of eighteen years or over the age of sixty-five years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

8. The insurance given by this policy does not cover, nor will indemnity be paid for, any loss resulting from injury received (1) while engaged in aeronautics in any form; (2) while in military or naval service in time of war; or (3) while not within the civilized limits of the globe unless it be while travelling by regular lines of passenger conveyance.

The action was tried before Mr. Justice Ives who dismissed the action on the following grounds, firstly, that uraemia caused the death and that it resulted from a combination of the accident with certain pre-existing active diseases of the body; secondly, that the assured had made a material misrepresentation in the application that he was fifty-four years of age when he was in fact sixty-four years of age and, lastly, that the insurance contract ceased to cover the risk after the insured reached the age of sixty-five years.

From this judgment, the plaintiff appealed to the Appellate Division of the Supreme Court of Alberta (1), which reversed the judgment of the learned trial judge by a majority judgment. Chief Justice Harvey considered that the death was covered by the terms of the policy; that, if the assured had made a material misrepresentation, the defendant had elected after knowledge of the falsity and after the death to treat the insurance as valid until the assured was sixty-five years of age and that it was bound by its election and, lastly, that miscellaneous provision 5 was a condition and void because it was not printed in red ink

[1933] 1 W.W.R. 282.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

as required by the statute in that behalf. Mr. Justice Clarke, Mr. Justice Mitchell and Mr. Justice Lunney concurred in the judgment of the Chief Justice.

Mr. Justice McGillivray was of opinion that the death was covered by the terms of the policy, that the assured had made a material misrepresentation as to his age, that the defendant had elected after knowledge of the falsity and after the death to treat the insurance as valid until the assured was sixty-five years of age and that it was bound by its election; but he dissented from the remaining members of the Court on the effect of miscellaneous provision 5, which he considered a provision defining and limiting the risk. He was of opinion that the appeal should be dismissed.

The result of the majority judgment was that the appeal was allowed with costs and the plaintiff was awarded judgment against the defendant for $7,675 with interest and costs.

From this judgment the defendant appeals to this Court.

It was contended before us by the appellant,

1. That the assured had made a material misrepresentation in the application and that there was no election by the appellant.

2. That miscellaneous provision 5 was a provision defining and limiting the risk and not a condition.

3. That the loss of life of the late Arthur C. Casey was not effected solely or independently of all other causes by the happening of a purely accidental event.

All of these contentions were denied by the respondent.

1. The learned trial judge found that the late Arthur C. Casey has made a material misrepresentation as to his age in the application for insurance. This finding was not disturbed by the Appellate Division of the Supreme Court of Alberta and no valid reason is disclosed to disturb it here.

As to election, the rule was stated in the House of Lords by Lord Blackburn in *Scarf* v. *Jardine* (1) in the following words:—

The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended

(1) (1882) 7 App. Cas. 345, at 360 and 361

it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

On February 9th, 1932, the appellant prepared a draft for $151.23, payment of which was stated on its face to be conditional upon surrender of the policy and execution by the respondent of a receipt worded in part as follows:

In full compromise, payment, satisfaction, discharge and release of any and all claims * * * under policy or certificate 2719.

Second—In consideration of the surrender by me of said policy.

Third—As full consideration for the unearned premium or money heretofore paid on said policy or certificate.

The above draft was sent to the solicitor of the respondent in a letter dated February 9th, 1932, from Chas. E. Hanslip, who styled himself chief adjuster, which letter read in part as follows:

We would also refer you to section 5 of part XI, miscellaneous provisions of the policy, which reads as follows:

Insurance under this policy shall not cover any person under the age of 18 years or over the age of 65 years. Any premium paid to the company for any period not covered by this policy will be returned upon request * * * The indemnity payable, therefore, if covered by the policy, would only be for the loss of time intervening between the date of injury and date of death * * *

We also find that the deceased was born on May 25th in the year 1861, so that he was 70 years, 6 months and 17 days of age when he became disabled on December 11th last. The policy is dated June 13th, 1925, and if you will refer to statement no. 2 of his signed application, copy of which is endorsed on the policy and made a part thereof, you will observe the age was stated to be 54 years. The deceased, however, had already passed his 64th birthday when he made application for our policy in June of 1925, and as he attained the age limit of 65 on May 25th in the year 1926, the policy therefore has been null and void since that date, as provided by section 5 of the miscellaneous provisions referred to herein.

You will therefore understand in view of the foregoing that the claim is not covered, the policy having been null and void since May 25th of 1926, and as the premiums paid since that time amount to $151.23, we are pleased to enclose our draft for this sum, made payable to the order of Amy B. Casey, the beneficiary of the Deceased, to which the policy should be attached when being deposited in the bank for collection.

The remaining correspondence is with the general manager of the appellant.

On the 29th day of February, 1932, the appellant wrote the solicitor of the respondent a letter reading in part as follows:

I take it that we are agreed that the deceased had attained the age of 70 years and 6 months at the time he sustained injuries on December 11th, 1931, and that our policy contains an age limit of 65 years.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

The age limit in the policy is a limitation, and is not a variation of or an addition to the statutory conditions. The Act does not require us to print, in red ink, exclusions or limitations which may be part of the policy.

* * *

Considering that the immediate cause of death was uraemia, and that he was afflicted with an enlarged prostate, myocarditis and arteriosclerosis, the loss of life was not caused "solely and independently of all other causes" by the happening of a purely accidental event, as provided by the policy.

* * *

At the time the application for this policy was signed, he was in his 65th year. The statement, in his application, as to age was material to the acceptance of the risk by the company, and if his true age had been stated, the policy would not have been issued.

After considering all of the circumstances, I am sure that you will agree with me that the limit of our liability is a refund of the premium paid on the policy, which has already been forwarded.

To this letter the solicitor of the respondent on the 2nd day of May, 1932, wrote a reply stating fully his views in support of the respondent's claim. The letter concluded with the following request that the appellant should further consider the matter:

I am sure that after further consideration of the matter you will agree with me that the company is liable to pay the beneficiary the full indemnities under the policy and I would be glad if you would give the matter your early consideration. If however you decide that you are not prepared to make settlement I would ask you to advise me as soon as possible and in that case it will be necessary to have the matter decided by the courts. In order to save time I would appreciate it if you would let me have the names of your solicitors here in Calgary who would accept service of the statement of claim on your behalf.

The solicitor of the respondent again wrote on the 23rd day of May, 1932, and submitted further authorities to the appellant.

On May 31st, 1932, the appellant wrote to the solicitor of the respondent a reply reading in part as follows:

We have your letter of May 2nd, 1932, which we have carefully considered, although we believe you have gone rather far afield in your consideration of points of law which may arise in the litigation of it.

If we believed in the merits of this claim, you would not need to quote authorities at such length to persuade us to pay it, but believing, as we do, that there never was a binding contract because of misrepresentations contained in the application and that the cause of death was not an accident, within the meaning of our contract, we cannot be persuaded by your citations of legal decisions, in other cases, that the claim ought to be paid.

* * *

However interested you may have become in the pursuit of the technical features of this contract, and the decisions which seem to you

to relate to them, you will appreciate that this company never undertook to pay and cannot be expected to pay a claim for principal sum under an accident policy on the life of a man seventy years of age who died from uraemia and myocarditis.

The draft sent by the appellant was retained by the solicitor of the respondent but not cashed. The offer of this draft by the appellant can scarcely be termed an unequivocal act within the rule as stated by Lord Blackburn in *Scarf* v. *Jardine* (1), as its payment was conditional upon its acceptance by the respondent as a compromise as well as a payment of all claims. The letter, moreover, in which it was enclosed and upon which the respondent relies strongly to shew election, was from one, Chas. E. Hanslip, who styled himself chief adjuster. There was no evidence that Chas. E. Hanslip had any authority to make an election for the appellant. In *British Empire Underwriters* v. *Wampler* (2), Duff J., now Chief Justice of Canada, said,

> There is not, I think, any satisfactory evidence of authority reposed in the adjuster to enter into a contract to pay and it appears to me to be more than doubtful whether the facts relied upon establish a contract even assuming such authority.

And in the same case, page 598, Anglin J. afterwards Chief Justice of Canada said,

> In the absence of express authority enabling an employee such as Marsh was to commit the company to a liability not covered by its policy, I cannot conceive that it is within the scope of his powers to do so.

Atlas Assurance Co. v. *Brownell* (3). *Commercial Union* v. *Margeson* 29 (4). As late as May 2nd, 1932, the solicitor of the respondent, as appears above, urged further consideration of the claim to full indemnities and on May 23rd, 1932, submitted further authorities in support. It cannot be said, in the words of Lord Blackburn, that the appellant led the respondent to believe that it had made its choice to consider the policy valid and subsisting until the 25th day of May, 1926. The correspondence as a whole does not assist the respondent when read with the draft, or without the draft, the substantial effect being that the appellant was offering the draft both as a compromise and a payment with a reservation of its contention that the appellant was not liable on the policy at all and the solicitor of the respondent was endeavouring to secure more fav-

(1) (1882) 7 App. Cas. 345.
(2) (1921) 62 Can. S.C.R. 591, at p. 596.
(3) (1889) 29 Can. S.C.R. 537.
(4) (1889) 29 Can. S.C.R. 601.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

ourable consideration. It is worthy of note in this connection that the last pleading of the respondent was delivered on the 21st day of July, 1932, but that election was not mentioned in the pleadings until it was incorporated by amendment at the opening at the trial on the 3rd day of November, 1932.

Election has been discussed here at some length, because the respondent contended that by this means the appellant had also waived miscellaneous provision 5 of the policy.

The material misrepresentation made by the insured, however, is not available to the appellant as a defence to the action.

Statutory provision 2 printed in the policy reads as follows:

2. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties. No such statement shall be used in defence to a claim under this policy unless it is contained in the copy of the application for this policy which is endorsed hereon or attached hereto.

Section 267 of *The Alberta Insurance Act*, 1926, which was in force at the time of the last renewal and at the time of the death of the late Arthur C. Casey reads as follows:

267. The conditions set forth in schedule E to this Act shall be deemed, subject to the provisions of sections 268 to 272, to be part of every contract of accident and sickness insurance in force in Alberta, and shall be printed on every policy hereafter issued under the heading "Statutory Conditions."

Statutory condition 2, schedule E, reads as follows:

2. All statements made by the insured upon the application for this policy shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defence of a claim under this policy unless it is contained in the written application for the policy and unless a copy of the application, or such part thereof as is material to the contract, is indorsed upon or attached to the policy when issued.

The appellant contended before us that a copy of such part of the application as was material to the contract was indorsed upon or attached to the policy within the wording of the statute. But the indorsement on the policy omitted the particulars of the kind of insurance applied for and the amount thereof, and further the indorsement contained at least one material alteration and addition made without authority by the appellant. The words "office and travelling duties only" were added after the words "Manager, Alazhar Temple" which latter words had constituted the

statement of the applicant to question 4—Occupation and duties. The words "No Exceptions" were inserted by the appellant without authority as the statement of the assured to questions 10 and 14, respectively, of the application in response to which the applicant had not made any statement at all. It is not necessary to consider the unauthorized additions to 10 and 14 because the omission by the appellant from the indorsement on the policy purporting to be a copy of the application or such part as was material to the contract of the particulars of the kind of insurance applied for and the amount thereof was an omission of material parts of the application; and, further, the addition of the words "office and travelling duties only" was an unauthorized material alteration. It is worthy of note that the appellant considered the latter words false and material when it delivered its statement of defence on the 13th day of July, 1932, paragraphs 22 and 23 of which were as follows:

22. Some of the said statements were false and materially affected the acceptance of the risk and the hazard assumed by the Defendant.

23. The statement that his occupation was manager of Alazhar Temple, and that his duties consisted of office and travelling duties only was false, as he had other and more hazardous duties to perform, one of which he was performing at the time of the accident.

The appellant, however, urged that, in any event, the misrepresentation as to age formed a basis of the contract of insurance and bound the respondent when suing to enforce the contract and referred us to the following authorities.

St. Regis Pastry Shop and Baumgartner v. *Continental Casualty Co.* (1). In this case there was not a written application at all.

Newsholme Brothers v. *Road Transport and General Insurance Company Limited* (2). In this case the proposal form contained the following clause

We hereby warrant that the answers stated above are true, that we have withheld no information which might influence the acceptance of this proposal and that the warranty hereby given shall be deemed to be promissory and shall be the basis of the contract between us and the company.

Some of the answers were untrue in material respects and the plaintiff failed. In the case before us, however, the mis-

(1) (1928) 63 O.L.R. 337. (2) [1929] 2 K.B. 356.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

representation was not a warranty and was not promissory. *Dorst* v. *Trans Canada Insurance Company* (1). In this case, there was not a written application and the false statement of the insured was promissory in nature. The exact wording of it was as follows: "The automobile is and will be usually kept in a Public or Private-Both-Garage." In truth, the automobile was not kept in a garage. It was usually kept in an open driveway and that is where it was on the night it was stolen and burned.

2. Miscellaneous provision 5.

The respondent urged that miscellaneous provision 5 came within section 8 of *The Accident and Sickness Policy Act, Statutes of Alberta,* 1923, chapter 48, which read as follows:

8. (1). If an insurer desires to vary, omit or add to the statutory conditions or any of them except as provided in sections 6 and 7 there shall be printed in conspicuous type not less in size than ten point, and in red ink, immediately after such conditions, the proposed variations or additions or a reference to the omissions, with these introductory words: "This policy is issued on the above statutory conditions with the following variations, omissions and additions which are, by virtue of The Accident and Sickness Policy Act, in force so far only as they may be held to be just and reasonable to be exacted by the insurer."

(2). No variation, omission or addition except as provided in sections 6 and 7 shall be binding upon the insured unless the foregoing provisions of this section have been complied with, and any variation, omission or addition shall be so binding only in so far as it is held by the Court before which a question relating thereto is tried, to be just and reasonable.

None of the statutory conditions deal with such a subject as that covered by miscellaneous provision 5. In *Curtis's and Harvey (Canada) Limited, in Liquidation and North British and Mercantile Insurance Company Limited* (2) Lord Dunedin said, page 312:

Their Lordships think that it is the policy of the statute to make a hard-and-fast rule that every fire policy shall have attached to it these statutory conditions, and that they cannot be varied so as to be binding on the insured, unless the variations are authenticated in the prescribed manner. The result will be that, if not varied, they remain in full force, but any other stipulation and covenant which may define or limit the risk and also receive effect in so far as it does not contradict the statutory conditions which are paramount. Applying this view to the question in hand, the insurers are warranted free from explosions of every sort except such explosion as is provided for by statutory condition 11. Now statutory condition 11, as already stated, only deals with an explosion originating a fire, and does not deal with the case of an explosion

(1) [1933] O.R. 98. (2) [1921] 1 A.C. 303.

incidental to a fire. It follows that the present case is not touched by statutory condition 11, and the warranty free from explosion can have effect.

See, also, *The London Assurance Corporation* v. *The Great Northern Transit Company* (1), *Ross* v. *Scottish Union and National Insurance Company* (2), and *The W. Malcolm Mackay Company* v. *The British America Assurance Company* (3).

I am of opinion that miscellaneous provision 5, like miscellaneous provision 8, is a clause limiting and defining the risk rather than a variation of the statutory conditions.

The respondent contended, however, that miscellaneous provision 5 was invalid by virtue of section 4 of *The Accident and Sickness Policy Act*, statutes of Alberta, 1923, chapter 48, which read as follows:

4. In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

This statute was repealed in 1926 and section 4 re-enacted as section 266 of *The Alberta Insurance Act*, statutes of Alberta, 1926, chapter 31. The latter section was repealed by *The Alberta Insurance Act*, 1926, Amendment Act, 1929, chapter 62, section 10, and a new section 266 substituted as follows:

266. Every policy shall contain the names and address of the insurer, the name and address and occupation or business of the insured, the name of the person to whom the insurance money is payable, the premium for the insurance, the indemnity for which the insurer may become liable, the event on the happening of which such liability is to accrue, and the term of the insurance.

At the time of the last renewal and at the death of the insured, *The Interpretation Act*, R.S. of Alberta, 1922, chapter 1, was in force. Section 13 (*b*) of that Act provided as follows:

13. Whenever any enactment is repealed or regulation revoked (hereinafter called the old enactment or regulation), such repeal or revocation shall not, subject to section 14 hereof—

(*b*) Affect any act done, or right or liability accruing or accrued or incurred under the old enactment or regulation.

(1) (1899) 29 Can. S.C.R. 577. (2) (1918) 58 Can. S.C.R. 169.
(3) [1923] S.C.R. 335.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

The respondent contended that the event insured against included "any bodily injury occasioned by external force or agency," as provided in section 4 of the 1923 Act, that section 4 restricted the right of the insurer to define or limit the risk beyond the words "the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy," that the accident to the late Arthur C. Casey did not arise from any hazard or class of hazard expressly stated in the policy, that miscellaneous provision 5 was an exclusion not permitted by section 4, and that the subsequent repeal of section 4 did not affect the rights and liabilities of the parties accruing or accrued or incurred respectively under it at the time the policy was written and thereafter as long as it remained in force.

Main v. *Stark* (1); *Reynolds* v. *The Attorney-General for Nova Scotia* (2); *Green v. Blackburn* (3), and *Abell* v. *The Corporation of the Township of York* (4).

It is important, then, to determine whether the insurance was provided by a continuing contract to which the 1923 Act applied or by a new contract each year.

The policy insured Arthur C. Casey

in consideration of the agreements and statements contained in the application and the payment of an annual premium of $25 as therein provided.

One agreement in the application was as follows:

I agree to pay an annual premium of $25 for said policy as follows: Annually.

The first renewal receipt dated April 26th, 1926, was worded in part as follows:

Received of A. C. Casey $25 * * * being the yearly premium to continue Policy No. C.D. 2719 in force to June 1st, 1927, subject to the provisions and conditions stated in the policy.

On June 20th, 1931, the Alberta managers of the appellant wrote the late Arthur C. Casey in part as follows:

We acknowledge receipt of your cheque in the amount of $25 being an annual premium on Commercial policy of the above name and number. We are enclosing herewith Renewal Certificate No. R. 268721 shewing your contract in good standing until the thirteenth of June, 1932.

The appellant urged before us that the insurer had a right to refuse to accept the premium for any renewal and that each renewal, including the renewal of June, 1931, constituted a new contract and that accordingly the statute law

(1) (1890) 15 App. Cas. 384.
(2) [1896] A.C. 240.
(3) (1908) 40 Can. S.C.R. 47.
(4) (1920) 61 Can. S.C.R. 345.

applicable to the case was as it existed at the time of the last renewal, namely in June, 1931. It is true that each party had a statutory right to cancel the policy at any time, but neither party did in fact cancel it, and it is by no means clear that the insurer had a right to refuse to accept premium, properly tendered, for any renewal of the policy on the facts of this case. Joyce on Insurance, volume 2, page 1122. I am of opinion that each renewal did not constitute a new contract, but was a continuation of the original contract. *Howard* v. *Lancashire Insurance Company* (1), *Liverpool and London and Globe Insurance Co.* v. *Agricultural Savings and Loan Co.* (2), *Royal Exchange Assurance Co.* v. *Hope* (3).

It is now necessary to consider whether section 4 of the 1923 Act did really preclude the parties to the contract from exercising the right they otherwise would have possessed to define or limit the risk in the manner set out in miscellaneous provision 5. Section 4 deals with the scope of the risk—"the event insured against"—in this sense that it extends the coverage to bodily injuries of every kind occasioned or happening in the manner indicated notwithstanding any term of the policy; and it goes on to provide that from this wide field there may be excluded accidents arising from any hazard or class of hazard specially described. The primary subject matter of the section is the kind or nature of the bodily injuries in respect of which the insured is covered, and the coverage is declared to include bodily injuries of every description subject to the proviso mentioned. It is quite clear that the enactment of this section dealing with this subject matter does not curtail the contracting powers of the parties in such a way as to prevent them from defining or limiting the risk—"the event insured against"—by providing that it shall not include events happening after a fixed date or after the insured shall have reached a certain age.

3. Cause of Death.

As mentioned above, the learned trial judge found that uraemia, which caused the death of the late Arthur C. Casey, resulted from a combination of the accident with certain pre-existing active and not latent diseases of the

(1) (1885) 11 Can. S.C.R. 92. (2) (1903) 33 Can. S.C.R. 94.
(3) [1928] Ch. Div. 179.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

body, that therefore, the death of the insured was not from accident within the meaning of the policy and that the case was distinguishable from *Fidelity and Casualty Company of New York* v. *Mitchell* (1).

This finding of the learned trial judge was not affirmed by the Appellate Division of the Supreme Court of Alberta. Chief Justice Harvey stated in his reasons for judgment:

> Assuming that upon the construction placed by the learned trial judge upon the relevant clause of the policy, this case could be distinguished from the authoritative decision, as regards which there is room for argument, yet, in my opinion, there was a wrong construction of the clause.

Mr. Justice McGillivray said:

> My Lord, the Chief Justice, has set out the facts with admirable succinctness. I have nothing to add to his statement. I agree that the accident was the cause of the death,

and he later proceeded to deal with Miscellaneous Provision 5.

It was admitted by the appellant that the late Arthur C. Casey had fallen (from a scaffold) a distance of about five feet to a cement floor and that he had sustained a compound fracture of the leg. The evidence of Dr. Follett was that the general condition of the man prior to the accident had been very good. In December, 1928, he had consulted Dr. Follett, who appeared to have been his regular physician, for myocarditis—a weakness of the muscles of the heart—and he had had a consultation again in September, 1931. For this condition he had been taking Tr. Digitalis once in a while for three or four years. The condition of the heart was serious but it did not incapacitate the patient from doing his work. The physician had not been consulted in respect of any other ailments and did not know that the patient had an enlarged prostate until after the accident. The patient then told Dr. Follett that he had an enlarged prostate for about two years but there is no evidence in the record that he had been unable to void before the accident. He was, however, thereafter unable to void and a catheter was tied in. For the first three or four days he seemed to do very well, but in six or seven days infection spread locally, gradually went thorugh the system and, forty-eight hours before death, the patient became unconscious. Dr. Follett said that the patient had never suffered from uraemia to his knowledge prior to the

(1) [1917] A.C. 592.

accident and that he would think that the infection of the kidneys came from the wound. There was also well-marked arteriosclerosis, which injuriously affects the functioning of kidneys, but the physician would not say that before the accident arteriosclerosis had injuriously affected the functioning of the kidneys of the patient, although such was possible. Dr. Follett lastly would not admit that myocarditis had anything to do with uraemia but agreed that arteriosclerosis was a possible cause of it.

The appellant called as its medical witness, Dr. Willis Merritt, who, apparently, had not seen the late Arthur C. Casey and who gave his evidence after hearing the evidence of Dr. Follett. Dr. Merritt was of opinion that arteriosclerosis degenerates kidneys so that they cannot excrete enough waste product and causes uraemia, and that, when the prostate is enlarged so that the patient is unable to void, a back pressure on the kidneys results and thus assists in bringing on uraemia. In his opinion death was the result of the accident, the condition of arteriosclerosis and the condition of the enlarged prostate. He agreed that the poison from the wound would set up a diseased condition of the kidneys.

It is clear from the foregoing that up to the time of the accident the late Arthur C. Casey had been able to carry on his duties as Manager of Alazhar Temple, and there is nothing in the record to suggest that, if the accident had not happened, he would not have been able to continue so to do indefinitely. There is no direct evidence that he had been unable to void before the accident, that myocarditis had anything to do with lessening the functioning of his kidneys or that the arteriosclerosis had in fact up to that time lessened their functioning. There is, on the contrary, evidence that infection first appeared at the end of five or six days at the site of the wound and gradually spread locally.

The learned trial judge, however, in his reasons for judgment said:—

> Dr. Follett was the attending physician of the insured for some years before he died. In his evidence he tells us that in December, 1928, he examined his patient and found him suffering from myocarditis and arteriosclerosis.
>
> The cause of death was uraemia and the doctor states that the uraemia resulted from a combination of the accident and arteriosclerosis;

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

that the accident alone, or the arteriosclerosis alone should not have caused death at that time.

The learned trial judge was clearly in error. The following is the relevant evidence of Dr. Follett, who alone had any actual knowledge of the condition of the late Arthur C. Casey before the accident.

Q. You also said there was no kidney trouble and you said "Not to your knowledge" and your knowledge I believe was of September, 1931?—A. No, from December, 1928, the first time I saw Mr. Casey as a patient.

Q. I am speaking of the last occasion?—A. From September, 1931, I think I have examined his urine on a couple of occasions. I don't know whether each time or one, I could not say.

Q. Then along until the accident?—A. No, first hand knowledge.

Q. Had you previously catheterized him?—A. Never. I did not know he had an enlarged prostate until he got into the hospital and told me.

Q. There is no doubt in your mind that this arteriosclerosis lessened the function of the kidney, no doubt about that?—A. That is correct.

The COURT: Let me get that, you say that before the accident the function of the kidneys by reason of the condition must have been lessoned?—A. No, I would not want to say that. I have no direct knowledge, I never had anything to do with the man except for his heart on some occasions, and I examined his urine once I remember distinctly and it seemed all right so far as the ordinary test was concerned.

In Fidelity and Casualty Company of New York v. *Mitchell* (1), Lord Dunedin, delivering the judgment of their Lordships said, page 596,

But their Lordships agree with the result reached in the exceedingly careful and able judgment of Middleton J., confirmed unanimously by the learned judges of the Court of Appeal. His view is most tersely expressed in a single sentence; "This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident.

Mr. Justice Middleton had also said in his judgment (2),

The tuberculosis of the system was harmless until, as the direct result of the accident, it was given an opportunity to become active.

In the case before us, it is not shown that the myocarditis, arteriosclerosis or enlarged prostate were, before the accident, active in injuriously affecting the functioning of the kidneys. I am therefore of opinion that the cause of death was within the wording of the policy. But even if this is not so, much may be said for the view that the loss is covered by the wide wording of section 4 of the 1923 Act, which has already been discussed at length.

The respondent also urged that the assured was misled by the agent who solicited the insurance into believing that the policy would be good if the assured lived to be one hundred years old, and that the appellant through its agent

(1) [1917] A.C. 592. (2) (1916) 35 O.L.R. 280, at 285.

thereby waived miscellaneous provision 5. *Wing* v. *Harvey* (1). This contention cannot prevail in view of miscellaneous provision 1 of the policy and in view of statutory condition 20 of the 1923 Act or statutory condition 20 of Schedule E of the 1926 Act. See also *Biggar* v. *Rock Life Assurance Company* (2).

Miscellaneous provision 5 of the policy is, as above stated, a bar to the claim of the respondent. The result, therefore, is that the appeal must be allowed and the action dismissed. Under all the circumstances, it is not a case for costs.

CANNON J.—I concur in the conclusions of my brother Hughes that the action should be dismissed. The plaintiff brings forth a contract which expressly limits the insurer's risk in such a manner that, on attaining the age of 65 years, the insured automatically ceased to be covered. His capacity to be "insured" under the policy ceased because the risk as assumed by the company, no longer existed. He reached 65 years of age without accident causing him bodily harm and, therefore, the risk, as assumed by the company, never became a liability. It is common ground that when the accident happened, Casey was 70 years old; therefore, outside the scope of the contract on which the action is based.

I would allow the appeal without costs.

Appeal allowed, no costs.

Solicitors for the appellant: *Smith, Egbert & Smith.*

Solicitors for the respondent: *Robt. S. McKay.*

(1) (1854) 5 DeG. B. & G. 265. (2) [1902] 1 K.B. 516.

1933

*Mar. 16
*Oct. 3

WILLIAM JAMES KERR (PLAINTIFF) APPELLANT;

AND

FRANCES MARGARET KERR AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Marriage—Action for declaration that marriage ceremony null and void—Want of parent's consent—Marriage Act, R.S.O. 1927, c. 181, ss. 17, 34—Validity of legislation—Jurisdiction of Supreme Court of Ontario—The divorce Act (Ontario), 1930 (Dom.)—B.N.A. Act, ss. 91 (26), 92 (12) (14).

Plaintiff, aged 20, and defendant, aged 17, went through a form of marriage in Ontario on December 2, 1930. To obtain the marriage licence, defendant swore (falsely, as known to both parties) that she was 18 years of age. No parent's consent, as required by s. 17 of the *Marriage Act*, R.S.O. 1927, c. 181, was obtained. Carnal intercourse had previously taken place between the parties. The marriage was not consummated nor did the parties since the ceremony cohabit or live together as man and wife. Plaintiff sued for a declaration that the marriage ceremony was null and void.

Held: The action should be dismissed, as the Supreme Court of Ontario had no jurisdiction to grant the decree sued for.

S. 17 (requiring in certain cases parental consent as a condition precedent to a valid marriage) and s. 34 (providing that a form of marriage gone through without the required consent should be void; and giving the Supreme Court of Ontario power to entertain an action and declare the marriage void, but limited with regard to circumstances or conditions, such limitation excluding jurisdiction in the present case) of the *Marriage Act* (as it stood in 1930 and when the judgment at trial was pronounced) were *intra vires* of the Ontario legislature (Crocket J. dissenting as to the jurisdictional enactment in s. 34).

The construction and effect of ss. 17 and 34 discussed.

In the exercise of its jurisdiction in relation to "the solemnization of marriage in the province" (*B.N.A. Act, s. 92 (12)*), a provincial legislature may require parental consent to the marriage of a minor as a condition precedent to a valid marriage.

The Dominion statute, *The Divorce Act (Ontario), 1930* (c. 14) (the construction and effect of it discussed) did not affect the Ontario legislation in question, nor do the facts in the present case afford any ground for annulment of marriage under the Dominion statute.

The obtaining of the marriage licence by defendant's false affidavit as to age did not afford plaintiff a ground for annulment of the marriage (*Plummer* v. *Plummer*, [1917] P. 163, cited by Lamont J.).

Per Duff C.J.: The province's authority as to "solemnization of marriage" is plenary (*Liquidators of the Maritime Bank of Canada* v.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

Receiver-General of New Brunswick, [1892] A.C. 437, at 442) and extends *(inter alia)* to attaching the consequence of invalidity absolutely or conditionally. It is not necessary to decide whether the requirements of s. 34, controlling its courts in exercising the jurisdiction thereby conferred, had the effect of qualifying any rule of substantive law as to the invalidity of marriages which might be established by ss. 17 (1) and 34. The province has power to prescribe rules governing its courts in exercising the jurisdiction conferred upon them by s. 34 (for giving effect by remedial process to rules of substantive law relating to "solemnization of marriage") because that power (1) *prima facie* affects matters falling within "solemnization of marriage" or "administration of justice" (in *B.N.A. Act*, s. 92 (12) (14)), and (2) could not be brought under any jurisdiction appertaining to the Dominion Parliament under any of the enumerated heads of s. 91 of the *B.N.A. Act;* as regards process designed to give effect to substantive rules of law competently enacted by a province in execution of its exclusive authority under s. 92 (12) (solemnization of marriage), the Dominion could not intervene in any way with a view to sanctioning or controlling any jurisdiction or procedure established for that purpose by a province (and therefore the power must be vested in the province—*Att. Gen. for Ontario* v. *Att. Gen. for Canada*, [1912] A.C. 571, at 581).

Per Rinfret, Smith and Cannon JJ.: The provincial legislature had power to provide that the stipulated consent must be had under certain circumstances but should not be necessary under certain other circumstances. But irrespective of the question of the validity of the marriage under (and on construction of) ss. 17 and 34 (2), the plaintiff could not succeed in his action; the Ontario court had no inherent jurisdiction to entertain it—its jurisdiction rested entirely upon the provisions of the Act, and s. 34 (2) excluded jurisdiction under the circumstances of this case.

Per Lamont J.: The provincial legislature had full power, under s. 92 (14) (administration of justice in the province) of the *B.N.A. Act*, to enact s. 34; to give jurisdiction to the court in some cases and conditions and withhold it in others; and without s. 34 the court had no jurisdiction to declare null and void the going through of a form of marriage.

Per Crocket J.: The limitations in s. 34 upon the court's jurisdiction to declare a marriage void for want of consent, in effect prescribed conditions to the jurisdiction depending on matters which did not pertain in any way to "solemnization of marriage," but went beyond that subject and invaded the exclusive legislative authority of the Dominion Parliament in relation to all other matters pertaining to the larger subject of "marriage and divorce" (*B.N.A. Act*, s. 91 (26)). and therefore the jurisdictional enactment in s. 34 (which, however, was severable from the substantive enactment therein) was *ultra vires*. But, apart from s. 34 (purporting to give jurisdiction only under conditions which did not exist in the present case) there was no enactment authorizing the court to pronounce the decree asked for; (the jurisdiction conferred by the Dominion Act, 1930, c. 14, did not cover any jurisdiction to grant a decree of annulment for any cause which the provincial legislature has validly declared as a cause of annulment in exercise of its exclusive legislative authority upon the

1933

KERR v. KERR

subject of Solemnization of Marriage); nor (with some doubt —reference to *Board* v. *Board* [1919] A.C. 956; also to the reasons in *Vamvakidis* v. *Kirkoff*, 64 Ont. L.R. 585) has the Supreme Court of Ontario inherent jurisdiction to do so.

Judgment of the Court of Appeal, Ont., [1932] O.R. 601, affirmed in the result.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Logie J., pronounced on March 17, 1932 (2)) dismissed the plaintiff's action, which was for a decree declaring the ceremony of marriage performed between the plaintiff (then aged 20 years) and the defendant Mrs. Kerr (then aged 17 years) on December 2, 1930, at Hamilton, Ontario, null and void. The material facts of the case are sufficiently stated in the judgment of Lamont J. now reported. Leave to appeal to this Court was granted by the Court of Appeal. The appeal to this Court was dismissed.

O. M. Walsh and *F. J. L. Evans* for the appellant.

Joseph Sedgwick, K.C. for the respondent Attorney-General for Ontario.

W. P. McClemont for the respondent Mrs. Kerr.

DUFF C.J.—I concur with the view of the Appellate Division that s. 17 (1) of the *Marriage Act* is *intra vires* of the Provincial Legislature. I have no doubt that, in exercise of its jurisdiction in relation to the subject reserved to the provinces by s. 92 (12), "Solemnization of Marriage," the legislature of a province may lawfully prescribe the consent of the parents or guardian to the marriage of a minor as an essential element in the ceremony of marriage itself. Nor have I any doubt that by s. 17 (1) the consents required are prescribed as elements in the ceremony. These requirements apply to all marriages celebrated in Ontario, and to no marriages but those celebrated in Ontario, whether the parties to the marriage be domiciled in Ontario or elsewhere. The legislature is, I think, dealing with the solemnities of marriage and not with the capacity of the parties.

(1) [1932] O.R. 601; [1932] 4 D.L.R. 288.

(2) [1932] O.R., 289; [1932] 2 D.L.R. 349.

It is not suggested that, according to the practice prevailing in the different provinces of Canada at the time of Confederation, the giving of such consents pursuant to the requirements of the law, would not properly have been regarded as belonging to such solemnities. The province, therefore, has power to require such consents as a condition of the validity of the solemnization of marriages within the province. But, it should be observed that the jurisdiction of the province is not limited to that. The authority with regard to the subject "Solemnization of Marriage" is plenary. Lord Watson, in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1), said:

> In so far as regards those matters which, by s. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.

The authority of the provinces, therefore, extends not only to prescribing such formalities as properly fall within the matters designated by "Solemnization of Marriage"; they have the power to enforce the rules laid down by penalty, by attaching the consequence of invalidity, and by attaching such consequences absolutely or conditionally. It is within the power of a province to say that a given requirement shall be absolute in marriages of one class of people, while it may be dispensed with in other marriages. This, of course, is always subject to the observation that a province cannot, under the form of dealing with the "solemnization of marriage," enact legislation which, in substance, relates to some part of the subject of "marriage" which is not reserved to the provinces as a subject of legislative jurisdiction.

I must not be understood as expressing the view that it would not be competent to the Dominion, in exercise of its authority in relation to the subject of "marriage," in matters which do not fall within the subject of "solemnization of marriage," to deprive minors domiciled in Canada of the capacity to marry without the consent of their parents. No such question arises here, and it is quite unnecessary to pass an opinion upon it. The authority of the Dominion to impose upon intending spouses an incapacity

(1) [1892] A.C. 437, at 442.

1933

KERR v. KERR

Duff C.J.

which is made conditional on the absence of certain nominated consents is not in question.

One principle it is essential to bear in mind, in construing the *British North America Act,* is that a matter which, for one purpose and from one point of view, may fall within a subject reserved to the Dominion, may, for another purpose and from another point of view, fall within a subject reserved to the provinces; and that, when such is the case, legislation regarding such matters, from the proper provincial point of view, and for the proper provincial purpose, will take effect in the absence of legislation in the same field by the Dominion.

Nor is it necessary to consider whether or not the requirements of s. 34, which, admittedly, control the courts of Ontario in exercising the jurisdiction thereby conferred, have the effect of qualifying any rule of substantive law in respect to the invalidity of marriages which may be established by s. 17 (1) and s. 34. The point might be of considerable practical importance, but it does not arise on this appeal. The province unquestionably has authority (whether in relation to the Administration of Justice (s. 92 (14)), or in relation to Solemnization of Marriage (s. 92 (12)), it is needless to determine) to prescribe rules governing the courts of the province in exercising the jurisdiction conferred upon these courts by s. 34. That power is vested in the province, first, because *prima facie* it affects matters falling within the subject "Solemnization of Marriage," or the subject "Administration of Justice"; and second, because the authority to prescribe rules governing the courts of Ontario, in exercising the jurisdiction conferred upon them by the legislature of Ontario, for giving effect by remedial process to rules of substantive law relating to "Solemnization of Marriage," a subject within the exclusive jurisdiction of the legislature, could not be brought under any jurisdiction appertaining to the Dominion Parliament under any of the enumerated heads of s. 91. For our present purpose, we may assume that some jurisdiction is vested in the Dominion in respect of remedial process touching matters within "Marriage," and not within either "Divorce" or "Solemnization of Marriage." But, as regards process designed to give effect to substantive rules of law competently

enacted by a province, in execution of the exclusive authority belonging to it in virtue of s. 92 (12), the Dominion would be powerless to intervene in any way with a view to sanctioning or controlling any jurisdiction or procedure established for that purpose by a province. If there is no such authority vested in the Dominion, it follows that it must be vested in the province. "Now, there can be no doubt," said Lord Loreburn in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1),

> that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.

This alone is fatal to the appeal.

Nor do I think the Dominion statute of 1930 (20 & 21 Geo. V., c. 14) affects any matter in controversy. Minors above the age of consent (14 in males, and 12 in females) were undoubtedly capable of contracting marriages under the law of England as it existed on the 15th of July, 1870. As I have already pointed out, the provisions of the legislation before us do not affect this matter of capacity—a matter which is not touched by them. They deal exclusively with matters which are properly treated as comprised within the solemnities of marriage. If the effect of the Dominion Act is to make available the procedure of the probate and divorce court in England for the purpose of obtaining a declaration of invalidity on the ground that, under the provisions of s. 17 (1) and s. 34, a marriage is void for want of observing the formalities therein prescribed (formalities comprised within the subject "Solemnization of Marriage"), then, as already indicated, to that extent, the Dominion statute is *ultra vires*. The Dominion, to repeat, has no power to prescribe such a procedure for such a purpose, either explicitly or referentially.

But I am by no means satisfied that such is the effect of the Act of 1930. The phrase "annulment of marriage" may not unreasonably be read as restricted to proceedings impeaching a marriage on grounds other than some defect in "solemnization" within the meaning of s. 92 which would vitiate *ab initio* the ceremony itself by force of the

(1) [1912] A.C. 571, at 581

1933
KERR
v.
KERR
Duff C.J.

law of the province alone. In view of the then existing state of Ontario law, the qualfication "in so far as it can be made to apply in the province of Ontario," may, perhaps, be paraphrased "in so far as it can properly be made to apply to that province by the Dominion legislation" and this consideration may afford, as Riddell J.A. thinks, a good ground for so construing the words "annulment of marriage."

The appeal must be dismissed with costs.

The judgment of Rinfret, Smith and Cannon JJ. was delivered by

SMITH J.—The facts and secs. 17 and 34 of the Ontario *Marriage Act,* R.S.O. 1927, ch. 181, are set out in the reasons of my brother Lamont.

The appellant, in his statement of claim, pleads the provisions of *The Divorce Act (Ontario), 1930,* being Statutes of Canada, 20-21 Geo. V., ch. 14, and amendments thereto, and the provisions of the Ontario *Marriage Act;* and claims, by virtue of these Acts, a decree declaring the ceremony of marriage celebrated between the parties null and void.

The Divorce Act referred to does not deal in any way with the solemnization of marriage, which is a matter entirely within provincial jurisdiction. It is applicable to divorce and to the annulment of marriages where there has been valid solemnization. A marriage validly solemnized may, under the English law, be void or voidable on grounds other than those giving a right to divorce. The facts established in this case would not, under the English law, constitute a ground for annulment of a validly solemnized marriage, for the reasons stated by the learned Chief Justice of Ontario.

The question of whether or not there was a validly solemnized marriage in this case depends entirely upon the provisions of the Ontario *Marriage Act.* If, under the terms of that Act, there was a valid solemnization of marriage, the appellant's action necessarily fails. That question turns upon the construction to be given to the provisions of sec. 17 when read in conjunction with subsec. 2 of sec. 34, which reads as follows:

(2) The Court shall not declare a marriage void where carnal intercourse has taken place between the parties before the ceremony.

If this subsection is to be construed as dealing with jurisdiction without any other signification, and sec. 17 is to be regarded as alone dealing with the question of validity and as making the marriage void under the circumstances of this case, then we have the peculiar situation of an enactment making a marriage void and at the same time forbidding the court so to declare in an action between the parties. It is difficult to understand what object would be served by such prohibition.

On the other hand, if sec. 17 and this subsec. 2 are to be read together, it may be that the proper construction is that subsec. 2 makes an exception to the provision of sec. 17 requiring consent and making consent a condition, in which event the marriage would be valid, notwithstanding the provisions of sec. 17. If such is the proper construction, there can be no doubt that such a provision is *intra vires* because the legislature clearly has jurisdiction to provide that the stipulated consent must be had under certain circumstances but shall not be necessary under certain other circumstances.

It is pointed out, however, that it is not necessary in this particular action to pass upon the question of the validity of the marriage, because the appellant cannot succeed unless the marriage was void, and the court, by the statute, is expressly prohibited, in this kind of an action, from making any such declaration.

There seems to be no doubt that the court has no inherent jurisdiction to entertain an action of this kind between the parties to the marriage ceremony, and that the jurisdiction rests entirely upon the provisions of the statute. That being so, subsec. 2 excludes jurisdiction under the circumstances of this case.

I am therefore refraining from expressing an opinion as to the proper construction to be placed upon the provisions of sec. 17 and subsec. 2 of sec. 34. I concur in the view that in any event the court had no jurisdiction to declare the marriage void, as prayed in the statement of claim, and that the appeal should be dismissed. There will be no order as to costs.

1933

KERR
v.
KERR

Lamont J.

LAMONT J.—This is an appeal from the judgment of the Court of Appeal for Ontario (1) reversing a judgment of Mr. Justice Logie (2) in favour of the appellant, in an action for a declaration that the form of marriage solemnized between the appellant and the respondent, Frances Margaret Kerr (née Smith), was null and void.

The facts of the case are not in dispute. The parties first met in April, 1930, and sexual intercourse took place between them on some four occasions. In September, 1930, Frances Margaret Smith found herself to be pregnant and she and some of her friends urged the appellant to marry her. He objected, claiming that he was not the cause of her condition. Yielding, however, to their importunities, the appellant, on December 2nd, 1930, went through a form of marriage with her at Hamilton, Ontario, where they both resided. To obtain the marriage licence Frances Margaret Smith made an affidavit that she was eighteen years of age, although she was then only seventeen. When the affidavit was made both the appellant and Miss Smith knew that the statement therein contained as to her age was false, and knew also that it was made for the purpose of procuring the marriage licence. The ceremony was performed without the knowledge of the parents or family of either of the parties. No consent to the marriage was obtained from the mother of Frances Margaret Smith as required by section 17 of the *Marriage Act* (R.S.O., 1927, ch. 181). The marriage was never consummated and the parties, since the ceremony, have not cohabited or lived together as man and wife.

On these facts the trial judge gave judgment for the appellant, declaring the marriage ceremony between the parties to be null and void upon the ground that the consent of the girl's mother to the marriage (her father being dead) had not been obtained, and that section 34 of the Act was *ultra vires* of the provincial legislature.

From that judgment an appeal was taken to the Court of Appeal by the respondent, Frances Margaret Kerr, and by the Attorney-General for Ontario, who had been added as a party to the action. The Court of Appeal reversed the judgment of the trial judge, holding that section 34 was

(1) [1932] O.R. 601; [1932] 4 D.L.R. 288.

(2) [1932] O.R. 289; [1932] 2 D.L.R. 349.

within the competence of the provincial legislature. The appellant now appeals to this Court and asks that the judgment of the trial judge be restored.

The appeal turns upon the construction to be placed upon sections 17 and 34 of the *Marriage Act*. The relevant parts of these sections are:—

17. (1) Save in cases provided for by subsections 3 and 4 of this section and by section 18, where either of the parties to an intended marriage, not a widower or a widow, is under the age of eighteen years, the consent in writing of the father if living, or, if he is dead, or living apart from the mother and child, and is not maintaining or contributing to the support of such child, the consent in writing of the mother if living, or of a guardian if any has been duly appointed, shall be obtained from the father, mother or guardian before the licence is issued * * * and such consent shall be deemed to be a condition precedent to a valid marriage, unless the marriage has been consummated or the parties have after the ceremony cohabited and lived together as man and wife.

34. (1) Where a form of marriage is gone through between persons either of whom is under the age of eighteen years without the consent of the father, mother or guardian of such person, when such consent is required by the provisions of this Act, * * * such form of marriage shall be void and the Supreme Court shall have jurisdiction and power to entertain an action by the person who was at the time of the ceremony under the age of eighteen years, to declare and adjudge that a valid marriage was not effected or entered into, and shall so declare and adjudge if it is made to appear that the marriage has not been consummated and that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of nineteen years.

(2) The Court shall not declare a marriage void where carnal intercourse has taken place between the parties before the ceremony.

The contention of the appellant is:—

1. That section 17 (1) is competent provincial legislation in so far as it requires the consent of the parents or guardians of a contracting party—not a widower or a widow—to an intended marriage before the issue of the licence if the party is under the age of eighteen years, and also in so far as it enacts that such consent shall be a condition precedent to a valid marriage.

2. That section 34 is *ultra vires* of the provincial legislature, as it is legislation on the subject of marriage and divorce which, by section 91 (26) of the *British North America Act, 1867*, is exclusively assigned to the Dominion Parliament.

3. That, as the consent required by section 17 (1) was not obtained, and as section 34 is *ultra vires*, the marriage

1933

KERR
v.
KERR

Lamont J.

should be held null and void by virtue of *The Divorce Act (Ontario), 1930,* enacted by the Dominion Parliament.

By the *British North America Act, 1867,* the power to make laws respecting marriage and its solemnization was distributed between the Dominion Parliament and the provincial legislatures. To the Dominion was assigned the exclusive legislative jurisdiction over the subject of Marriage and Divorce (section 91 (26)); while to the provinces was given the exclusive legislative jurisdiction over the solemnization of marriage in the provinces (section 92 (12)). The solemnization of marriage might readily have been included within the general description of "Marriage and Divorce," but it seemed wise to the framers of our constitutional Act to carve out of the field which marriage and divorce would otherwise have covered, a small but distinct and essential part designated "The Solemnization of Marriage in the Province" and give the provincial legislatures the exclusive right to make laws in respect thereof. Each legislative body is supreme within its own sphere and the question we have to determine is, does the impeached legislation (s. 34) fall within any one of the subjects exclusively assigned to the provincial legislatures?

Since the decision of the Privy Council in *In re Reference Concerning Marriage* (1), it has been settled law that the exclusive power of the provincial legislatures to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred upon the Dominion Parliament as regards marriage, by section 91 (26), and enables the provincial legislatures to enact conditions as to the solemnization which may affect the validity of the contract.

Solemnization of marriage within the meaning of section 92 includes not only the essential ceremony by which the marriage is effected, but also parental consent where such consent is required by law. In *Sottomayor* v. *DeBarros* (2) Cotton, L. J., says:—

> It only remains to consider the case of *Simonin* v. *Mallac* (3). The objection to the validity of the marriage in that case, which was solemnized in England, was the want of consent of parents required by the law of France, but not under the circumstances by that of this country. In

(1) [1912] A.C. 880.
(2) (1877) 3 Prob. Div. 1, at 7.
(3) (1860) 2 Sw. & Tr. 67.

our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage.

The provincial legislature is, therefore, competent by apt legislation to make the preliminaries, leading up to the marriage ceremony, conditions precedent to the solemnization of the marriage. From this it follows, in my opinion, that the legislature is also competent to declare that in the event of these conditions precedent not being complied with no valid marriage has taken place.

Section 17, however, does not make consent a condition precedent to a valid marriage in every case where a contracting party is under the age of eighteen years. The legislation does not apply to cases coming within subsections 3 and 4 of this section, nor where the contracting party is a widow or widower, nor does it apply where the marriage has been consummated, or the parties have, after the ceremony, cohabited and lived together as man and wife.

Then are subsections 1 and 2 of section 34 competent provincial legislation?

It will be observed that subsection 1 deals, not with marriage, but with a "form of marriage," which indeed is all that the performing of the ceremony can be where no valid marriage takes place.

Section 34 (1) declares that if the consent, required by section 17, has not been obtained "such form of marriage shall be void."

The object of these two sections is, I think, clear. By them the legislature was endeavouring:

1. To provide that a failure to furnish the consent to an intended marriage, required by section 17 in case of a contracting party thereto under the age of eighteen years who has gone through a form of marriage, would in certain cases have the effect of preventing a valid marriage from taking place, and

2. To bestow on the Supreme Court of Ontario jurisdiction to entertain an action and to declare and adjudge that the going through of such a form of marriage, under the circumstances, would not constitute a valid marriage.

1933

KERR v. KERR

Lamont J.

This jurisdiction was bestowed on the court only in those cases in which the conditions prescribed by the statute had been complied with. That is to say where:

1. The action is brought by a contracting party who at the time of the ceremony was under the age of eighteen years, and who brought the action before he or she reached the age of nineteen years.

2. It is made to appear that the marriage had not been consummated and that such persons have not, after the ceremony, cohabited and lived together as man and wife.

The onus of establishing each of these requisites is on the person bringing the action and if the onus is not discharged the court has no jurisdiction to declare that a valid marriage has not taken place.

Apart, therefore, from enacting that the furnishing of the consent should be a condition precedent to a valid marriage and that when a form of marriage had been gone through without such consent being obtained such form should be null and void—which it is not disputed is within the competence of the legislature—the whole enactment in these two sections concerns the bestowal of jurisdiction on the Supreme Court of Ontario to try an action and make a declaration that there has been no valid marriage in certain cases and under certain conditions, and the withholding of such jurisdiction in others, particularly subsection 2 where the Act expressly states that the court should not declare a marriage void where carnal intercourse has taken place between the parties before the ceremony. Is it within the competence of the legislature to give jurisdiction to the court in some cases and withhold or deny it in others?

In the case of a marriage void by the law of the place where it was celebrated, on account of lack of essential formalities, a declaration that it is invalid has been described as " merely a judicial ascertainment of facts." It ascertains but does not change the status of the parties. If that is so, and I think it is, it is difficult to see why the legislature should not be competent to invest the courts with jurisdiction to ascertain a fact. The jurisdiction of the Supreme Court of Ontario is statutory. Without this enactment the court would have no jurisdiction to declare null and void the going through of a form of marriage.

In my opinion the bestowing upon the court jurisdiction to entertain an action to make a finding of fact thereon and to make a declaration in accordance with that fact, is clearly within the competence of the legislature under section 92 (14) which, subject to section 101 of the Act, assigns to the legislature the exclusive power to make laws respecting the "Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." This includes the power to define the jurisdiction of the courts as well as the jurisdiction of the judges who constitute the same. *(In re County Courts of British Columbia* (1)). It also includes the power to enlarge, alter or diminish such jurisdiction. *(Regina* v. *Levinger* (2)).

If we examine sections 91 and 92 it will be seen, speaking generally, that the power to legislate in respect of practice and procedure (adjective law) has been exclusively assigned to the provincial legislatures except so far as relates to divorce and criminal law, subject, of course, to s. 101 of the Act; that in matters relating to the subjects over which exclusive legislative jurisdiction has been, by section 91, assigned to the Dominion Parliament, whenever it was intended that Parliament should also legislate as to the practice and procedure to be adopted, an express statement to that effect is found in section 91. In this case I have no doubt that the provincial legislature had full power, under section 92 (14), to enact the impeached legislation.

It was also contended that the marriage should be annulled on the ground that the marriage licence was obtained by the false affidavit of the respondent, Frances Margaret Kerr, as to her age. A similar contention was made in *Plummer* v. *Plummer* (3). In that action, although the notice or declaration required by the Acts contained statements false to the knowledge of both parties, it was held that a marriage by licence was not to be invalidated by reason of a false statement in the notice. The same principle, in my opinion, applies here.

The appeal should therefore be dismissed.

(1) (1891) 21 Can. S.C.R., 446. (2) (1892) 22 Ont. R. 690.
(3) [1917] P. 163.

1933

KERR v. KERR

Crocket J.

CROCKET J.—I regret that I cannot agree with my brethren upon the question of the constitutionality of the provisoes of sec. 34 of the Ontario *Marriage Act* as it stood in that statute at the time of the commencement and trial of this action.

The impugned section deals with two distinct subjects. The first part concerns the requirement of the consent of a parent or guardian to the marriage of a person under the age of 18 years and unqualifiedly enacts that a form of marriage gone through by such a person without such consent shall be void. The remainder of the section deals entirely with the jurisdiction of the Supreme Court to pronounce a decree of annulment in the case of such a marriage. It purports to empower the court to entertain an action for annulment only by the person who was at the time of the marriage ceremony under the age of 18 years, and then to adjudge that a valid marriage was not effected or entered into only "if it is made to appear that the marriage has not been consummated and that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of nineteen years." It then, by subsec. 2, expressly prohibits the court from declaring a marriage void where carnal intercourse has taken place between the parties before the ceremony.

The consent of a parent or guardian of the person under the age of 18 years, concerning, as it intrinsically does, the subject matter of the solemnization of marriage (See *Sottomayor* v. *De Barros* (1), unmistakably falls under sec. 92 (12) of the *British North America Act,* and is a subject respecting which the legislature by that section is given exclusive capacity to legislate, by way of exception to the exclusive legislative authority which sec. 91 (26) vests in the Parliament of Canada in relation to all other matters pertaining to the larger subject of Marriage and Divorce.

The report of the Judicial Committee of the Privy Council on the Canadian *Marriage Reference* of 1912 (2) distinctly laid down the principle that sec. 92 (12) enables the provincial legislature "to enact conditions *as to solemnization* which may affect the validity of the contract"

(1) (1877) 3 Prob. Div. 1. (2) [1912] A.C. 880.

of marriage. I have no doubt that in accordance with the principle of this decision, this exclusive legislative authority in the provincial legislature comprises not only the power to declare void a marriage for want of the required consent of a parent or guardian in the case of a marriage solemnized between persons, one of whom is under the age of 18 years, but the power to confer upon the Supreme Court jurisdiction to pronounce a decree of nullity for want of such consent in such case, or for any other reason which in reality pertains to the subject matter of the solemnization of marriage.

I find it impossible, however, to assent to the view that the conditions prescribed by the provisoes in sec. 34 as conditions, not as to the validity or invalidity of the marriage ceremony, but as conditions to the right of the court to pronounce a decree of nullity in the case of such a marriage, are conditions which do pertain in any way to the subject matter of the solemnization of marriage. The manifest intent, and the real pith and substance of these provisoes, is to prevent the Supreme Court from declaring void any marriage ceremony for want of the required consent of a parent or guardian of a person under the age of 18 years, except at the instance of the party to the marriage ceremony who was under the prescribed age at the time of the performance of that ceremony; and, even where an action for annulment is brought by such party, to prohibit the court from granting such a decree if, after the ceremony, there has been consummation and cohabitation as husband and wife between the parties; or if the plaintiff has failed to bring his or her action for such annulment before attaining the age of 19 years; or, further, if the parties to the marriage have had carnal intercourse before the performance of the ceremony. The provisoes prescribe conditions which, whether they do or do not themselves strictly affect the validity of the marriage contract, make a judicial declaration or judgment of annulment impossible in such a case. They are an absolute bar to such a decree, and in reality dispense with the requirement of a parent's or guardian's consent to the solemnization of the marriage ceremony, which the statute has previously enacted as a condition of validity, making, as they do, the neglect or laches of the party under age to bring his or her action for

1933

KERR
v.
KERR

Crocket J.

annulment before attaining the age of 19 years, or carnal intercourse between the parties, either before or after the marriage ceremony, conclusive, so far as the court is concerned, of a valid marriage relationship quite irrespective of the required consent of parent or guardian or of the solemnization of the marriage ceremony at all. None of these conditions pertain to any of the requisite preliminaries or formalities of the marriage ceremony. They treat of matters which are wholly extraneous thereto, i.e., the conduct of the parties before and after the ceremony. Consummation and cohabitation as husband and wife are, no doubt, the natural consequences of a marriage ceremony, but obviously, whether consummation or subsequent cohabitation take place or not, could not conceivably affect the right of any person, possessing the requisite governmental authority for the purpose, to solemnize or perform the ceremony, or even the right or capacity of the parties themselves to have it solemnized; neither could the neglect or laches of either party to bring an action for annulment before attaining the age of 19 years. In my opinion, they go entirely beyond the subject matter of the solemnization of marriage and consequently invade the exclusive legislative authority of the Dominion Parliament in relation to all other matters pertaining to the larger subject of Marriage and Divorce.

That "Solemnization of Marriage in the Province" does not comprehend the whole subject of marriage, as used in sec. 91 (26), and connotes only a limited division of the larger field of the whole relationship of marriage, is self-evident. The report of the Judicial Committee on the *Marriage Reference* case of 1912 (1), already referred to, as well as the argument of counsel who combatted the legislative power of the Parliament of Canada to enact the proposed Marriage Bill, then under review, clearly demonstrates that there is a broad distinction between marriage and the solemnization of marriage, and that there are many conditions which may affect the validity of the contract of marriage which do not touch the subject of the solemnization of marriage. All that that case decided was that the jurisdiction of the Dominion Parliament does not, on the

(1) [1912] A.C. 880.

true construction of secs. 91 and 92, cover the whole field of validity, and that the provincial legislatures had the exclusive capacity to determine by whom the marriage ceremony might be performed and to make the officiation of the proper person a condition of the validity of the marriage—a condition which, unlike any of those now in question, manifestly and inherently concerns the solemnization of the ceremony of marriage. The plain implication of the decision is that all matters respecting Marriage and Divorce, which do not strictly concern the subject matter of the Solemnization of Marriage, lie exclusively within the legislative capacity of the Dominion Parliament, whether they be dealt with as grounds or conditions of annulment or as discretionary or absolute bars to the granting by any court of decrees of annulment.

It seems to me that if it is now to be held that the provincial legislatures can validly impose any such restrictions as are here in question upon the right of the Supreme or any other provincial court to grant decrees of annulment for want of the requisite consent of a parent or guardian to the solemnization of a marriage ceremony, they may quite as logically impose any other imaginable restrictions, not only as conditions to the granting of such decrees, but as conditions to the validity of a marriage, and thus exhaust and effectively control the whole field of validity. If they can prescribe the fact of no previous carnal intercourse having taken place between the parties to the solemnization of a marriage ceremony, either as a condition of the validity of the marriage or as a condition of the power of the court to grant a decree of annulment, why may they not likewise, for instance, prescribe the condition that the parties be not related by consanguinity or that there is no impotence upon the part of either as further conditions of validity or of the jurisdiction of the court to pronounce a decree of annulment in such a case?

In the Province of New Brunswick, the legislature, long before confederation, constituted a Court of Divorce and Matrimonial Causes which, by virtue of sec. 129 of the *British North America Act,* still exists, for the determination of all matters and questions touching and concerning marriage and contracts of marriage, and divorce, as well from the bond of matrimony as divorce and separation

1933

KERR
v.
KERR

Crocket J.

from bed and board, and alimony. The statute establishing this court prescribes as the only causes for divorce from the bond of matrimony and of dissolving and annulling marriage frigidity or impotence, adultery and consanguinity within the prohibited degrees. Whether consanguinity and impotence are regarded as grounds of divorce from the bond of matrimony or as grounds of annulment, I venture to think that neither is a matter which concerns Solemnization of Marriage within the contemplation of sec. 92 (12) of the *British North America Act,* and that, since that Act came into operation, only the Parliament of Canada could validly legislate with respect to them, either as grounds of divorce or as grounds of annulment. The provincial legislatures may enact conditions as to solemnization which may affect validity, but such conditions must not go beyond those matters which in reality pertain either to the act or ceremony of solemnization itself or to the preliminary steps leading thereto. They cannot, by annexing to a condition which does thus concern the solemnization of marriage, such as the consent of a parent or guardian of one under age, further conditions, which do not themselves pertain to solemnization, but have to do with the capacity of the parties and their conduct as well after as before the performance of the marriage ceremony, as conditions either of validity of the ceremony or of the rights of the parties to obtain judicial declarations of annulment, trench upon that field which the *British North America Act* has exclusively reserved for the Parliament of Canada, viz: Marriage and Divorce, except the Solemnization of Marriage. Such further conditions, as I have indicated, either concern or they do not concern the subject matter of the solemnization of marriage. If they are to be regarded as concerning that subject matter, the words "marriage and" in enumeration 26 of the classes of subjects with respect to which sec. 91 of the *British North America Act* provides that the Parliament of Canada may exclusively make laws, would, in my opinion, be rendered meaningless and of no effect, and the provincial legislatures enabled to occupy the entire field of validity of marriage, for, as I have already endeavoured to point out, there would be no condition which they could not enact as a prerequisite of the valid solemnization of a marriage, whether such condition con-

cerned the capacity of the parties or not. "Solemnization of marriage in the province," as enumerated in sec. 92 (12), would not operate "by way of exception" to the powers conferred on the Parliament of Canada by sec. 91 (26) to make laws in relation to "marriage and divorce," as held by the Judicial Committee on the Reference of 1912 (1), but by way of a complete abrogation of those powers, in so far as "marriage" is concerned.

For these reasons I think the enactment that a marriage ceremony solemnized between persons, one of whom is under the age of 18 years, without the consent of a parent or guardian of such person, shall be void, is valid as touching a matter which directly pertains to the solemnization of the marriage ceremony, and that it is severable from the rest of the section, which deals with another distinct subject, viz: the conditions upon which the Supreme Court may exercise its jurisdiction to pronounce decrees of annulment; and that the rest of that section is *ultra vires* of the provincial legislature. The use of the conjunction "and" and of the definite article "the" before the words "person who was at the time of the ceremony under the age of eighteen years" does not, I think, render the substantive enactment disseverable from the jurisdictional enactment, any more than if the two were contained in separate sections. There is certainly nothing in the jurisdictional clauses which limits or in any way alters the effect of the substantive enactment, while subsec. 2 absolutely prohibits the court from declaring "a marriage void" where carnal knowledge has taken place between the parties before the ceremony. The whole of the jurisdictional enactment could be deleted from the section without affecting the substantive enactment in any manner.

The question remains as to whether, apart from the provisions of sec. 34, the Supreme Court of Ontario possessed the jurisdiction to declare such a marriage void for want of the consent of a parent or guardian of the party who was at the time of the ceremony under the prescribed age. The section itself purports to give the court jurisdiction only under the conditions stated, which do not exist in the present case, notwithstanding that it has previously and

(1) [1912] A.C. 880.

1933

KERR v. KERR

Crocket J.

unqualifiedly enacted that every and any form of marriage gone through between persons, one of whom is under the age of 18 years, without the required consent, shall be void.

If I am right in the view that the unqualified nullification enactment for want of the consent of a parent or guardian of the party to the marriage who was under the age of 18 years is valid and severable from the rest of the section, and the rest of the section *ultra vires*, it follows that it is or was at the time of the commencement and trial of the action enacted as substantive law in the Province of Ontario that the solemnization of such a marriage ceremony without the required consent was absolutely void. But where, apart from the enactments of sec. 34, does the Supreme Court of Ontario derive its authority to pronounce a decree of annulment?

It is argued that *The Divorce Act (Ontario)*, enacted by the Dominion Parliament in 1930, conferred the necessary jurisdiction. This Act reads as follows:—

1. The law of England as to the dissolution of marriage and as to the annulment of marriage, as that law existed on the fifteenth day of July, 1870, in so far as it can be made to apply in the province of Ontario, and in so far as it has not been repealed, as to the province, by any Act of the Parliament of the United Kingdom or by any Act of the Parliament of Canada or by this Act, and as altered, varied, modified or affected, as to the province, by any such Act, shall be in force in the province of Ontario.

2. The Supreme Court of Ontario shall have jurisdiction for all purposes of this Act.

By the law of England a marriage was not on the date mentioned void for want of consent of a parent or guardian of a person under the age of 18 years nor has it since been so enacted. In any event the law of Ontario, in so far as it was validly enacted in relation to the solemnization of marriage, would not be affected thereby. In relation to any conditions affecting the validity of marriage or the annulment of marriage other than conditions as to solemnization the law of England, in my opinion, would apply, by virtue of the Dominion Act. The conferring of jurisdiction upon the Supreme Court of Ontario by sec. 2 of the Dominion Act "for all purposes of this Act" does not therefore, I think, cover any jurisdiction to grant a decree of annul-

ment for any cause which the provincial legislature has validly declared as a cause of annulment in exercise of its exclusive legislative authority upon the subject matter of the solemnization of marriage.

It is contended also that the Supreme Court, apart from the provisions of sec. 34 of the provincial *Marriage Act,* possessed inherent jurisdiction as His Majesty's Supreme Court of Judicature for the Province, without any express authorization, to apply and give judicial effect to any substantive law competently enacted by the provincial legislature, such as the enactment now in question, unqualifiedly declaring void any marriage ceremony gone through by a person under the age of 18 years without the consent of a parent or guardian of such person. I confess that I have felt considerable doubt upon this question in view of the judgment of the Judicial Committee of the Privy Council in *Board* v. *Board* (1), an Alberta case involving the jurisdiction of the Supreme Court of that Province, in which the substantive law enacted by the English *Matrimonial Causes Act,* 1857, had been introduced, to give effect to that law in the absence of any specific statutory authority to try matrimonial causes. After anxious consideration of the reasons for that decision, as stated by Viscount Haldane, and of the reasons for judgment of the Court of Appeal of Ontario in *Vamvakidis* v. *Kirkoff* (2), in which the history of the several courts, established in Upper Canada and in the Province of Ontario, which were finally "consolidated" as the Supreme Court of Ontario in 1881, and their jurisdiction, were exhaustively considered in the light of the reasons for the decision in *Board* v. *Board* (3), I have reached the conclusion, though not without some difficulty, that it cannot be presumed in the case of the Supreme Court of Ontario, that it possessed inherent authority to entertain a suit for the declaration of nullity of marriage, and that no statutory authority existed whereby the learned trial judge could validly adjudge, as he did, that a valid marriage was not effected between the parties in this case.

(1) [1919] A.C. 956. (2) (1929) 64 Ont. L.R., 585.
(3) [1919] A.C. 956.

1933
KERR
v.
KERR
Crocket J.

For this reason, though of opinion that the provisoes of sec. 34 of the Ontario *Marriage Act*, as they stood in 1930, were *ultra vires* of the Provincial Legislature, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Walsh & Evans.*

Solicitors for the respondent Mrs. Kerr: *McClemont & McClemont.*

Solicitor for the respondent The Attorney-General for Ontario: *E. Bayly.*

1933
*June 5, 6, 7, 8.
*Oct. 3.

BALDWIN INTERNATIONAL RADIO COMPANY OF CANADA, LIMITED (DEFENDANT) ..... APPELLANT;

AND

WESTERN ELECTRIC COMPANY, INCORPORATED, AND NORTHERN ELECTRIC COMPANY, LIMITED (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Infringement—Subject matter—Combination—Anticipation—Claims of Specification (sufficiency of)—Patent Act, R.S.C. 1927, c. 150, s. 14.

The judgment of Maclean J., President of the Exchequer Court of Canada, [1933] Ex. C.R. 13, holding that the plaintiffs' patent for a certain "improvement in acoustic devices" (of the type commonly known as loud speakers) was valid and had been infringed by defendant, was affirmed; the court holding against the defendant's contentions that there was lack of subject matter, that there was anticipation, no infringement, and (a ground not urged in the Exchequer Court) that the two claims of the specification which plaintiffs relied on were insufficient and failed to meet the requirements of s. 14 (*c*) of the *Patent Act* (R.S.C. 1927, c. 150) because they did not distinguish between what was already old and what the applicant for patent "regarded as new" in the invention claimed.

To decide an objection grounded upon anticipation, one must look at the description in the specification, so as to ascertain what the invention really is. The claims may add light to it, but they are not meant for that purpose, and their object is mainly to define the extent of the monopoly to which protection is granted. The description in the present patent clearly showed that the invention consisted in a

PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Hughes JJ.

certain combination, not a mere aggregation or a juxtaposition of known contrivances, but a group of co-acting parts achieving a combined result, which satisfies the definition of a combination for the purposes of the patent law. In such case, it matters not whether some or all of the elements were old and already known in the art as separate entities; the only point (on the question of anticipation) is whether the actual combination was new.

The claims relied on by plaintiffs (and attacked as aforesaid) must be read with reference to the entire specification; and it was sufficient if it appeared from the claims so read what the applicant regarded as his invention; and, so read, the claims left no doubt of the exact nature of the invention claimed as new; and there existed no difficulty in ascertaining and defining what were the exact parts of the new combination and what the monopoly covered. Where the combination itself is the only thing regarded and described as the invention, the fact that the claiming clause does not distinguish old from new is not a ground for objection (*British United Shoe Machinery Co. Ltd.* v. *A. Fussell & Sons Ltd.*, 25 R.P.C. 631, and other cases cited; *Patent Act*, s. 14, considered). It is only if the applicant desires to claim invention for a subordinate element *per se* that it is necessary for him to claim the element separately.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that, as between the parties to the action, claims 4 and 9 of the letters patent of the plaintiffs No. 287,240, dated February 12, 1929, for new and useful improvements in acoustic devices, were valid and had been infringed by the defendant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

E. G. Gowling and *D. K. MacTavish* for the appellant.

O. M. Biggar, K.C., R. S. Smart, K.C., and *M. B. Gordon* for the respondents.

The judgment of the court was delivered by

RINFRET J.—The respondents are the owners of Canadian Letters Patent No. 287240 granting them the exclusive right and privilege of making, constructing, using and vending to others a certain "improvement in acoustic devices". They brought this action for the infringement of their rights by the appellants.

In the Exchequer Court of Canada (1), the respondents succeeded and were held entitled to the relief claimed by them, together with their costs of the action.

(1) [1933] Ex. C.R. 13.

1933

BALDWIN INTERNATIONAL RADIO CO. OF CANADA LTD. v. WESTERN ELECTRIC CO. INC. et al.

Rinfret J.

The appellants now appeal and renew before this Court three of the objections which were unsuccessful in the trial court, to wit: Invalidity of Letters Patent on two grounds —absence of subject-matter, and anticipation; and denial that there was infringement on their part. A new ground not urged before the Exchequer Court is that the claims of the specification relied on by the respondents are insufficient and fail to meet the requirements of section 14 (*c*) of the *Patent Act*, because they do not distinguish between what was already old and what the patentee "regards as new" in the invention therein claimed by him.

We will examine each of the appellants' several objections in the order in which they have been presented to us. Before we do so, however, it will be convenient to say a word of the device which forms the subject of the patent in suit.

The "acoustic device" covered by the patent is of the type familiarly known as a loud speaker. Its function is to reproduce sound, including musical notes and the human voice. It is known that sound, as heard by the human ear, consists of the vibration of the air. Sound waves are sequences of alternate compressions and expansions of the air in immediate contact with the ear. The object of the sound reproducer is therefore to catch the vibrations caused by the instruments or voices, translate them into electrical or mechanical impulses and transmit them back into sound waves at the other end of the receiver, or, in the case of loud speakers, bring them to the human ear in amplified form. For that purpose, both electrical and mechanical devices have been adopted. Here, we are concerned with an electrical device.

The respondent's device is described in the patent as follows:

> In accordance with a preferred embodiment of the invention, a piston diaphragm is provided to radiate into a sound chamber having a plug secured therein which decreases the area of a portion of the sound passage therethrough. The diaphragm and plug are so shaped and arranged that converging sound passages are formed thereby extending from the centre of the diaphragm and from its peripheral portion to a common sound passage. The cross sectional areas of the converging sound passages preferably increase as the common sound passage is approached and these areas are such, moreover, that the air displayed by the diaphragm flows from each of the converging sound passages into the common sound passage with substantially the same velocity. The meeting point of the converging sound passages is effectually the throat of the horn since the

volume of the sound passage beyond this point is not appreciably affected by the displacement of the diaphragm. Extending from this throat portion to the mouth of the horn, it is preferable to have the cross-sectional area of the sound passage such that the area of the wave front of the transmitted sound progressively increases exponentially with respect to the distance travelled.

This description is immediately followed in the patent by the statement that

The invention may be readily understood by referring to the accompanying drawing in conjunction with the following detailed description.

The drawing is a sectional view of a loud speaking receiver employing the feature of the present invention. An electromagnet having a hollow annular core 10, a winding 11, and annular pole pieces 12 and 13 provides a magnetic field in which the coil 14 is positioned. The top portion 15 of the magnetic core 10 is detachable to permit the assembling of the winding 11 on the core structure and is secured to the lower portion of the core by the screws 16. The diaphragm to which the coil 14 is attached comprises a stiff, dish-shaped, piston portion 17, a flexible corrugated portion 18 and a flat portion 19 which is clamped between the housing structure 20 and the upper portion 15 of the core structure. The diaphragm is separated from the portion 15 of the magnetic structure and the housing 20 by the clamping rings 21 and is held in a clamped position by screws (not shown) which pass through the flanged portion of the housing 20, washers 21 and the flat portion 19 of the diaphragm and which are threaded into the upper portion 15 of the magnetic structure. The light rigid coil 14 is connected to the stiff, piston portion 17 of the diaphragm, which is also made of light material, by means of a strip 30 of stiffened fabric material such as oiled silk coated with bakelite or shellac, or a strip of thin, lightweight metal. When assembled the coil 14 is positioned approximately equi-distantly from the pole pieces 12 and 13. The ends of the conductor of which the coil 14 is wound may be brought out in any suitable manner to the screws 31 and 32 which are electrically connected to the terminals 33 and 34 respectively. The housing structure 20 is connected to a suitable sound projector such as the exponentially tapered horn 26.

The metallic plug 23 in the form of a spherical meter is secured to the housing 20 by the projecting lugs 24 and the screws 25, thus forming converging sound passages which extend from the centre of the diaphragm and from its peripheral portion to a common annular sound passage, formed between the plug 23 and the housing 20. There are preferably three projecting lugs on the plug equally spaced about its periphery, although a greater or lesser number of lugs may be used if desired. The radius of the plug 23 is slightly smaller than that of the adjacent surface of the dish-shaped portion 17 of the diaphragm and the housing structure is likewise suitably shaped so that the cross-sectional areas of the sound passages formed between these surfaces progressively increase from the centre of the diaphragm and from its peripheral portion toward the common sound passage. The cross sectional areas of these sound passages, moreover, are such that the air displaced from each of the converging passages flows into the common sound passage at substantially the same velocity. The meeting point between the converging sound passages and the common sound passage is effectively the throat portion of the sound projector since the volume of the sound passage beyond this point is not affected appreciably by the displacement of the diaphragm.

1933

BALDWIN INTERNATIONAL RADIO CO. OF CANADA LTD. v. WESTERN ELECTRIC CO. INC. et al.

Rinfret J.

We have in the above the material part of the "detailed description".

Every sound, as shown by the record, has two basic elements: pitch, which is due to the number or frequency of the vibrations per second in the air; loudness or intensity, which is due to the amplitude of the vibrations. But, of course, each sound has a different tone quality which is determined by the presence of what are called "overtones" or "harmonics". The fundamental waves produce the pure notes. The overtones are the number of additional sound waves superimposed on the fundamental wave and which give the characteristic note of a given instrument, or the characteristic sound of the human voice. The frequency range, including fundamentals and overtones, is said to be from 25 for the lowest note to 20,000 vibrations per second for the highest note; but the useful range of pitch audibility is stated to extend from about 50 to about 9,000 per second.

The problem faced by the inventor, with the development of the talking moving picture, was the design of an instrument capable of reproducing sound covering the high range of pitch audibility so as to transmit to the human ear the exact characteristic of each instrument, or of each individual voice, and with sufficient loudness or intensity that it could be heard in all parts of the largest auditoriums. Such are the difficulties which the patent in suit claims to have solved satisfactorily.

The invention, so it was stated, was

> to receive or transmit sound with high and substantially uniform efficiency over a wide frequency range * * * to improve the transmission characteristics of loud speaking receivers at the upper portion of the sound frequency range * * * By inserting the plug into the sound chamber the frequency response characteristic of the loud speaker (was) improved to such an extent that the point of low radiation is moved up to a frequency of about 14,000 cycles per second and the efficiency of the loud speaker is practically uniform up to a frequency above 5,000 cycles.

This leads us to a consideration of the appellants' objections, first, that the patent lacks subject matter or, which is the same thing, that there was no invention in the respondents' device; and, second, that the device was anticipated in the prior art.

Whether there is invention in a new thing (art, process, machine, manufacture or composition of matter) is a question of fact "for the judgment of whatever tribunal

has the duty of deciding". (Ref. Lord Moulton's dictum quoted by Terrell on Patents, 7th ed., p. 71). The evidence shows that, generally speaking, at the time of the invention, there were at least two main difficulties to overcome: a large range of frequencies could not be reproduced at all and, within their limited range, the several apparatus were unequal in their reproduction of the intensity of sound. The receivers on the market were entirely deficient in the higher frequencies, under which most of the important overtones lay, and there was lack of naturalness in the sound produced, so that the individual characteristics of the voice or of the instrument could not be satisfactorily identified, all the components of the sound failing to pass in their proper intensity. Moreover, the sound output in certain frequencies often became unduly enhanced, with resulting abnormal loudness or distortion of the sound commonly known in the art as "blasting". As a consequence, the fidelity of the reproduction was imperfect and inadequate.

Bearing in mind the enormous extension of the moving picture business, it is easy to understand how important it was to increase the capacity of the apparatus in translating the range frequency and the amplitude of the sound waves and to improve the tone quality so as to make the reproduction satisfactory from the viewpoint of the practical purposes for which it was intended. We would gather from the evidence that many a skilled craftsman was at work endeavouring to overcome the difficulties and some hundreds of patents were taken out with regard to all sorts of diaphragms, driving mechanisms and sound boxes with the object of solving the problem.

Wente, the inventor of the respondents' device, produced an ingenious article, of which the utility is conceded, and which brought a markedly superior result. It increased the frequency range capable of reproduction; its transmission was louder and more even; it improved the accuracy of the tone quality and did away with distortion or "blasting". It met with ready adoption and quickly went into wide commercial use.

We agree with the learned President that there is no lack of subject-matter in the patent in suit. We also agree with him with regard to the objection founded on the

1933

BALDWIN INTERNATIONAL RADIO CO. OF CANADA LTD. v. WESTERN ELECTRIC CO. INC. et al.

Rinfret J.

prior art. It is not possible to base anticipation on the evidence adduced by the appellants.

In order to decide an objection grounded upon anticipation, one must look at the description in the specification, so as to ascertain what the invention really is. The claims may add light to it, but they are not meant for that purpose, and their object is mainly to define the extent of the monopoly to which protection is granted. It may be that a patentee has discovered and described a new thing for which he made no claim, in which case he will have no "exclusive property and privilege", but obviously his patent may not be displaced upon the ground of prior knowledge or use by others.

The description in this patent is set out in an earlier part of the judgment. It clearly shows that the invention consists in a combination. It is a combination of four elements: a diaphragm, a sound chamber, a plug and means for driving or actuating the diaphragm. The diaphragm is described as comprising "a stiff, dish-shaped, piston portion, a flexible corrugated portion and a flat portion which is clamped between the housing structure and the upper portion of the core structure". The sound chamber has the plug secured therein so as to decrease the cross-sectional areas of the sound passages therethrough. The plug is so shaped as to conform with the concavity of the dish-shaped diaphragm, the radius of the plug being slightly smaller and so arranged as to form with the diaphragm converging sound passages extending from the centre of the diaphragm and from its peripheral portion to a common sound passage, which is effectually the throat of the horn. (N.B. It is common ground that the horn, although an obvious adjunct of the apparatus and although referred to in the specification, is not an element of the patented combination). The driving or actuating means, throughout the "detailed description", are referred to as a coil and they are shown as such on the drawing. The specification states that "the light rigid coil" is attached or connected to the stiff piston portion of the diaphragm and that, when assembled, it is positioned approximately at equal distance from the pole pieces of the electromagnet.

The invention lies in the particular combination so described: the combination of a diaphragm of a particular

defined *form* actuated from the periphery of its rigid portion by a defined type of driving mechanism (the dynamic type) and used with a special type of sound chamber having in it a plug of a particular description. This is not, as was urged by counsel for the appellants, a mere aggregation or a juxtaposition of known contrivances. We have here a group of co-acting parts achieving a combined result or, as was said in *British United Shoe Machinery Company Ltd.* v. *A. Fussell & Sons Ltd.* (1), "a collocation of intercommunicating parts so as to arrive at (what may be called) a simple and not a complex result". That satisfies the definition of a combination for the purposes of the patent law.

Having read the specification as describing a combination, it matters not whether, as contended by counsel for the appellants, the plug or the diaphragm or the coil driver or the sound chamber are old and were already known in the art as separate entities. On this branch of the case, viz.: anticipation, the only point is whether the actual combination is new. In the light of the evidence given at the trial, it appears that the particular diaphragm, the particular air chamber with the plug were never before used together in the way described; and it may be stated with certainty that not a single patent was referred to which anticipated the combination of elements constituting Wente's invention. It is idle to repeat that anticipation is not established by what the learned President so justly qualified the "imaginary assemblage" of separate elements gathered from glosses selected here and there in several and distinct anterior specifications. None of the prior patents relied on conveyed the same knowledge or gave information equal, in practical utility, to that given by the respondents' patent. The result is that the objection based on anticipation was rightly dismissed by the Exchequer Court.

The designer of the appellants' device, in the course of his testimony, made some reference to a demonstration in Dr. Lee de Forest's studio, in New York City, in February or March, 1926. On that occasion, he was shown an apparatus in the nature of a dynamic cone speaker and, as he thought, reproducing sounds in a very satisfactory way.

(1) (1908) 25 R.P.C. 631, at 657.

1933

BALDWIN INTERNATIONAL RADIO CO. OF CANADA LTD. v. WESTERN ELECTRIC CO. INC. *et al.*

Rinfret J.

In the same testimony a mere mention is made of another apparatus, the Panetrope R.C.A. 104, a performance of which was witnessed by him in a large auditorium in Salt Lake City in the year 1925. These were introduced in the evidence apparently to show that, at the time of Wente's invention, there were other types of loud speakers on the market suitable for talking moving picture equipment. The evidence was addressed neither to the issue of subject-matter, nor to that of anticipation. It may be that it might have been developed. As it stands in the record, it is entirely inconclusive. It gives no information whatever on the structure or on the operation of the apparatus and it is quite impossible to ask the court to make a finding on that kind of evidence.

We have so far reached the conclusion that the patent in suit, read as a patent for a combination, has subject-matter and utility and that it had not been anticipated. Before proceeding to consider the issue of infringement, it will be more convenient to examine the new point urged in this court by the appellants to the effect that the claims are insufficient and that the specification does not fulfill the requirements of section 14 of the *Patent Act* (c. 150 of R.S.C. 1927).

At the outset of the trial in the Exchequer Court, counsel for the respondents declared that they would rely only on claims 4 and 9 of the patent. Counsel for the appellants accepted this situation, so that the trial proceeded on the basis of the respondents' declaration, and it was limited to the question of the merits or demerits of the two claims in question. No evidence, no argument was addressed to the other claims; and the validity of the patent as a whole, upon the ground of insufficiency of the claims, was not put in issue. We think, therefore, the discussion must be restricted to claims 4 and 9. Here is the full wording of the two claims in dispute:

Claim 4:

An acoustic device comprising a piston diaphragm having a flexible peripheral portion and a substantially dish-shaped central portion, means for driving said diaphragm at the periphery of its central portion, a horn, a sound chamber between said diaphragm and said horn, a plug in said sound chamber for decreasing the cross-sectional area of a portion of the sound passage therethrough.

Claim 9:

An acoustic device comprising a diaphragm having a dish-shaped portion and a flexible portion, a coil attached to said dish-shaped portion for driving said diaphragm, and means juxtaposed to one face of said diaphragm for directing sound waves from the centre of the diaphragm outwardly and from the outer edge of said diaphragm inwardly to an annular passage, the face of said means conforming substantially to the face of the diaphragm juxtaposed thereto.

The objection made by the appellants is that these claims do not distinguish what is new from what was known or used before. There is no doubt it was at one time the rule in Great Britain that the claiming clause must clearly distinguish that which was old from that which was new; although it may yet be a question whether the rule applied to patents other than process patents or patents for improvements of a known article and whether it was ever meant to apply to a patent covering a combination as such. The old rule, however, has been considerably modified and the new doctrine found expression, amongst others, in Halsbury, "Laws of England", *vis.* Patents & Inventions, sec. 340, at p. 162. In that section, we find the following:

It may be expedient or even necessary to mention in the claiming clause of the specification something which, though not the invention itself nor *per se* proper subject-matter of letters patent, helps to explain the invention. If the claiming clause is drafted so as to claim this thing *per se*, the patent is clearly bad, for it claims something which is not the invention. * * * (But) upon the authorities it is now established that if the claiming clause does in fact claim the invention and does not claim anything that is old *per se*, the patent is not avoided because in the claiming clause that which is old is not distinguished from that which is new.

It will be sufficient for our purpose in that connection to refer to the judgment of the Court of Appeal, in England, in the case of *British United Shoe Machinery Company Ld.* v. *A. Fussell & Sons Ld.* (1). In that case, the inventor had applied for a new combination described in the specification and which claimed the whole combination as new. The objection was made that the claiming clause did not distinguish the old from the new. The earlier cases were considered and distinguished, and *Harrison* v. *Anderston Foundry Co.* (2) was followed. Moulton L.J. said that it was not a good objection to a claim for a combination that the patentee had not distinguished old from new; that, apart from the duty of a patentee to delimit his invention,

(1) (1908) 25 R.P.C. 631. (2) (1876) 1 App. Cas. 574.

1932

BALDWIN INTERNATIONAL RADIO CO. OF CANADA LTD. v. WESTERN ELECTRIC CO. INC. et al.

Rinfret J.

there is now no such duty on his part. He referred to a passage in *Harrison* v. *Anderston Foundry Co.* (1). The passage is illuminative on the point we are now discussing:

> The first is an objection said to be founded upon the case of *Foxwell* v. *Bostock* (2), decided by the late Lord Westbury when Lord Chancellor. It is said to have been determined in that case that where there is a patent for a combination there must be a discovery, or explanation of the novelty, and the specification must show what is the novelty, and what the merit of the invention. I cannot think that, as applied to a patent for a combination, this is, or was meant to be, the effect of the decision in *Foxwell* v. *Bostock* (2). If there is a patent for a combination, the combination itself is, *ex necessitate,* the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new. If, indeed, it were left open on the specification to the patentee to claim, not merely the combination of all the parts as a whole, but also certain subordinate or subsidiary parts of the combination, on the ground that such subordinate and subsidiary parts are new and material, as it was held a patentee might do in *Lister* v. *Leather* (3), then it might be necessary to see that the patentee had carefully distinguished those subordinate or subsidiary parts, and had not left it *in dubio* what claim to parts, in addition to the claim for combination, he meant to assert. The second objection to the first claim in the present case was founded on the doctrine of *Lister* v. *Leather* (3). In the present case, however, no question of this kind appears to me to arise. The patentees claim, as I have said, for a combination under their first claim, calling it "the construction and arrangements of the parts of mechanism herein distinguished generally".

And, after having made the quotation, Lord Fletcher Moulton adds (4):

> Therefore what Lord Cairns said was,—If what you have claimed, and the monopoly which you have obtained, is for a combination, that combination is the novelty, and you have no obligation beyond accurately defining it. In my opinion that is the law as it now stands.

Lord Justice Buckley expressed the same view, and his judgment was that where a patentee claims what is substantially a new combination, he need not discriminate and identify that part of his combination which is new. He said (5):

> The combination is the novelty, and to sufficiently describe the combination is sufficient to describe the novelty; but if the combination is not new, which is the case first put by Lord Selborne in *Moore* v.

(1) (1876) 1 App. Cas. 574, at 577-578.
(2) (1864) 4 DeG. J. & S. 298.
(3) (1858) 8 El. & Bl. 1004.
(4) 25 R.P.C. at 656.
(5) 25 R.P.C. at 657.

Bennett (1), so that there cannot be a valid patent for a combination, then even though the patentee misdescribes it as a new combination, which by hypothesis it is not, the novelty must be in the subordinate integer. *Foxwell* v. *Bostock* (2) then applies. To describe it as a new combination is, in such a case, to misdescribe it. The invention in such a case is the improvement upon a particular part of an old combination, and the part must be identified by the patentee.

We do not think that section 14 of the *Patent Act* prescribes any different rule. The section requires that:

> The specification shall
> (*a*) correctly and fully describe the invention and its operation or use as contemplated by the inventor;
> (*b*) set forth clearly the various steps in a process, or the method of constructing, making or compounding, a machine, manufacture, or composition of matter;
> (*c*) end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

What is required, therefore, under our law, is that the applicant should give a full and correct description of the invention and its operation or use. If the invention is a new process, he should set forth clearly the various steps in the process; if a machine, manufacture, or composition of matter, the specification should explain the method of constructing, making or compounding the same. Then, in every patent, the claim or claims must state distinctly what the applicant regards as new and in which he claims an exclusive property and privilege. If the invention be a new thing, or the improvement of a thing, he must so state; but where the invention consists merely in the new combination of old elements or devices, such combination is sufficiently described if the elements or devices of which it is composed are all named and their mode of operation given and the new and useful result to be accomplished pointed out (Compare: *Bates* v. *Coe* (3)). It is only if the applicant desires to claim invention for a subordinate element *per se* that it is necessary for him to claim the element separately, if he wishes to secure in it an exclusive property and privilege.

In the present case, we have already indicated the reasons why we thought the patent ought to be construed as a patent for a combination, and nothing more. We are dealing with a meritorious invention; and the respondents are

(1) (1884) 1 R.P.C. 129. (2) (1864) 4 DeG. J. & S. 298.
(3) (1878) 98 U.S. 31.

1933

BALDWIN INTERNATIONAL RADIO CO. OF CANADA LTD. v. WESTERN ELECTRIC CO. INC. et al.

Rinfret J.

entitled to have their claims interpreted "by a mind willing to understand, not by a mind desirous of misunderstanding" (*Lister* v. *Norton* (1)). Claims 4 and 9 must be read with reference to the entire specification; and it is sufficient if it appears from the claims so read what the patentee regards as his invention. See Fletcher Moulton on Patents, 1913 ed., p. 87; Terrell on Patents, 7th ed., p. 121. Here, the combination itself is the only thing which Wente regarded as his invention. He correctly and fully described it in the description part of the specification. He indicated the method of constructing and making the new combination in the detailed description and in the accompanying drawing which forms an essential part of the patent; and, upon a fair construction of claims 4 and 9 construed with reference to the entire specification, there can be no doubt, in our view, of the exact nature of the invention which he claimed as new; and there exists no difficulty in ascertaining and defining what are the exact parts of his new combination and what his monopoly covers. It should be added that, had we come to the conclusion that the specification and drawing contain more or less than was necessary for obtaining the end for which they purported to be made, there was not the slightest suggestion that such omission or addition had been wilfully made for the purpose of misleading (*Patent Act*, s. 31).

The attack made by the appellants upon the patent of the respondents having failed, the only remaining point is that of infringement; and, in regard to it, we find no difficulty in following the finding made by the Exchequer Court. The appellants' device is substantially the same as the respondents' device. The diaphragm in one is dished in the opposite direction to the way it is dished in the other; but obviously the appellants cannot escape infringement upon such a flimsy pretence. There is a hole in the middle of the plug designed for the appellants' apparatus; but this slight difference is more apparent than real. In effect, as the evidence shows, the difference has no bearing on the nature of the device or in the method of its operation. The trial judge found, and the evidence establishes, we think, that the

(1) (1886) 3 R.P.C. 197 at 203.

response curves of the defendants' device, taken according to standard practice, indicate that the sound intensity for the different frequencies are practically the same with the hole free, or with the hole plugged. The hole does not seem to have any practical effect in so far as results are concerned.

All the characteristics of Wente's patent are incorporated in the appellants' device and we are unable to agree with the appellants that the central aperture in the plug saves them from infringement of Wente's invention. The scientific fact is that both plugs (aperture or no aperture) were put there substantially for the same function and their performance is practically identical. We have therefore two devices based upon the same principles, composed of the same elements, and producing no results materially different. In those circumstances, we must come to the conclusion that one is a mere imitation of the other and that therefore the respondents' patent has been infringed (*Collette* v. *Lasnier* (1)).

For the above reasons, the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Henderson, Herridge & Gowling.*

Solicitors for the respondents: *Smart & Biggar.*

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT (NEW BRUNSWICK, 1932, C. 36).

1933.
* Oct. 17,18.
* Dec. 22.

GRACE BETTS AND GRETA GALLANT ..... } APPELLANTS;

AND

THE WORKMEN'S COMPENSATION BOARD ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Workmen's compensation—New Brunswick Act, 1932, c. 36, ss. 7, 8 (1), 2 (m)—"Mining"—"Mine rescue work"—"Accident arising out of and in the course of his employment."

The appellants' husbands, miners in the employ of M. Co., lost their lives when they went down a disused mine shaft on M. Co.'s property in an attempt to rescue fellow employees who were overcome by gas

* PRESENT:—Duff C.J. and Rinfret, Smith, Crocket and Hughes JJ.

(1) (1886) 13 Can. S.C.R. 563.

1933

BETTS AND GALLANT v. THE WORKMEN'S COMPENSATION BOARD.

in attempting to rescue children who while playing had gone into the shaft and been overcome by gas. The Workmen's Compensation Board disallowed appellants' claims for compensation under the *Workmen's Compensation Act*, N.B., 1932 c. 36, and its decision was affirmed by the Appeal Division of the Supreme Court of New Brunswick (6 M.P.R. 120).

Held: "Mine rescue work," included (by s. 2 (*m*)) under the term "Mining" in the Act, should not be construed as applying only to the occurrence of a peril which places in jeopardy the lives of miners in a mine which is in actual operation. There is no warrant for limiting the meaning of the words so as to exclude rescue in a mine shaft in which actual operations have ceased or been suspended, if circumstances arise to create a peril there; or so as to apply only to the rescue of miners.

"Employment" in s. 7 of the Act is not to be restricted to the actual particular work the workman is engaged to do. An accident is one "arising out of and in the course of his employment," within the meaning of s. 7, which arises out of and in the course of anything the workman does which is reasonably incidental to such work. Also, a workman may be impliedly authorized in an emergency to do something which does not fall within the scope of his ordinary duties under his contract of service (*Culpeck* v. *Orient Steam Nav. Co.*, 15 B.W.C.C. 187, at 189, and other cases cited). This principle, in its application, is not limited to emergencies in which the employer's property is involved. It applies to any emergency in which the interests of the employer are in any manner involved. The scope of employment, as indicated in the contract of service, may be impliedly enlarged by the occurrence of an emergency, and without any intervention on the part of the employer, and, if the employment is thus enlarged, anything which the workman does in such an emergency is to be deemed quite as much a part of his employment as if it were comprehended in the contract of service itself.

The Act should not be narrowly construed against workmen, but should be given a large and liberal construction in their interest (*Gibbs* v. *Great Western Ry. Co.*, 12 Q.B.D. 208, at 211, cited).

In the present case, the vital question was, not whether the descending into the mine shaft was a duty which the appellants' husbands' contracts of service as coal miners imposed upon them, but whether, in going to and participating in the work of rescue which the mine manager had undertaken at the shaft, they were doing something which they were, expressly or impliedly, authorized to do. This question demanded consideration of the entire evidence regarding the employing company's responsibility for the condition of the idle shaft and the presence in it of noxious gas as well as its responsibility for the protection of that shaft as a source of danger, the giving of the alarm, the mine manager's participation in the work of rescue, his bringing employees to the scene of peril, and especially his directions as to summoning other employees from the neighbouring shafts. The question as to the appellants' husbands going to and participating in the rescue in consequence of orders or directions expressly given by the mine manager was entirely one of fact, upon which the Board had not made, and this Court was (under said Act) precluded from making, a finding. As the Board had misconstrued provisions of the Act and (in consequence) had ignored evidence that should have been

considered, the case should be sent back to it for reconsideration in the light of this Court's holdings as to the true construction of s. 7 of the Act.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1), dismissing (by a majority) the present appellants' appeals from a decision of the Workmen's Compensation Board of New Brunswick disallowing (by a majority) the appellants' claims for compensation under the *Workmen's Compensation Act*, Statutes of New Brunswick, 1932, c. 36, which claims were made by reason of the deaths, on July 28, 1932, of the appellants' husbands, who were miners in the employ of the Miramichi Lumber Co. Ltd. at Minto, New Brunswick, and who met their deaths while attempting to rescue two fellow employees who had been overcome by gas after entering a disused mine shaft on the said company's property in an attempt to rescue some children who had, while playing, entered the mine shaft and been overcome by gas.

The material facts of the case (as found by the Board) and the questions in issue on the appeal are sufficiently stated in the judgment now reported and are indicated in the above headnote.

Special leave to appeal to this Court was granted by the Appeal Division of the Supreme Court of New Brunswick.

The appeal was allowed with costs in this Court and in the Appeal Division, and the case sent back to the Board for reconsideration in the light of what this Court held to be the true construction of s. 7 of the Act.

W. H. Harrison, K.C., for the appellants.

N. B. Tennant for the respondent.

The judgment of the court was delivered by

CROCKET J.—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) dismissing the appeal of the appellants from a decision of the New Brunswick Workmen's Compensation Board, disallowing their claims for compensation under the provisions of the *Workmen's Compensation Act* of that province for the deaths of their husbands.

(1) (1933) 6 M.P.R. 120.

1933

BETTS AND GALLANT v. THE WORKMEN'S COMPENSATION BOARD.

Crocket J.

There was a division of opinion both in the Board and in the Appeal Division. The majority decision of the Board was that of the Chairman, Mr. Sinclair, and Mr. Steeves (though the latter was not present at the examination of the witnesses), with Mr. Doucet, the third member, dissenting, while the majority decision in the Appeal Court was that of Grimmer and Baxter, JJ., with Hazen, C.J., dissenting.

The Act allows an appeal from a decision of the Board only on a question as to its jurisdiction or on a question of law.

That the decision of the Board was primarily grounded upon the Chairman's view of the legal effect of the material provisions of the statute under which the compensation was claimed is conclusively shewn by a perusal of the written reasons which the Chairman has given for the Board's decision. He first says that the evidence seems "to be quite clear and uncontradicted," and summarizes it in the following exceedingly brief statement of facts:

> Some children were playing on the property of the Miramichi Lumber Company at Minto. Apparently four of them attempted to climb down the ladder of an abandoned mine and on reaching the bottom were overcome by gas.
>
> The alarm was given sometime between 11.30 or 12.00 o'clock a.m., when the miners of the working pits were at dinner. Immediately a number of miners went to their rescue. A Mr. Tooke and Mr. Bauer were the first two to go down the disused shaft to rescue the children. They were both overcome by gas, then a Mr. Betts and a Mr. Gallant went down to help. Mr. Gallant got to the bottom of the pit and was overcome by the gas and did not survive. Mr. Betts attempted to climb out of the pit, but before he got to the top, fell and was killed; there can be no doubt he was killed by the fall which was caused by his being overcome by the gas.

He immediately proceeds:—

> To bring these claims, it must be shown that the deaths of Betts and Gallant were occasioned by an accident which arose out of and during the course of their employment.
>
> Under the definition of "Mining," Mine Rescue is to be included as Mining, and the question at once arises, are the circumstances as set forth by the evidence "Mine Rescue".
>
> It seems to me that before this question can be answered in the affirmative, certain conditions must be shown to have existed:
>
> 1. There must be a mine in actual operation.
>
> 2. There must have occurred some accident or happening that placed the lives of the miners in the mine in jeopardy.

If those conditions existed and miners who were not working at the place where the accident happened went to the rescue of the imperilled miners and lost their lives, then their dependents would be entitled to compensation under the terms of the Workmen's Compensation Act.

In this case, however, these conditions did not exist, the pit or shaft where the accident happened had been abandoned for a number of years. The children who entered the abandoned pit had no right there, and the first man (men) who entered the shaft (no doubt referring to Bauer and Tooke) did so, not to rescue miners, but the children, and did so of their own volition prompted simply by their humane desire to try and save these lives. If they had lost their lives as the result of their humane efforts, I do not see how this could come under "Mine Rescue," nor how the industry of Mining could be called upon to assume the cost of compensating their dependents.

The fact that Betts and Gallant may have gone to the rescue of their fellow workmen who had gone to the rescue of the children does not, to my mind, strengthen the cases for their dependents, consequently, I am forced to the conclusion that the deaths of Mr. Betts and Mr. Gallant were not caused by an accident arising out of and during the course of their employment, nor can the occurrences in any way be classed as "Mine Rescue".

The question as to the emergency to which the misfortune was primarily due being an accident within the meaning of the Act was not considered by the Board, nor was it considered or even so much as raised by counsel before the Court of Appeal, though Mr. Tennant now raises it on this appeal. Upon this question we have no doubt that the deaths of the applicants' husbands must be considered as accidental within the meaning of the governing section of the Act.

It will be observed that, while the Chairman finds that Tooke and Bauer entered the shaft to rescue the children of their own volition, prompted simply by their humane desire to save these lives, he makes no such finding in the case of Betts and Gallant, but simply states that the fact that they may have gone to the rescue of their fellow-workmen, who had gone to the rescue of the children, did not strengthen the cases for their dependents, and that, consequently, he was forced to the conclusion stated.

There can be no doubt that the Chairman construed "mine rescue" as applying only to the occurrence of a peril which places in jeopardy the lives of miners in a mine which is in actual operation, and held that for that reason Betts and Gallant could not be considered as engaged in "mine rescue work" at the time of their deaths.

1933

BETTS AND GALLANT v. THE WORKMEN'S COMPENSATION BOARD.

Crocket J.

The only other reason suggested for the finding that the deaths of the deceased men were not caused by accident arising out of and in the course of their employment is that Tooke and Bauer, who entered the shaft before them, did so of their own volition, prompted simply by their humane desire to rescue the children, and that the fact that Betts and Gallant went down to rescue them, even though they were fellow-workmen, makes no difference. This is plainly itself a pure question of law, quite as much so as the question of the legal effect of the words "mine rescue".

As to the question of the Board's construction of the words "mine rescue", it should first be stated that these words appear only in the interpretation section of the Act, 2 (*m*). This reads simply: "'Mining' includes mine rescue work." S 3 (1) specifies the industries to which Part I of the Act, including s. 7, the governing section which gives the right to compensation, applies. S. 3 (1) begins: "This part shall apply to employers and workmen in or about the industries of lumbering, mining," etc., etc., and ends with the words: "and any employment incidental thereto or immediately connected therewith", i.e., incidental to or immediately connected with any one of the industries named. S. 2 (*m*) was not in the original Act.

Whatever effect the specific inclusion of "mine rescue work" in s. 3(1) may have, we are of opinion that there is nothing to warrant the limitation which the Board has placed on these words. In the absence of any definition in the statute itself they must be given their popular and ordinary meaning in relation to the industry of mining, as all other words and expressions in the Act, not specifically defined, must be construed in the same sense, i.e., in the sense in which they would be generally understood in the lay, as distinguished from the purely professional mind. See *Fenton* v. *Thorley* (1); and *Trim Joint District School Board* v. *Kelly* (2). Whether viewed, however, in the popular and ordinary, or in a technical, sense—if they could in any way be said to have any technical meaning—we cannot see how they can properly be taken to exclude rescue in a mine shaft, in which actual operations have

(1) [1903] A.C. 443. (2) [1914] A.C. 667.

ceased or been suspended, if circumstances arise to create a peril there, or to apply only to the rescue of miners.

The Board, however, has not only found that Betts and Gallant were not engaged in mine rescue work within the meaning of the Act when they lost their lives, but that their deaths were "not caused by an accident arising out of and during the course of their employment", and this is really the decisive question. Ordinarily such a finding is a mixed question of law and fact, involving not only a conclusion upon the legal effect of the words contained in the phrase as it appears in the material section of the statute, but a consideration of the evidence adduced in support of the claim in question. Where, however, it involves no question as to the facts upon which it is based the question is entirely one of law. See *Sparey* v. *Bath Rural District Council* (1).

As appears from what has already been stated, the only fact found by the Board which bears upon this question, apart from the fact of the shaft in which the fatalities occurred being an abandoned mine, is that Bauer and Tooke, the first men to enter the shaft, did so of their own volition, prompted simply by their humane desire to try and save these lives. Whether the statement that "the fact that Betts and Gallant may have gone to the rescue of their fellow workmen who had gone to the rescue of the children does not, to my mind, strengthen the cases for their dependents" implies that Betts and Gallant were also prompted simply by their humane desire to try and save the lives of their fellow workmen, and that this consideration also formed part of the basis of the Board's finding, it is evident from what has already been said that the finding is primarily based on the Board's construction of the meaning of the words "caused by accident arising out of and in the course of his employment", as contained in s. 7 of the Act, and that the finding cannot be supported on appeal if the construction which the Board has placed upon those words is erroneous. This is the vital point with which we are now concerned.

As the meaning of any phrase in a statute cannot be truly ascertained without looking at it closely in the context in which it is used and in the light of all other pro-

(1) (1931) 48 T.L.R. 87.

1933

BETTS AND GALLANT v. THE WORKMEN'S COMPENSATION BOARD.

Crocket J.

visions of the statute bearing upon it, it is well that s. 7 should be fully set forth. It is as follows:—

> When personal injury or death is caused to a workman by accident arising out of and in the course of his employment in any industry within the scope of this Part (Part I), compensation shall be paid to such workman or his dependents * * * unless *such injury* was, in the opinion of the Board, intentionally caused by such workman, or was wholly or principally due to intoxication or serious and wilful misconduct on the part of the workman, or to a fortuitous event unconnected with the industry in which the workman was employed.

The only other provision in the statute, material to the question, besides s. 2(*m*) and those which I have above quoted from s. 3(1), is that of s. 2(*v*), which is that "'workman' includes a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied".

It is to be borne in mind, therefore, in the first place, that s. 7 and s. 3(1) with the words "mine rescue work" incorporated in it are to be read together, so that the concluding words of s. 3(1) "and any employment incidental thereto or immediately connected therewith" are to be deemed as being embodied in s. 7. This, I think, points directly against any intention to narrowly restrict the word "employment", as used in s. 7, to the workman's ordinary work as designated in his contract of service.

It may well be that the word "employment" in s. 7 might *prima facie* point to employment as fixed by the contract of service, but that it was not intended to restrict it to that alone would appear to be conclusively indicated by the language of the proviso "unless such injury * * * was wholly or principally due * * * to a fortuitous event unconnected with the industry in which the workman was employed." The last quoted words themselves imply that there may be an injury arising out of and in the course of a workman's employment within the meaning of the first part of the section, which is, not wholly or principally due, but in part due, to a sudden emergency, which may be outside the scope of a workman's ordinary work but connected with the industry in which he is employed; otherwise why except from the provisions of the preceding clause a fortuitous event "unconnected" with that industry? It is clear beyond all question that, so far as concerns the fortuitous event to which the injury claimed for may be in

part due, it is not the particular workman's particular work with which it must be connected, but "the industry in which the workman was employed".

No such provisions as these are contained in the Imperial *Workmen's Compensation Act*, and yet it has been laid down by the courts again and again that the words "arising out of and in the course of the employment", as they appear in the governing section of that Act, embrace, not only an injury to a workman which arises out of and in the course of the particular work indicated by his contract of employment, but any injury which arises out of or in the course of anything the workman does which is reasonably incidental to such work.

To limit "employment" to the actual, particular work the workman is engaged to do, in this case, would be to limit it to the actual work of mining coal. Baxter, J., in his very exhaustive opinion in fact says: "The work which all these men were employed to do was to mine coal", but he adds: "The orders, express or implied, of the employer must be in relation to that occupation *or the things incident to it,*" thereby fully recognizing the principle that not only the usual work of the workman is to be regarded but anything he may do which is incidental thereto. That learned Judge also quoted the dictum of Lord Atkinson in *St. Helen's Colliery Co.* v. *Hewitson* (1), regarding the test which the latter said he had been rash enough to suggest, viz:

> that a workman is acting in the course of his employment when he is engaged "in doing something he was employed to do," or what is, in other and, I think, better words, in effect the same thing—namely, when he is doing something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract of service.

With all deference, I venture to think that the learned Judge of the Appeal Division laid too much stress upon this dictum, and attached to it a narrower meaning than Lord Atkinson himself intended. The very illustrations the latter gives in the next following paragraph seem to me to shew that when he spoke of "duty" he had no thought of restricting its application to something the workman was actually obliged to do by his contract of service. "For instance", he says,

(1) [1924] A.C. 59.

1933

BETTS AND GALLANT v. THE WORKMEN'S COMPENSATION BOARD.

Crocket J.

haymakers in a meadow on a very hot day are, I think, doing a thing in the course of their employment if they go for a short time to get some cool water to drink to enable them to continue the work they are bound to do, and without which they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment and sit down on their employer's premises to eat food to enable them to continue their labours.

Workmen stopping work for the moment and going to get some cool water to drink or sitting down on their employer's premises to eat food cannot surely be said to be doing something in discharge of a duty to their employer either directly or indirectly imposed upon them by their contract of service, if the word "duty" is to be read in its strict literal sense; yet Lord Atkinson himself gives these very instances as instances of cases which would fall within the terms of his test.

There are numerous cases under the Imperial *Workmen's Compensation Act*, as well as under the Imperial *Employers' Liability Act*, which the *Workmen's Compensation Act* replaced, which shew that such statutes should not be narrowly construed against workmen, but that on the contrary they should be given a large and liberal interpretation in their interest. In *Gibbs* v. *Great Western Ry. Co.* (1), a case under the Imperial *Employers' Liability Act* (1880), Brett, M.R., used these words:

> This Act of Parliament having been passed for the benefit of workmen, I think it is the duty of the court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore *as largely as reason enables one* to construe it in their favour and for the furtherance of the object of the Act.

Few instances furnish any better illustration of this principle than those given by Lord Atkinson of his own suggested test of the meaning of the words "arising out of and in the course of their employment". Suggested tests are, no doubt, often most useful as aids in solving the question involved, but the truth is, as Lord Dunedin put it, in *Trim Joint District School Board* v. *Kelly* (2), already cited, and referring to his own remarks in *Plumb* v. *Cobden Flour Mills Co.* (3), in which latter Lord Atkinson as well as Viscount Haldane, L.C., and Lord Kinnear concurred, "the ultimate criterion must always be found in the words

(1) (1884) 12 Q.B.D. 208. (2) [1914] A.C. 667.
(3) [1914] A.C. 62.

of the Act itself, and not in tests, explanations, or definitions given by judges, however eminent", or, as Viscount Haldane in the same case said: "Having regard to the conflict which exists between judicial opinions expressed in some of the decided cases, the only safe guide appears to me to be the language of the Act of Parliament itself."

It goes almost without saying that it would be quite impossible for any one to devise any test which would apply to all of the many and differing cases which are constantly arising under Workmen's Compensation Acts.

Mr. Justice Baxter, however, quotes in part a dictum from the opinion of Lord Macmillan in *Sparey* v. *Bath Rural District Council* (1), which seems to me to define in the clearest possible way the real issue which the Compensation Board had to consider in the case at bar, namely:—

> The question is whether the workman when he was injured was in his capacity as an employee doing something referable to his employment or was in his capacity as a citizen doing something independent of his employment.

This helpful dictum, however, does not attempt to define the scope of the word "employment", but the sentence immediately preceding it, with equal clearness, sheds valuable light upon the question of employment also. In this he says:—

> The place where an accident occurs to a workman is not the determining element in deciding whether it occurred in the course of the employment, though it may be a very important element, *for the course of employment is not a matter of physical locality but of legal relationship.*

There is no suggestion in the whole dictum of either narrowing or enlarging the meaning of the words "course of employment" as they stand in the statute. As to this, he points out, it is a question purely of legal relationship, dependent on considerations of various and differing facts and circumstances. The *locus* of the accident may be one, but it alone is not necessarily conclusive one way or the other. What the learned Lord says as to place, would obviously similarly apply as to time or any other fact bearing on the question of the scope of the workman's employment, such, for example, in the case of an attempted rescue, whether the person sought to be rescued was a fellow workman or a stranger to the employment in which he was engaged.

(1) (1931) 48 T.L.R. 87, at 91.

1933

BETTS AND GALLANT v. WORKMEN'S COMPENSATION BOARD.

Crocket J.

In this view and having regard to the special provisions of the New Brunswick Act already discussed, I cannot for my part appreciate upon what logical ground the word "employment", as used in this Act, can be said to be limited to the particular work described in his contract of service.

That a workman may be impliedly authorized in an emergency to do something which does not fall within the scope of his ordinary duties under his contract of service must now, I think, be taken to be a settled rule of law. As Scrutton, L.J., said in *Culpeck* v. *Orient Steam Navigation Co.* (1):

> There have been many cases where the servant of the employer has done something quite outside his ordinary duties, but has done that something in his master's interests, as, for instance, in the case of a fire, or of a thief stealing ship's stores. There have been many cases where the action of the servant has been justified by the general duty of protecting his master's interests in an emergency, although he has embarked on work which he had not been specifically engaged to do.

See particularly *Rees* v. *Thomas* (2); *London & Edinburgh Shipping Co.* v. *Brown* (3); and *Poland* v. *Parr* (4).

Baxter, J., suggests that this principle applies only to emergencies in which the employer's property is involved. With every respect, I think that the principle is not so limited, and that it applies to any emergency in which the interests of the employer are in any manner involved. No consideration of property was involved either in *Culpeck* v. *Orient Steam Navigation Co.* (5) or in *London & Edinburgh Shipping Co.* v. *Brown* (6). The latter case was the case of a stevedore, entirely of his own volition and on his own suggestion, leaving his work on the quay, where he was employed, and going into the hold of a vessel where his work did not require him to go, for the purpose of rescuing a workman, engaged with another crew of men employed by the same employer, who had been overcome by noxious gas in the bottom of the hold. As in the case at bar, Brown was himself overcome and lost his own life. Why should the rule be limited simply to emergencies in which only property interests are involved? Surely an

(1) (1922) 15 B.W.C.C. 187, at 189.
(2) [1899] 1 Q.B. 1015.
(3) (1905) 7 Fraser, Session Cases, 488.
(4) [1927] 1 K.B. 236.
(5) (1922) 15 B.W.C.C. 187.
(6) (1905) 7 Fraser, Session Cases, 488.

emergency which involves the lives of a foreman and other employees as well as those of children in a mine shaft which is in the control of the employer is of as much importance to the employer as the emergency of a horse running away, as was the case in *Rees* v. *Thomas* (1), or of a supposed intention on the part of a boy to steal a few handfuls of sugar from a truck moving along a public highway, as was the case in *Poland* v. *Parr* (2). It is true, as the learned Judge of the Appeal Division points out, that in *Poland* v. *Parr* (2), Atkin, L.J., in the course of his judgment, does say: "Any servant is as a general rule authorized to do acts which are for the protection of his master's property", but a perusal of this judgment shews that the quoted statement is given as a mere illustration of the principle he was expounding. The essence of the judgment is to be found in the words: "A servant may be impliedly authorized in an emergency to do an act different in kind from the class of acts which he is expressly authorized or employed to do."

The clear result of the cases, in my opinion, is that the scope of a workman's employment, as indicated in his contract of service, whatever it is, may be impliedly enlarged by the occurrence of an emergency without any intervention on the part of the employer, and that, if the employment is thus enlarged, anything which the workman does in such an emergency is to be deemed quite as much a part of his employment as if it were comprehended in the contract of service itself.

It is, of course, beyond question that the employer may himself either expressly or impliedly enlarge the scope of the workman's employment under his contract of service without regard to any question of emergency. He could not, of course, as Baxter, J., suggests, by doing so enlarge the scope of the word "employment", as used in the Act, but unless the Act itself restricts its scope so as to exclude anything which may be done under such express or implied authority—which, I have already pointed out, it does not—no such question as that suggested by His Lordship can arise.

The vital question raised by the claims is not whether the act of Betts and Gallant in descending into the mine

(1) [1899] 1 Q.B. 1015. (2) [1927] 1 K.B. 236.

1933

BETTS AND GALLANT v. WORKMEN'S COMPENSATION BOARD.

Crocket J.

shaft was a duty which their contract of service as coal miners imposed upon them, as the Board manifestly assumed, but whether, in going to and participating in the work of rescue which the mine manager had undertaken at the shaft, they were doing something which they were either expressly or impliedly authorized to do.

It is apparent that the proper solution of this question demands consideration of the entire evidence regarding the company's responsibility for the condition of the idle shaft and the presence in it of the noxious gas as well as its responsibility for the protection of that shaft as a source of danger; the giving of the alarm, the participation of the mine manager in the work of rescue, his bringing Bauer and other employees to the scene of the peril, and especially his directions as to the summoning of other employees from the neighbouring shafts. It is equally apparent from its decision that the Board ignored all such evidence, though it states that the evidence seemed to be clear and uncontradicted, and, we think also, from an examination of the entire evidence as contained in the appeal book, that the case was one in which the Board might well have found that the deaths of the applicants' husbands were caused by accident arising out of and in the course of their employment within the contemplation of the Act.

In the view I take of the case, it is needless to discuss the cases of *Jones* v. *Tarr* (1), or *Mullen* v. *Stewart* (2), which were so strongly relied upon by the respondent's counsel, further than to say, that they, like the cases relied upon by the appellant's counsel regarding the rule as to the occurrence of an emergency extending the scope of a workman's employment, all lacked the important feature which the case at bar presents with respect to the employer himself intervening in the emergency and summoning his employees from the scene of their work to take part in the rescue work.

I should have no hesitation in holding, in the circumstances disclosed by the evidence, that if the mine manager was responsible for the summoning of the unfortunate men from the scene of their work to help in the work of rescue, which he was directing as the manager of the mining company, their deaths while participating in the work of rescue

(1) [1926] 1 K.B. 25. (2) (1908) 1 B.W.C.C. 204.

1933

BETTS AND GALLANT v. WORKMEN'S COMPENSATION BOARD.

Crocket J.

were caused by accident arising out of and in the course of their employment within the contemplation of the Act. The difficulty is that this particular question as to their going to and participating in the rescue in consequence of orders or directions expressly given by the mine manager is entirely a question of fact, upon which, in the absence of a finding by the Board, we are precluded, we think, on such an appeal as this from ourselves making any such finding, notwithstanding the Board's statement that the evidence is uncontradicted.

After much anxious consideration of this aspect of the case, I have concluded that all we can do is to send the case back to the Board for reconsideration in the light of what we have here held to be the true construction of s. 7 of the statute.

The appeal should be allowed with costs in this Court and in the Appeal Division.

Appeal allowed with costs, and judgment in the terms indicated.

Solicitors for the appellants: *Weldon & McLean.*

Solicitor for the respondent: *Nigel B. Tennant.*

1933

FRIGIDAIRE CORPORATION (PLAINTIFF) ..... APPELLANT;

AND

JOHANNA MALONE (DEFENDANT) ... RESPONDENT.

*Nov. 2, 3.
1934
*Jan. 26.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale—Cooling apparatus—Conditional sale to contractor—Building contract—Apartment house—Material furnished by contractor—Commercial sale—Purchase price unpaid—Revendication, not from the buyer, but from the owner of the building—Arts. 1488, 2013e, 2268 C.C.

The appellant company sold and delivered to the Standard Construction Company certain mechanical cooling devices and apparatus under the ordinary conditional sale terms that it would remain owner until full payment of the purchase price, which included the costs of installation. The conditions of payment were 25% cash when installation completed and the balance in twenty-four monthly instalments. The respondent was owner of certain property in Montreal and proposed to make over the building erected thereon into an apartment house.

* PRESENT—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

1934

FRIGIDAIRE CORPORATION *vs.* MALONE

For this purpose, the respondent entered into a contract with the Standard Construction Company, which undertook to do the work and provide the materials for a fixed price based upon cost plus 20% for profit. The respondent was not aware of the existence of that contract with the appellant. The work, including the installation of the cooling apparatus, having been completed, the respondent paid in full the Standard Construction Company, which later on went into liquidation. As only the said cash payment of 25% had been made by the construction company, the appellant, alleging its ownership of the cooling apparatus in accordance with the terms of the contract, took an action to revendicate them, not from the buyer, the Standard Construction Company, but from the respondent, the owner of the building where they had been installed.

Held that, assuming that the cooling apparatus were still moveable things although "incorporated" into the building (art. 2013e C.C.), the appellant had no right to revendicate them from the respondent, who was in possession *bona fide,* in view of the terms of article 2268 of the civil code, especially the third paragraph, interpreted in the light of the circumstances of this case.

Held, further, that the words "nor in commercial matters generally" in article 2268 C.C. indicate, on the part of the Legislature, an intention to protect against the possibility of revendication the person possessing in good faith as proprietor not only a thing acquired through purchase, but any moveable thing acquired by "acte translatif" of ownership in commercial matters. The provision was enacted having regard to the superior interest of commerce.

Judgment of the Court of King's Bench (Q.R. 54 K.B. 462) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, P. Demers J. and dismissing the appellant company's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

John T. Hackett K.C. for the appellant.

Chs. Laurendeau K.C. for the respondent.

The judgment of this Court was delivered by

RINFRET, J.—La cause que nous avons à décider nous est présentée de la façon suivante:

Frigidaire Corporation (l'appelante) a vendu et livré à Standard Construction Limited certains appareils frigorifiques. Elle allègue que cette vente était subordonnée à la condition qu'elle resterait propriétaire des appareils jusqu'à

(1) (1933) Q.R. 54 K.B. 462.

paiement complet du prix d'achat. Le prix incluait le coût de l'installation. Le paiement devait être effectué à raison de 25 p. 100 après installation et de vingt-quatre versements mensuels pour la balance. Le paiement de 25 p. 100 a été fait; mais les paiements subséquents ne l'ont pas été. L'appelante invoque donc son titre de propriétaire qu'elle a conservé par suite de la convention, et elle revendique les appareils frigorifiques. Mais elle ne les revendique pas de son acheteur. Les appareils ont été installés dans les immeubles appartenant à l'intimée, et c'est de cette dernière que l'appelante les réclame.

L'intimée a fait valoir plusieurs moyens de défense et elle a réussi en Cour Supérieure et en Cour du Banc du Roi à faire rejeter l'action de l'appelante.

Nous sommes d'avis que ces jugements doivent être confirmés pour les motifs suivants:

Il ne saurait faire de doute, d'après la preuve, que les appareils frigorifiques ont été installés dans les immeubles de l'intimée par suite d'un contrat en vertu duquel Standard Construction Company Limited a entrepris de transformer ces immeubles en une maison de rapport contenant seize logements. Même si le document écrit ne spécifie pas les appareils frigorifiques, il est évident qu'ils furent installés comme partie de l'entreprise.

La convention entre l'intimée et Standard Construction Company, suivant une méthode maintenant assez fréquente, fixait le prix de l'entreprise au coût des travaux et des choses fournies, plus 20 p. 100 représentant le profit des entrepreneurs.

Les appareils furent installés dans les immeubles de l'intimée par l'appelante elle-même. Cela était d'ailleurs l'une des conditions du contrat de cette dernière avec Standard Construction Company. Par suite des termes de ce contrat et par le fait qu'elle a elle même procédé à l'installation, l'appelante savait que les appareils étaient destinés aux immeubles de l'intimée. Bien plus, elle s'engageait à les poser elle-même.

On doit également conclure que l'intimée ignorait les conditions de la vente des appareils à Standard Construction Company. C'est ainsi qu'en a décidé la Cour du Banc du Roi; et nous ne trouvons aucune justification pour mettre de côté son interprétation de la preuve sur ce point.

1934

FRIGIDAIRE CORPORATION vs. MALONE

Rinfret J.

Dans les circonstances, le résultat de la cause nous paraît dépendre de l'article 2268 du code civil.

Au moment de la revendication, les appareils frigorifiques avaient été installés dans les immeubles de l'intimée pour les fins auxquelles ils étaient destinés. Cette installation était complète et il ne restait rien à y faire. Si la cause était soumise comme une revendication de matériaux fournis pour la construction (car les matériaux peuvent être des "objets façonnés", art. 2013a C.C.), il y aurait beaucoup à dire sur la question de savoir s'ils n'avaient pas déjà été "incorporés à la construction", au sens de l'article 2013e du code civil. Il se pourrait que le mot "incorporés" (en tenant compte du but de l'article 2013e C.C.) ne doive pas nécessairement être interprété dans le même sens que le mot "incorporés" de l'article 379 du code civil. Nous croyons devoir faire cette mention en passant pour éviter tout ambiguïté sur la portée de notre décision, mais sans nous prononcer, puisque nous devons décider la cause telle qu'elle a été conduite et soumise par les parties.

Nous prenons donc pour acquis que les appareils frigorifiques étaient encore des meubles corporels au moment où l'appelante a tenté de les revendiquer de l'intimée.

Vis-à-vis de l'appelante, l'intimée était un tiers ayant la possession actuelle des appareils frigorifiques et ayant cette possession à titre de propriétaire. Elle avait acquis cette possession et en était devenue propriétaire par suite du contrat qu'elle avait fait avec Standard Construction Company et où cette dernière s'était engagée à installer les appareils frigorifiques dans les immeubles de l'intimée. Standard Construction Company était un entrepreneur général dont l'occupation et la fonction étaient, entre autres choses, d'entreprendre des travaux de construction de maisons. Une des méthodes courantes d'exécuter des ouvrages de cette nature est de stipuler le prix sur la base du coût des travaux, de la main-d'œuvre et des choses fournies par l'entrepreneur, avec, en plus, un pourcentage sur le tout, qui constitue le profit de l'entrepreneur. C'est la méthode qui a été adoptée en l'espèce. En pareil cas, l'entrepreneur fait un bénéfice sur le coût de l'ouvrage, y compris celui des choses qu'il fournit. En plus, la preuve en cette cause-ci établit qu'il est devenu d'usage fréquent, à Montréal, dans la construction des maisons de rapport contenant plusieurs

logements, d'include la fourniture et l'installation d'appareils frigorifiques qui font normalement partie de ce genre d'entreprises.

A l'aide de ces faits, il suffit d'envisager la cause du point de vue du troisième paragraphe de l'article 2268 du code civil. Il est probablement certain, comme l'a dit Sir Alexandre Lacoste, C.J., dans la cause de *National Cash Register* v. *Demetre* (1) que cet article est le corollaire des articles 1487 et suivants du code civil. Mais la portée des articles 1487, 1488 et 1489 C. C. est plus générale que celle des paragraphes de l'article 2268 C.C. qui traitent spécialement de la revendication. Pour cette raison, nous pouvons limiter notre jugement à l'interprétation de ce dernier article en tant qu'il réfère au cas qui nous est soumis. Si les faits de la cause sont couverts par le texte, il en résulte "un déni d'action en revendication" (Codificateurs, Rapport supplémentaire, p. 366), et nous n'avons pas besoin d'aller au delà.

Nous avons déjà dit que l'intimée ignorait les termes de la vente faite à Standard Construction Company des appareils frigorifiques. Elle était donc de bonne foi (art. 412 C.C.). D'ailleurs la bonne foi se suppose toujours (art. 2202 C.C.), et "c'est au réclamant à prouver * * * les vices de la possession et du titre du possesseur" (art. 2268 (1) C.C.). L'article empêche la revendication

si la chose a été achetée de bonne foi dans une foire, marché, ou à une vente publique, ou d'un commerçant trafiquant en semblables matières, (ou) en affaire de commerce en général.

Ce texte, il faut le remarquer, est plus ample que celui du Code Napoléon; il importe d'en tenir compte en comparant la doctrine française sur cette question, quoique les commentaires de Troplong (Prescription, sur article 2280, Code Napoléon, nos 1040 et suiv.) et de Laurent (vol. 32, nos 562 et suiv.) seraient loin de conduire à un résultat différent de celui que nous adoptons. D'après notre article, la possession actuelle à titre de propriétaire élève un obstacle à la revendication du réclamant

si la chose a été achetée * * * d'un commerçant trafiquant en semblables matières.

Nous l'avons dit: Il est suffisamment établi que, à Montréal, les appareils frigorifiques de ce genre sont compris

(1) (1905) Q.R. 14 K.B. 68.

1934

FRIGIDAIRE CORPORATION vs. MALONE

Rinfret J.

parmi les fournitures que font les constructeurs de maisons de rapport contenant plusieurs logements. L'intimée pouvait donc prétendre—et elle n'y a pas manqué—que, dans les circonstances qui ont été prouvées, elle a acheté ces appareils de Standard Construction Company, qui, dans le cours ordinaire de ses affaires, trafiquait en semblables matières.

Mais l'appelante soutient qu'il n'y a eu entre Standard Construction et l'intimée, ni achat, ni vente. Elle soumet que l'article 2268 C.C. ne s'applique qu'à la possession résultant d'une vente et elle attire notre attention sur l'article 1683 du code civil, qui dit:

> Lorsque quelqu'un entreprend la construction d'une bâtisse ou autre ouvrage par devis et marché, il peut être convenu ou qu'il fournira son travail et son industrie seulement, ou qu'il fournira aussi les matériaux.

Ce texte, toutefois, n'oblige pas à attribuer au contrat d'entreprise mélangé de vente de matériaux la nature exclusive d'un louage de services. Comme le fait remarquer M. Planiol, l'article dit seulement que, lorsqu'on charge quelqu'un de faire un ouvrage, on peut convenir qu'il ne fournira pas seulement son travail ou son industrie, mais "qu'il fournira également la matière". C'est une disposition purement énonciative relative à un contrat complexe et qui n'écarte pas les règles de la vente pour la fourniture de matériaux. Les articles qui suivent se bornent à formuler quelques préceptes très limités, relatifs aux risques, qui ne permettent pas d'en tirer des conséquences plus générales sur la nature du contrat. (Voir Planiol & Ripert, Traité Pratique, vol. II, p. 159.)

Mais, pour la solution de cette cause, il ne nous paraît pas nécessaire de faire la distinction entre les deux parties du contrat. L'article 2268 C.C., interprété dans son esprit, ne nous restreint pas à un sens aussi étroit. En introduisant dans le texte les mots "ni en affaire de commerce en général", ce que le législateur a entendu protéger contre la revendication, c'est la possession acquise dans certaines conditions. Il ne s'est pas préoccupé autant de la nature de l'acte d'acquisition que des circonstances dans lesquelles cette acquisition a eu lieu. Pour employer l'expression de Troplong (Prescription, sur article 2280, n° 1063), le code protège "le droit du tiers qui possède la chose avec un "*acte translatif*". Dans ce sens, et au moyen de sa convention avec Standard Construction Company, l'intimée a

acquis de cette dernière la possession à titre de propriétaire des appareils frigorifiques qui ont été installés dans ses immeubles; et, dans les conditions où s'est faite cette acquisition (c'est-à-dire un contrat où l'entrepreneur général, dans le cours ordinaire de ses affaires fournissait moyennant profit des appareils qu'il avait achetés à cette fin), la transaction est certainement couverte par le texte de l'article.

Ce texte constitue une exception créée par la loi en faveur des acquéreurs, dans l'intérêt du commerce en général. Bourjon, à qui l'on attribue la maxime: "En fait de meubles, possession vaut titre", disait (Liv. 3, tit. 2, ch. 1, parag. IV): "La sûreté publique le veut ainsi." Les commentateurs s'accordent à déclarer que les rédacteurs du code civil ont consacré cette doctrine dans l'intérêt supérieur du commerce (voir, entre autres, Troplong—déjà cité —n° 1059, et 32 Laurent, n° 588). C'est l'interprétation de la cause du Banc du Roi dans la cause de *National Cash Register* v. *Demetre* (1). Ce n'est d'ailleurs qu'une application restreinte du principe que, en fait de meubles, il n'y a pas de droit de suite.

Il nous reste à faire une observation:

L'action de l'appelante a été instituée le 20 mars 1929. Une action de ce genre doit être prise essentiellement contre le possesseur. Si l'on s'en tient à la preuve, l'intimée avait alors vendu à la Société de Fiducie, depuis le mois de février 1929, les immeubles dans lesquels furent placés les appareils frigorifiques. Il s'ensuivrait que l'action n'aurait donc pas été dirigée contre le véritable possesseur. Nous n'en faisons pas un motif de notre jugement, parce que l'intimée n'a pas fait état de cette situation, et il est donc probable qu'elle était susceptible d'explication.

Mais nous sommes d'avis que l'appel doit être rejeté avec dépens pour les raisons que nous avons exposées.

Appeal dismissed with costs.

Solicitors for the appellant: *Hackett, Mulvena, Foster, & Hannen.*

Solicitors for the respondent: *Garneau & Hébert.*

(1) (1905) Q.R. 14 K.B. 468.

1933

* Dec. 1, 4.
* Dec. 22.

PHILIP J. RISTOW (DEFENDANT).... APPELLANT;

AND

HELEN WETSTEIN, AN INFANT, BY HER NEXT FRIEND, LOUIS WETSTEIN, AND THE SAID LOUIS WETSTEIN (PLAINTIFFS) ..... } RESPONDENTS;

AND

DANIEL McINTYRE (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Evidence—Misdirection in charge to jury—Objection not taken at trial, to the charge—Miscarriage of justice—New trial.

M., while driving appellant's motor car on a city street at night (3.30 a.m.) in a heavy rainstorm and very poor visibility, ran into a steel post which was four inches inside the curb off the travelled highway. The impact rendered M. unconscious and injured W., an occupant, and damaged the car. M. testified that he was driving that night at 15 to 18 miles per hour. W. sued appellant and M. for damages. The trial judge, in charging the jury, said: "There is no suggestion, apparently, that he was going too fast, that is, that he was exceeding any speed limit; and there is no evidence as to just how fast he was going when he went down Bathurst St. So that I think, on the whole, you may take it safely for granted that there is no evidence that he was going too fast, either in exceeding the definite speed limit, or under the circumstances." The jury found that the accident was not caused by negligence of M., and the action was dismissed. The Court of Appeal ordered a new trial. Appellant appealed.

Held: The above facts in evidence constituted evidence that should have been considered by the jury as to whether or not M. was driving too fast under the circumstances (*Tart* v. *Chitty*, 102 L.J.K.B. 568; *Baker* v. *Longhurst*, 102 L.J.K.B. 573), and should have been directed to their attention; and the above quoted part of the charge amounted to a withdrawal of those facts from their consideration, and was a misdirection, involving a mistrial and a miscarriage of justice in the sense that the plaintiff's case was not properly submitted to the jury; therefore it was proper to order a new trial, notwithstanding that no objection was taken at the trial to the charge.

APPEAL by the defendant Ristow from the judgment of the Court of Appeal for Ontario granting a new trial to the plaintiffs upon their appeal from the judgment of Kerwin J. dismissing the action upon a jury's finding. The action was for damages for injury to the plaintiff Helen Wetstein caused by the collision of a motor car, in which

* PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

she was riding, with a steel post, on September 4, 1932, in Toronto, Ontario. The motor car was being driven by the defendant McIntyre and was owned by the defendant (appellant) Ristow. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

T. J. Agar, K.C., for the appellant.

I. Levinter for the respondents.

The judgment of the court was delivered by

SMITH J.—The action was brought on behalf of the infant respondent by her next friend for damages sustained by her while being driven in a motor car owned by the appellant and driven by one McIntyre.

The infant, seventeen years of age, was sitting in the front seat with the driver, and a Mr. Brown and Miss Kosky were in the rear seat. The party was returning from Swansea into the city of Toronto about 3.30 in the morning of the 4th of September, 1932, in a heavy rainstorm. They drove along Dundas street and turned to the right into Bathurst street, and McIntyre says that "six or seven" or "four or five" doors south of Dundas street, or "midway between that block", he ran into the steel post of the Toronto Transportation Commission, which is about four inches inside of the curb, that is, to the right of the travelled part of the highway. He says that on that particular night it had been raining all night, and that it was one of the worst rainstorms during the year. Visibility was very poor at the time of the accident, the windows of the car were closed; the wiper worked sometimes, and sometimes you had to start it off with your hand. Visibility on the right hand side of the car was poor, and it was difficult to see the curb, and he says that he was driving that night at from fifteen to eighteen miles per hour. He further says that the impact was so severe that his chest broke off the steering wheel, and he was "knocked out" temporarily, so that he did not know what happened to the other occupants of the car until he went to the hospital. He further states that the radiator of the car was damaged and had to be replaced, and that the cross members of the chassis, which are heavy pieces of material, were bent.

1933

RISTOW v. WETSTEIN.

Smith J.

The infant respondent had some teeth knocked out, others loosened, and sustained cuts and scars about the face, limbs and body.

The questions put to the jury, with the answers, were:

(1) Was the accident caused by the negligence of the defendant McIntyre? A. No.

(2) If so—that is, if you think it was caused by McIntyre's negligence—wherein did such negligence consist? No answer.

(3) Was the motor vehicle in McIntyre's possession without Ristow's consent? No answer.

The jury was directed that if they answered "No" to the first question, they need not answer the others.

On the answer to the first question, judgment was entered, dismissing the action with costs.

An appeal was taken to the Court of Appeal, which ordered a new trial, and from that judgment the defendant Ristow brings this appeal.

It is argued upon behalf of the appellant that the finding of the jury in favour of the defendant and dismissal of the action upon that finding constitute a right which can only be interfered with on proper legal grounds. The grounds for a new trial set out in the Court of Appeal are that the accident

may have been caused by the defective condition of the car, the wiper or the steering gear not working properly, and a question as to the car's condition should have been submitted to the jury;

and

a further question should also have been submitted to the jury as to whether McIntyre was using the car with the consent of Ristow.

The latter question was submitted to the jury, but not answered, in view of the answer to the first question.

Appellant's counsel contends that the failure to submit a question to the jury as to the condition of the car does not in law constitute a ground for a new trial, as no request was made to have such a question submitted, and no objection was made to the questions as submitted.

The Court of Appeal, however, further found that there had been a mistrial.

Looking at the learned judge's charge to the jury, he said:

There is no suggestion, apparently, that he was going too fast, that is, that he was exceeding any speed limit; and there is no evidence as to just how fast he was going when he went down Bathurst street. So that I think, on the whole, you may take it safely for granted that there is no evidence that he was going too fast, either in exceeding the definite speed limit, or under the circumstances.

This, to my mind, is a clear misdirection. The evidence quoted above surely constitutes evidence that should have been taken into consideration by the jury as to whether or not the driver was going too fast under the circumstances. The great force of the impact, as disclosed by the result, is cogent evidence as to the speed, and the speed at which a car should be driven depends upon the circumstances. Here, the driver had difficulty in seeing where he was going, by reason of the conditions, and he does not say that he reduced speed, or took any precautions in view of these prevailing conditions. He ran into this steel post, off the travelled highway, without having seen it at all, with the force indicated by the results. The learned judge's charge amounted to a withdrawal from the consideration of the jury of the most vital facts established by the evidence in favour of the plaintiff's case. If the jury had given an affirmative instead of a negative answer to the first question, and in answer to the second question had said that McIntyre was driving too fast under the conditions of invisibility that prevailed, could a Court of Appeal have set aside a judgment for the plaintiff on such answers? In other words, could it have been contended that there was no evidence upon which the jury could reasonably base such answers? It seems clear that such findings on this evidence could not have been disturbed.

As to the cogency of the evidence which the learned judge told the jury that they might disregard, some recent cases in England may be cited:

In *Tart* v. *Chitty & Co.* (1): After lighting up time, a wagon pulled up in a street fourteen feet wide, nine inches from the curb, the rear light having gone out. It was raining, and a motor cyclist, whose light threw a beam fifteen yards, crashed into the back of the wagon, and sustained injury. The County Court Judge held that defendants' servants were negligent, but that defendants had not shown that the plaintiff was negligent. On appeal, held:

That there was no evidence upon which a judgment could be founded that the plaintiff was not guilty of contributory negligence. Either he did not keep a proper lookout, or he was travelling at such a speed that he was unable to stop his motorcycle or to swerve so as to avoid the collision.

(1) (1931) 102 L.J.K.B. 568.

1933

RISTOW v. WETSTEIN.

Smith J.

Butterfield v. *Forrester* (1) and *Page* v. *Richards and Draper* (2) followed.

In *Baker* v. *Longhurst & Sons Ltd.* (3): A person driving at night must drive at such a speed that he can pull up within his limits of vision; accordingly, on his colliding with anything, he is faced with the dilemma that either he was driving at an undue speed or he was not keeping an adequate lookout, unless there is some other factor causative of the collision. In this case a horse tip-cart proceeding on its near side of the road at night, but without a light, was run into from behind by a motor-cyclist. In an action brought by the plaintiff against the owner of the cart for damages, based on the negligence of the driver of the cart in being without a light, the plaintiff said that his speed was 15-20 miles per hour, and that he could stop easily within ten yards. The beam of his lamp showed thirty yards ahead. He said that he never actually saw that it was a cart. He saw a dark object loom up, and swerved to avoid it:—Held, that the plaintiff, when proving the negligence of the defendants' servant, had established his own contributory negligence and, there being no contest of fact, judgment must be for the defendants.

In the present case the learned judge, instead of, in effect, withdrawing from the consideration of the jury evidence of the most vital kind on the question of the driver's negligence, should have directed their attention to the evidence bearing on that question; that is, to the evidence that the driver ran off the travelled highway and into the post without seeing it at all; that he was driving that night under the conditions described at 15 to 18 miles per hour and does not say that he reduced speed when unable to see clearly, and that he struck the post with the force and results mentioned.

There was a complete failure to direct the attention of the jury to this evidence on which a finding of negligence on the part of the driver might have been properly based, and in addition there was an express direction that the jury might disregard the most vital part of it. This was misdirection involving a mistrial and a miscarriage of justice in the sense that the plaintiff's case was not properly

(1) (1809) 11 East. 60. (2) (1920) (unreported).
(3) (1932) 102 L.J.K.B. 573-C.A.

submitted to the jury. A new trial was therefore properly ordered, notwithstanding the fact that no objection was taken to the charge.

1933
RISTOW
v.
WETSTEIN.
Smith J.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Agar & Thompson.*

Solicitors for the respondents: *Luxenberg & Levinter.*

1933

HIS MAJESTY THE KING (IN RIGHT OF THE DOMINION OF CANADA) (PLAINTIFF) ..... APPELLANT; * June 15, 16. * Dec. 22.

AND

THE ATTORNEY-GENERAL OF ONTARIO AND WILLIAM L. FORREST (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional Law—Waters and Watercourses—Real Property—Title to island claimed by Dominion and by Province—"Public Harbour"—"River Improvement"—B.N.A. Act, 1867, s. 108, and third schedule.

Held that Goderich Harbour, located at the mouth of the river Maitland, in Ontario, was (applying the test stated in *Atty. Gen. for Canada* v. *Ritchie Contracting & Supply Co.*, [1919] A.C. 999, at 1004, and upon the evidence), at the time of Confederation, a "public harbour" within the meaning of the 3rd schedule to the *B.N.A. Act.* (Duff C.J. refrained from deciding whether, in view of a certain lease, the harbour was, at Confederation, part of the "public works" or "public property" of the province, within s. 108 of the Act; consideration of this question being unnecessary in view of the ground of decision of the appeal).

But *held* that, on the evidence, it was not established that Ship Island (the land in question) was, at the time of Confederation, a part of the harbour, or a "river improvement" within said schedule; and therefore it could not be said that the island became the property of Canada under s. 108 of the Act.

Certain questions discussed, as to what forms part of a "public harbour" (and as to circumstances to be considered), and as to what would come under the designation of "river improvement," and authorities referred to. (*Per* Duff C.J.: The several descriptions in the schedule are not to be narrowly construed or applied—citing *Att. Gen.*

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* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

of Ontario v. *Mercer*, 8 App. Cas. 767, at 778. Where there is a "river improvement" in the form of a definite physical structure consisting of a principal part and auxiliary or subsidiary works, the whole would pass and with it a title, at least, to so much of the site and of the subsoil as might be regarded as reasonably necessary to give the Dominion free scope for the complete discharge of the responsibilities it was expected to assume touching such works.).

And *held* further, that a certain patent of lease made in 1862, under which the Crown in right of the Dominion of Canada claimed title by reason of a conveyance to it in 1927 of the lessee's rights, did not, on the description in the lease, include Ship Island.

The judgment of the Exchequer Court of Canada (Maclean J.—[1933] Ex. C.R. 44), that the title to the island was vested in the Crown in right of the Province of Ontario, subject to its lease (made in 1929) to respondent Forrest, affirmed.

APPEAL by the Attorney-General of Canada, as representing the Crown in right of the Dominion of Canada, from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the title to Ship Island, situated in the river Maitland, near its mouth, and in what is known as the Harbour of Goderich, in Ontario, was, prior to the taking thereof by the Crown in right of the Dominion of Canada on October 4, 1929, under the *Expropriation Act* (R.S.C. 1927, c. 64), vested, not in the Crown in right of the Dominion of Canada, but in the Crown in right of the Province of Ontario, subject to a lease dated August 16, 1929, in favour of the defendant Forrest.

The facts and circumstances of the case, and issues in question, are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed with costs.

Glyn Osler, K.C., and *D. Guthrie* for the appellant.

A. G. Slaght, K.C., and *W. G. Pugsley, K.C.*, for the respondent Forrest.

Joseph Sedgwick, K.C., for the respondent Attorney-General of Ontario.

DUFF C.J.—I agree with the judgment of my brother Rinfret, but I think it advisable to make some observations upon one or two points raised by the appeal.

The first of these concerns the effect of the lease of 1862 from the Crown to the Buffalo & Lake Huron Railway Co.

(1) [1933] Ex. C.R. 44.

An intelligent discussion, however brief, can only proceed with the pertinent provisions of the lease before us. I, therefore, quote them:

* * * provide sufficient accommodation in the Inner Harbour of Goderich aforesaid for the largest vessels navigating Lake Huron and shall establish and maintain during the period of this demise a facile and safe entrance or channel into the Inner Harbour aforesaid for such vessels as aforesaid and whether by the erection and maintenance of piers or otherwise with a depth in such channel sufficient for the safe entrance of the vessels aforesaid, and also shall and do at their like risk, cost, charges and expense from time to time and at all times during the term hereby granted well and sufficiently repair, uphold, maintain and keep the said wharves and piers, channel and Inner Basin in good, substantial and sufficient repair and fit proper and accessible for the safe landing of passengers and for the discharge of vessels and steamers and the landing and warehousing of goods and passengers therefrom. AND upon this further condition that the Buffalo and Lake Huron Railway Company and their Successors shall when and so often from time to time as they may contemplate any alterations, improvements or additions at the said Harbour or at the Wharves or Piers connected therewith or constituting part of the same, submit the same and the plans, diagrams and specifications thereof respectively to the Commissioner of Public Works and the Commissioner of Crown Lands and shall not commence or proceed with the said alterations, improvements or additions or prosecute, carry out or complete the same or any part thereof without the approval of the Commissioner of Public Works and the Commissioner of Crown Lands respectively. AND FURTHER that the Commissioner of Public Works and the Commissioner of Crown Lands or either of them and their Engineers, Architects and other Officers and Servants may from time to time during such periods of alterations, improvements or additions and at all times whatsoever have free access to at and from the said Harbour, Wharves or Piers connected therewith or constituting part of the same and to examine and view the state and condition of repair and of the navigation of the same as the case may be and that all such alterations, improvements and additions shall be executed to the satisfaction of the Commissioner of Public Works. AND upon this further condition that the said Company and their Successors shall and do permit and suffer foot passengers and other persons to use the said wharves or piers for the purpose of air and exercise or upon other lawful and reasonable occasion at any time or times without charge and also shall and do permit and suffer passengers to land at the said wharf or pier from any boat, ship or vessel with their personal baggage or luggage without charge. AND also upon condition that the said Company and their Successors shall demand and receive reasonable wharfage dues only for or in respect of goods and merchandise landed at or shipped from the said intended wharves or piers, and shall upon no account exact unreasonable or exorbitant dues for the same and that the same dues shall be in accordance with any Statute of Our Province of Canada passed in reference to the said Harbour and now of full force and effect, or hereafter to be passed and that in default of any such Statute as hereinbefore mentioned then that such dues only shall be received and collected by the said Company and their Successors as have been, in a Table thereof submitted to and approved by Our Governor General in Council. AND upon this further and express condition that in default of all or any of the conditions, provisoes, limitations

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

Duff C.J.

and restrictions these Our Letters Patent and the demise lease and the term hereby granted and everything herein contained shall be and We do hereby declare the same to be null and void to all intents and purposes whatsoever and that the land and premises hereby demised and leased and every part and parcel thereof shall revert to and become vested in Us, Our Heirs and Successors in like manner as if these Our Letters Patent had never been granted, or the lands and premises hereby demised, anything herein contained to the contrary thereof notwithstanding.

On behalf of the Attorney-General for Ontario, it is argued that the harbour in question, in view of this lease, cannot fall within the description "public harbour" or, as it was put by counsel, it is a "private harbour".

It is very clearly not a "private harbour" in the ordinary sense of these words. The public rights of navigation are not in any manner affected by the lease. On the contrary, the purpose of the lease is plainly to improve the capacity of the harbour for the purposes of navigation and commerce and to provide facilities for the exercise of the public rights in respect thereto. Power is reserved, it is true, to exact reasonable tolls under the supervision of the Crown in respect of the landing of goods but the seisin of the bed of the harbour and the shore remain in the Crown subject to the term of years granted.

Goderich Harbour was, on the 1st of July, 1867, a harbour to which the public had the right to resort and did resort for commercial purposes, and it would appear, therefore, that it satisfied the criteria laid down in *Attorney-General for Canada* v. *Ritchie Contracting & Supply Co.* (1).

But another condition must be present before s. 108 can take effect. That section applies only to public harbours which on that date were part of the "public works" or "public property" of the province. Whether on that date Goderich harbour as a whole was, and whether the particular parts of it (alleged to be so) in question were, in view of the lease to the Railway Company, part of the "public property" or "public works" of the province in the sense of s. 108, it is not necessary to consider; and I desire to reserve that point in the most complete sense until it arises for determination.

The next topic concerns the particular locality in respect of which the dispute arises. First of all, I wish to reserve

(1) [1919] A.C. 999.

the question whether, if it had been established as a fact that prior to and up to the 1st of July, 1867, fishermen had been permitted to use Ship Island for the purpose of wintering their boats there (that is to say, boats used for fishing in Lake Huron), that would not have been some evidence of the fact that this piece of Crown property had been recognized as part of the "public harbour". Then, much attention was given in argument to the icebreaker which had, at one time, been placed across the branch of the river between Ship Island and the main land. As to the purpose of this icebreaker, we are not left in doubt. It is explained in the following paragraph given in the report of the Commissioner of Public Works for the year 1861:

> From the foregoing it will be seen that the principle adopted in the construction of this harbour is to convert the extensive flat at the mouth of the river, some 20 acres in extent, into an inner basin, to have a depth of 14 feet water; the entrance to it being between two piers, with which considerable progress has been made. The width between the piers at the narrowest part is 170 feet. Vessels wintering in this harbour ran considerable risk in spring, from the ice carried down on the breaking up of the winter, by which a steamer was, in 1859, carried out and lost. To obviate this, the company have had an ice-breaker, of considerable extent, constructed across one of the branches of the river, which effectually answers its purpose.

An ice-breaker constructed for such a purpose might, according to the circumstances, be regarded as a part of the harbour works, that is to say, a part of the harbour, but, whether or not a part of the harbour, it would most assuredly fall within the description of "river improvement" as employed in the third schedule. I do not doubt, moreover, that, if there was a cribwork on Ship Island which was an integral part of the ice-breaker, or if merely intended to give the ice-breaker additional resistance against the impact of flood or ice, such cribwork would form part of the "river improvement". I must not be understood as attempting to expound the scope of the phrase "river improvement", but such a work as that under consideration devised for the protection of the harbour works and the shipping in the harbour from the force of the waters and the ice of the river is, in the strictest sense, a work for the improvement and protection of navigation and, in my view, plainly a "river improvement" within the meaning of the *B.N.A. Act*, if the other condition be satisfied, viz., that the work is part of the "public property" or a "public work" of the province.

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

Duff C.J.

This brings me to one or two general observations which I desire to add respecting the construction and effect of s. 108 and of the third schedule. One observation of the first importance I make in the form of an adaptation of Lord Selborne's words in *Attorney-General for Ontario* v. *Mercer* (1),

> The general subject * * * is of a high political nature; it is the attribution of royal territorial rights for purposes of * * * government.

It follows, I should think, that the several descriptions in the schedule are not to be narrowly construed or applied.

It is still more important to notice that the judgment of Lord Herschell in the *Fisheries* case (2) dealt only in a very restricted way with what would be comprised in a public harbour transferred by force of the statute. Their Lordships declined to define, or even to describe, "public harbours" and, indeed, their Lordships confined their opinion to one particular question, viz., the decision in *Holman* v. *Green* (3), in which this court had held that a foreshore bordering on a public harbour, if it was the property of the Crown, passed *de jure*. Their Lordships indicated circumstances in which, in their opinion, a foreshore would pass; if it had been used for anchoring ships or landing goods: but these conditions are only mentioned by way of example, and it is most important to note that they are strictly confined to the matter of the foreshore.

"Foreshore" was treated as employed in the strict technical sense. Mr. Blake, speaking for the Province of Ontario, on that ground declined to discuss the validity of *Holman* v. *Green* (3), which was left to Mr. Longley who represented Nova Scotia. The reason which led their Lordships to limit themselves so strictly to dealing with the subject of public harbours is, no doubt, to be found in the argument. Mr. Blake pointed out the almost insuperable difficulty of discussing the subject usefully in view of the absence of any information as to the nature of the harbours in Canada at the date of Confederation; and their Lordships naturally confined themselves to the concrete

(1) (1883) 8 App. Cas. 767 at 778.

(2) Attorney-General for Canada v. Attorney-General for Ontario, etc., [1898] A.C. 700.

(3) (1881) 6 Can. S.C.R. 707.

question presented by the decision in *Holman* v. *Green* (1). Indeed, in the formal answer expressed in the Order in Council, their Lordships limited themselves even more strictly. The answer is in these terms:

* * * whatever is properly comprised in the term "public harbours" became the property of the Dominion of Canada; and that the answer to the question, what is properly so comprised, must depend, to some extent, upon the circumstances of each particular harbour.

Attorney-General for British Columbia v. *Canadian Pacific Railway Company* (2) was concerned with the title to a very limited part of the foreshore of Burrard Inlet. In that case, evidence was adduced to show that the part of the Inlet adjacent to the part of the foreshore in controversy was in use for harbour purposes in the strictest sense, and the foreshore also, at and prior to the date of the admission of British Columbia into the Union. The finding of fact in that case was based upon that evidence.

Attorney-General for Canada v. *Ritchie Contracting & Supply Co.* (3) elucidates the matter somewhat further. It was held there that a harbour, in order to fall within the class "public harbour" in the relevant sense, must be one to which ships had the right to resort for harbour purposes and did so resort at the pertinent date; but the decision says nothing whatever which can assist you in determining what are and what are not the constituent parts of what is admittedly a "public harbour", for the purpose of precisely ascertaining the subjects that passed under that designation.

One consideration that ought not to be lost sight of is that an important reason for vesting in the Dominion public harbours and river improvements was that the Dominion, charged with exclusive jurisdiction regarding trade and commerce, navigation and shipping, lighthouses, buoys, the regulation of sea coast and inland fisheries was, no doubt, expected to assume the burden of maintaining navigation works, harbour works and river improvements such as, at all events, we are concerned with here.

No case has, prior to this, so far as I know, arisen respecting harbour works, works for facilitating the use of the harbour, for protecting the harbour and so on. I am inclined to think it would be difficult to find an adequate

(1) (1881) 6 Can. S.C.R. 707. (2) [1906] A.C. 204.
(3) [1919] A.C. 999.

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

Duff C.J.

ground for contending that such works did not pass under the statute. Indeed, so much appears to have been conceded in the *Fisheries* case (1) by the provinces.

As to river improvements, to adapt the judgment of the Judicial Committee in the *Fisheries* case (1), there would appear to be "no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada". I cannot doubt that, where you have a "river improvement" in the form of a definite physical structure consisting of a principal part and auxiliary or subsidiary works, the whole would pass and with it a title, at least, to so much of the site and of the subsoil as might be regarded as reasonably necessary to give the Dominion free scope for the complete discharge of the responsibilities it was expected to assume touching such works. I reserve in the fullest degree the question whether the title to the subsoil *ad centrum* would pass.

The judgment of Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ. was delivered by

RINFRET J.—The question to be determined in this appeal is whether His Majesty the King in right of the Dominion of Canada (who is the Appellant) is entitled to a small island about one acre in extent, known as Ship Island, in the harbour of Goderich, either in fee simple, or as assignee of the tenant for the remainder of a term of ninety-nine years created by a lease dated the 2nd day of June, 1862.

The Attorney-General of Ontario claims that Ship Island never vested in the Dominion. The respondent Forrest claims as lessee of the Crown in right of the province of Ontario, and also by prescription and possession as against the rights of the tenant under the lease of June, 1862.

The Appellant was proceeding to remove Ship Island for the purpose of improving Goderich Harbour, when His contractor was restrained by an interim *ex parte* order of the Supreme Court of Ontario, at the instance of the respondent Forrest. The Appellant thereupon commenced this action, claiming a declaration of his rights, or, in the alternative, the usual declaration of vesting under the *Expropriation Act*, R.S.C. 1927, c. 64.

(1) [1898] A.C. 700.

The learned President of the Exchequer Court delivered judgment on the 22nd December, 1932 (1), holding that the title to the island was vested in the Crown in right of the province of Ontario, subject to the lease to the respondent Forrest, and that the province and Forrest are accordingly entitled to compensation for the taking thereof.

His Majesty the King in right of the Dominion of Canada appeals from this judgment.

Goderich Harbour is located at the mouth of the river Maitland which flows into Lake Huron. At the period of time material to this case, the river wound its way to the lake through a series of islands, one of which was Ship Island. As observed by the trial judge, it may be assumed that the other islands "were of alluvial origin"; but Ship Island was of a different character. The evidence shows that it was high and dry land for at least a century. It stands at from two to five feet, on its easterly side, to from five to twelve feet, on the westerly side, above the level of the present high water mark in the harbour. It is covered with old trees (elm, basswood, black cherry, etc.), some of them as much as two feet or twenty inches in diameter. From the geological nature of the island, it may be asserted that it was not covered by water at any time within seventy-five or one hundred years back.

As land or public property situate within the territory known as Upper Canada before Confederation, there is no question that, under sections 109 and 117 of the *B.N.A. Act*, Ship Island, subsequent to the coming into force of the Act, remained part of the demesne lands of the Crown belonging to the province of Ontario, and that province retained it as its public property "subject to any trusts existing in respect thereof and to any interest other than that of the province in the same".

It was therefore incumbent upon the Appellant to show that the island had ceased to form part of the public property of the province and had become vested in the Crown in right of the Dominion of Canada; and, unless it be established that it passed out of the domain of the province, either through the operation of some statutory enactment, or by the effect of a deed conveying the title in whole or in part, it must be decided that Ship Island is

(1) [1933] Ex. C.R. 44.

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

Rinfret J.

still vested in the province of Ontario, and the judgment *a quo* must be confirmed.

The Appellant claimed title both ways:

(*a*) As a tenant through and under a patent of lease dated the second day of June, 1862, from the Crown to the Buffalo & Lake Huron Railway Company, all rights thereunder having been conveyed to the Appellant by a quit claim deed dated January 19, 1927;

(*b*) As owner of the fee by reason of the provisions of section 108 of the *B.N.A. Act*, the Appellant contending that Ship Island formed part of a public harbour on July 1, 1867; or, in the alternative, that it was on that date a river and lake improvement within the meaning of that section and the schedule thereto.

The action was tried and is submitted to us only on the question of title, and the judgment is therefore limited to that issue. It will be convenient to examine each of the Appellant's contentions in the order in which they are stated.

The property leased to the Buffalo & Lake Huron Railway Company, in 1862, is described in the patent of lease:

all those parcels of land covered with water situate in the townships of Goderich and Colborne in the County of Huron in our said Province of Canada, being the water lots in front of the town of Goderich in Lake Huron and extending half a mile to the south and north of the River Maitland together with the water lots in the said River extending from Lake Huron up the said river one mile and seven-eighths of a mile to opposite the northeast corner of the said Town of Goderich that is to say: (N.B. The patent then proceeds to define the water lots by metes and bounds).

As will be noticed, the lease from the Crown is a lease of "water lots". They are "water lots" in Lake Huron, or "water lots" in the river Maitland, but only "water lots". They are expressly designated as "parcels of land covered with water". The Crown lease contains a complete and minute definition of the metes and bounds, which we do not deem it necessary to set out here in full, but in which, with regard to the *locus in quo*, the lots are referred to as being

along the water's edge of the River Maitland along the Goderich side thereof to Lake Huron.

We find it impossible to bring Ship Island within the description of the leased property, and we agree with the learned President of the Exchequer Court that, upon the terms of the patent, Ship Island was not included in the grant.

It may be mentioned that on June 14, 1859, and on February 17, 1865, agreements were made between the Canada Company and the Buffalo & Lake Huron Railway Company whereby the former sold and conveyed to the latter all its rights and interest under patents or grants previously issued by the Crown to it; but with regard to Ship Island these agreements did not carry the Buffalo Railway Company any further than the lease from the Crown of 1862. It follows, therefore, that the Appellant took no right to or interest in Ship Island under the conveyance by the quit claim deed of January 19, 1927, from the Buffalo & Lake Huron Railway Company.

We have now to consider whether the island became vested in the Dominion by force of section 108 of the *British North America Act.*

Under that section,

> The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

The Third Schedule is entitled "Provincial Public Works and Property to be the Property of Canada"; and, among the works and property enumerated therein, are:

> 2. Public Harbours.
> 5. Rivers and Lake Improvements.

It is contended by the Appellant that, in 1867, Ship Island came under either of these two subheads. We will deal first with No. 2: Public Harbours.

This raises two questions: Whether in 1867 Goderich Harbour was a public harbour within the meaning of the Third Schedule; and, that being answered in the affirmative, whether Ship Island formed part of the harbour.

It would be difficult to say that, in 1867, Goderich harbour was not a "public harbour". In the *Fisheries* case (*Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* (1)), the Judicial Committee declined to attempt an exhaustive definition of the term. The view that it meant only "such a harbour and such portions of it as had been the creation of public money" was rejected by this Court (*Holman* v. *Green*) (2), and by the Privy Council (*Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.*) (3). In the latter case, it was explained that "*public harbour* means not

(1) [1898] A.C. 700. (2) (1881) 6 Can. S.C.R. 707.
(3) [1919] A.C. 999 at 1004.

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

Rinfret J.

merely a place suited by its physical characteristics for use as a harbour" (an "indentation of the coast to which the public have right of access, and which by nature is so sheltered as to admit of a ship lying there")—"but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose". (p. 1004).

Applying this test, and upon the evidence as to the state of affairs at the relevant date, i.e., at the date at which the *B.N.A. Act* became applicable, it must be agreed that Goderich Harbour was a public harbour. Even although the work of erection of the harbour and of the subsequent improvements thereof may not have been actually carried out by the province or through the expenditure of public money, the work done by the Canada Company or by the Buffalo Railway Company was part of the consideration—in fact, the main consideration—for the leases or grants from the Crown to these companies. To establish this it is sufficient to quote the following passage from the patent of lease to the Buffalo Railway Company of June 2, 1862:

> AND WE DO hereby declare it to be Our Royal will and pleasure and these Our Royal Letters Patent are granted upon and subject to the express conditions hereinafter mentioned that is to say, Upon condition that the said Company and their Successors shall and do at their own risk, costs, charges and expense within the space of five years from the date hereof provide sufficient accommodation in the Inner Harbour of Goderich aforesaid for the largest vessels navigating Lake Huron and shall establish and maintain during the period of this demise a facile and safe entrance or channel into the Inner Harbour aforesaid for such vessels as aforesaid and whether by the erection and maintenance of piers or otherwise with a depth in such channel sufficient for the safe entrance of the vessels aforesaid, and also shall and do at their like risk, cost, charges and expense from time to time and at all times during the term hereby granted well and sufficiently repair, uphold, maintain and keep the said wharves and piers, channel and Inner Basin in good, substantial and sufficient repair and fit proper and accessible for the safe landing of passengers and for the discharge of vessels and steamers and the landing and warehousing of goods and passengers therefrom.

It may further be added that, under the terms of the lease, all plans or diagrams of improvements had to be submitted to the Commissioner of Crown Lands and the Commissioner of Public Works and they were to be executed to their satisfaction. The companies were to permit and suffer passengers to land at the wharves or piers from any boat, ship or vessel with their personal baggage or luggage without charge and could demand and receive

reasonable wharfage dues only for and in respect of goods and merchandise landed at or shipped from the said wharves or piers, the dues being either controlled by statute or submitted to and approved by the Governor General in Council.

Without going into details, it appears by official plans and by departmental reports that a good portion of those works and improvements had been actually carried out and that, at the time of Confederation, Goderich Harbour was not only capable of being used, but that it was actually in use as a harbour in the commercial sense. It may accordingly be held as falling, at the pertinent date, within the "class of harbour meant by the expression *public harbour*".

In the view we take of the case, it is not necessary to discuss the nature of the province's proprietary rights in the harbour. It is sufficient to say that the Crown, in right of the province, held at least a reversionary interest.

Given a public harbour at Goderich, in 1867, there remains to find out what territory fell within it and, further, whether Ship Island, if within the ambit of the harbour, formed a part of it. (*Attorney-General for Canada* v. *Ritchie Contracting & Supply Co.*) (1). This must depend upon the circumstances of the particular case and, in accordance with the rulings of the Judicial Committee in the *Fisheries* case (*Attorney-General for Canada* v. *Attorney-General for Ontario, etc.*) (2), and in *Attorney-General for British Columbia* v. *Canadian Pacific Railway*) (3), that question must be tried as a question of fact.

We agree with the learned President of the Exchequer Court that, on the evidence, "it is open to serious doubt if Ship Island was, in 1867, situated within the bounds of what was known and used as Goderich Harbour"; and, at all events, we see no reason to dissent from his conclusion that the island was not a part of the harbour.

In the *Fisheries* case (2), the Privy Council expressed the opinion that even the foreshore, between the high and low water-mark, on the margin of a harbour, although Crown property, did not necessarily form part of the harbour, and that there must be a further inquiry as to whether

(1) [1919] A.C. 999 at 1003 and 1004.
(2) [1898] A.C. 700 at 712.
(3) [1906] A.C. 204 at 209.

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

Rinfret J.

it has "actually been used for harbour purposes, such as anchoring ships or landing goods". Of course, their Lordships' observations may be read as laying down only illustrations of what the test must be (Duff, now C.J., in *Attorney-General for Canada* v. *Ritchie Contracting & Supply Co.*) (1); but there is, in this case, no evidence that the island, at the date of Confederation, had become "one of the constituents of the harbour", or, in fact, was in use or had ever been in use for any "harbour purposes", except in respect to one particular: certain cribwork allegedly erected on the island and which may be looked at from the viewpoint either of a harbour work or of a river improvement. For that reason, that particular point will be dealt with together with the last contention in support of the claim of the Dominion, to wit: that Ship Island became vested in the Dominion as falling under item 5 of the Third Schedule of section 108: "Rivers and Lake Improvements".

The facts are these:

Vessels wintering in Goderich Harbour ran considerable risk in the spring on account of the ice carried down the river Maitland, on the breaking up of the winter. To obviate this, at some period prior to the year 1861, an ice-breaker was constructed across one of the branches of the river. This work is mentioned in the report of the Commissioner of Public Works of the 14th February, 1862, and again in the report of John Page, Chief Engineer of the Department of Public Works, dated the 20th January, 1870, where it is referred to as follows:

> In order to prevent the wharves, warehouses, etc., from being damaged during spring freshets, as well as for the protection of such vessels as might winter in the harbour, an ice-breaker, 1,100 feet long, and from 9 to 10 feet high over low water, has been constructed.
>
> This commences at a point on the south shore, 2,300 feet inside of the basin, and extends outwards in a direction nearly parallel with the entrance piers. It appears to be strongly built and secured; nevertheless, a heavy freshet in the spring of 1868, carried away about 200 feet of it, and made a large breach through the gravel bank in its rear.

Two departmental plans were filed, respectively dated July, 1861, and 5th November, 1870. They show the ice-breaker.

On the plan of 1861, it is traced across the river channel, in the direction of Ship Island, but it does not reach the

(1) (1915) 52 Can. S.C.R. 78, at 105.

island. It is, however, followed up by another tracing indicated as "cribwork", and running through the width of the island.

On the plan of 1870, the ice-breaker and the cribwork again appear, although not quite in the same relative position to one another. At the extreme end of the ice-breaker, on the island side, a legend on the plan indicates that 200 feet of the work were carried away in the spring of 1868 (as mentioned in Page's report above referred to) and states that this was repaired.

Neither the report of the Commissioner of Public Works, in 1861, nor that of Chief Engineer Page, in 1870, makes any reference to the cribwork on the island. Outside of the tracings on the plans, there is not the slightest evidence even alluding to it. None of the old residents, who were heard as witnesses, were able to give any information about it. It cannot be said with certainty that it was ever constructed. It may have been only part of the "proposed works". If ever constructed, it is impossible to say whether by the lessees of the Crown as part of their obligations or by the occupiers, if any, of the island for their own self purposes. Whatever evidence there is is inconclusive and is susceptible of being interpreted in one sense or the other. We are not satisfied that the presence of the cribwork on the island in 1867 has been established in such a way as to enable us to deal with it as a then existing public work or as a work which was then the property of the province and which could be classed either as harbour work or as a river improvement within the Third Schedule.

Moreover, the cribwork alone, not the island itself, would come under the designation of "river improvement". The island was put there by Nature. Under no stretch of imagination can it be styled a man-made improvement. It was authoritatively decided in the *Fisheries* case (1) that the transfer by s. 108 to the Dominion of "rivers and lake improvements" operates, on its true construction, in regard to the improvements only, that is to say: in regard only to the "artificial works" themselves. It is quite evident that, in this case, the transfer of the cribwork *qua* improvement would not carry the transfer of the entire

(1) [1898] A.C. 700, at 710-711.

1933

THE KING v. ATTORNEY-GENERAL OF ONTARIO AND FORREST.

Rinfret J.

island. We doubt if it would mean any more than an easement on Ship Island in favour of the Dominion. And that leads to a further difficulty, because the record is absolutely lacking in the information required to fix the *locus* of the easement. In the earlier days, Ship Island is proven to have had an area of four acres. This had dwindled down to nine-tenths of an acre in 1929. The balance has been "dredged away". For all we know, the cribwork may have been placed, if at all, on that part of the island which was "dredged away". It is certain that the cribwork and the ice-breaker have long since disappeared. To replace them, a breakwater was built, at a much later date, across the whole of the river Maitland and at some distance north of Ship Island.

The existence—even if it should be conceded—of the cribwork in 1867 would suggest at most the transfer of an easement on Ship Island to the Dominion of Canada by force of s. 108 and its schedule. With the meagre data at our disposal, it is not easy to see how the *locus* of the easement could be defined, nor can we perceive what useful purpose would be served by inserting in the judgment a declaration that the easement was vested in the Appellant, in view of the Appellant's avowed intention to destroy the island.

So far as that question may affect the amount of compensation, it may be taken care of when that and other matters reserved by the judgment of the Exchequer Court will be later considered by that court.

For the moment, the Appellant has failed to convince us that the conclusion reached by the learned President was wrong, and the appeal from his judgment ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondent the Attorney-General of Ontario: *Joseph Sedgwick.*

Solicitor for the respondent Forrest: *W. G. Pugsley.*

IN THE MATTER OF HELEN (THELMA) DELAURIER, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS.

1933
*Nov. 29.
1934
*Jan. 26.

MARIE DELAURIER AND JOSEPH DELAURIER (APPLICANTS) ..... } APPELLANTS;

AND

LILA JACKSON AND FREDERICK G. JACKSON (RESPONDENTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infant—Custody—Parental rights—Religious faith.

Appellants applied in the Supreme Court of Ontario for the custody of their infant child who, for about ten years from early infancy, had been in the care of respondents. Appellants were Roman Catholics and respondents were Protestants and the child had become identified with respondents' church. The application was dismissed, an appeal to the Court of Appeal for Ontario was dismissed, and an appeal was brought to this Court.

Held: In view of all the circumstances and the considerations in making the orders dismissing the application, those orders should not be disturbed.

Per Duff C.J. and Smith and Crocket JJ.: The father's authority as to the religious faith in which his child is to be educated, however wide it may have been at common law, must now be measured by the rules of equity, which, by express provision in the *Judicature Act,* prevail in Ontario, and which, on an issue like the present one, recognize the welfare of the child as the predominant consideration. If the child's general welfare requires that the father's rights as to the religious faith in which his child is to be reared be suspended or superseded, the courts in the exercise of their equitable jurisdiction have power to override them, though in doing so they must act cautiously. Due consideration must be given to the father's wishes, but if the court is satisfied, upon consideration of all the facts and circumstances (and though no serious misconduct of the father is proved), that those wishes conflict with the child's own best interests, viewed from all angles—material, physical, moral, emotional and intellectual as well as religious, then those wishes must yield to the child's welfare. (*In re O'Hara,* [1900] 2 I.R. 232, at 239, 241; *Ward* v. *Laverty,* [1925] A.C. 101, at 110, cited). The orders made in the present case were justified.

Per Rinfret J.: The rules of equity must prevail and a very great discretion is vested in the judge hearing the application. Having regard to all the circumstances, it cannot be said that the discretion has been wrongly exercised in this case.

Per Hughes J.: It is an equitable principle that the court may control or ignore the parental right but in so doing should act cautiously, and should act in opposition to the parent only when judicially satisfied that the child's welfare requires that the parental right be suspended

*PRESENT:—Duff C.J. and Rinfret, Smith, Crocket and Hughes JJ.

1934

DELAURIER v. JACKSON.

or superseded. As the orders herein were in their nature discretionary, and were affirmed by the Court of Appeal, there was no principle on which this Court could interfere.

APPEAL by the parents of the child, Helen (Thelma) DeLaurier, who was born on July 19, 1920, from an order of the Court of Appeal for Ontario dismissing the appeal of the said parents from the order of McEvoy J. of September 4, 1929, and the order of Kerwin J. of January 13, 1933, dismissing an application by way of originating notice, directed against the present respondents, for a writ of *habeas corpus* and for custody of the said child.

The material facts of the case are sufficiently stated in the judgments now reported. The appeal was dismissed with costs.

J. F. Boland, K.C., for the appellants.

J. L. Grogan for the respondents.

The judgment of Duff, C.J., and Smith and Crocket JJ., was delivered by

CROCKET J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario dismissing the appellants' appeal from the judgment of McEvoy, J., delivered September 4, 1929, and of Kerwin, J., delivered January 13, 1933, refusing an order for a writ of *habeas corpus* against the respondents, and for the custody of an infant girl, Helen or Thelma DeLaurier, of whom the appellants were the natural and the respondents the foster parents.

The appellants' motion, it appears, was made before Mr. Justice McEvoy on January 11, 1928, when, after hearing the evidence of both appellants and both respondents, and some other witnesses, His Lordship stated that the child would remain in the custody of the court in the meantime. "That will mean", he added, "with the Jacksons for the time being". The matter remained in that position until the delivery of His Lordship's formal judgment on September 4, 1929, from which the appellants appealed to the Appellate Division, which, on December 11, 1929, gave them leave to move in Single Court for an order for the present custody of the child, the appeal to stand over pending the disposition of such motion. Various notices of

motion returnable before different judges at chambers were subsequently served by the appellants, but no further proceedings were taken until June 28, 1932, when, in pursuance of an order of the late Mr. Justice Grant for the taking of further evidence before the Assistant Master, both the appellants and the respondents were further examined before that officer, and the evidence of other witnesses taken as well. The matter finally came before Mr. Justice Kerwin on December 20, 1932, when, after perusing the various orders and the evidence taken before Mr. Justice McEvoy and the Assistant Master, he concluded that he should see the parties and the child, and he therefore directed that they appear before him on January 9, the appellants after the hearing before the Master having removed to Montreal. Madame DeLaurier appeared before him in pursuance of this order and both Mr. and Mrs. Jackson, but Joseph DeLaurier was unable to attend. The three named were briefly examined, and the child interviewed, and on January 13 last His Lordship delivered his judgment refusing the application of the appellants for the custody of the infant.

The girl, Thelma, was born at Toronto, July 19, 1920. A few weeks after her birth her mother, Mrs. DeLaurier, was placed in a sanitorium for treatment for tuberculosis, and at the same time four of her children, including Thelma, were sent to a preventorium. Mrs. DeLaurier did not return to her home until February, 1922. Expecting to be confined shortly, she felt unable to look after the four children whom the authorities at the preventorium decided should be discharged from that institution. The Catholic Welfare Bureau undertook to place Thelma in St. Mary's Infant Home, and to see that she would be looked after until after the mother's confinement, and when she would be able herself to attend the child. It was found, however, that St. Mary's Infant Home was quarantined for measles and the Catholic Welfare Bureau then asked the Home to place the infant with some family. At the direction of the authorities of the Home, the father took the child on February 3, 1922, to Mr. and Mrs. Jackson who conducted a boarding house for infants, and who were to be paid by the Home at the rate of $20 per month. The City of Toronto paid for the child's maintenance for some time, and then the Catholic Welfare Bureau, but always through

1934

DELAURIER v. JACKSON.

Crocket J.

the Infants' Home. In September, 1922, the DeLauriers were notified that the Catholic Welfare Bureau would no longer be responsible for the child's maintenance and the Jacksons were notified by the Infants' Home that they would receive no further payments through that institution. The child's mother still felt unequal to looking after Thelma, and the husband thereupon made arrangements with the Jacksons for the latter to continue boarding the child at the same rate. The sum of $19 in all was paid by DeLaurier in instalments and the Jacksons then notified the parents to come and take the child, and to bring clothes for her. The parents were unable to supply the clothes and Thelma remained with the Jacksons. The father visited the child occasionally, but the mother states that she was unable to do so on account of her health, and because she was not familiar with the city.

These are the unfortunate circumstances which explain how the Jacksons were first brought into contact with Thelma when she was only 18 or 19 months old. A warm attachment seems to have grown up between them and the child, and, upon moving to Havelock, where Mr. Jackson had obtained a new position, they were allowed by the DeLauriers to take Thelma to live with them there. They remained there until 1927, when they returned to Toronto, bringing Thelma back with them, and continuing to treat her as a member of their family, as they had done during the whole period of their residence at Havelock.

The child has come to be known as Thelma Jackson, calls the Jacksons her father and mother and their son and daughter her brother and sister, although she knows that the DeLauriers are her natural parents. Both Mr. and Mrs. Jackson are Protestants and attend a United Church in Toronto, with which Thelma has become identified. She has been educated in the public schools of Toronto, where she has won honour certificates and apparently has been most happy.

The DeLauriers, who are Roman Catholics, have had fourteen children, of whom five were living with them in Toronto, one of these being a married son, whose wife and child lived also with them. Three younger boys occupied one room together in their parents' Toronto home, and a daughter another room, which Mrs. DeLaurier explained

she proposed Thelma, when she came back, should occupy with her. Another daughter was under treatment in a hospital. DeLaurier himself had served a sentence of two months for an offence against the Ontario Liquor Law, while one of the boys had twice been convicted of theft and another before a magistrate for some minor offence.

One thing the evidence clearly shews—that Thelma has been completely out of touch with her natural parents for a period of now over ten years and that her mother has had no contact with her since a few weeks or at most a few months after her birth.

After a careful examination of the evidence and the learned trial judge's (Kerwin, J.) conclusion thereupon and the reasons he gives for his decision, we are satisfied that he in no manner disregarded the provisions of s. 24 of the Ontario *Infants Act,* upon which the appellants much rely. The effect of this section, no doubt, is that none of the provisions of that statute shall be deemed to alter whatever authority the father may otherwise by law possess as to the religious faith in which his child is to be educated. This authority, however wide it may have been at common law, must now be measured by the rules of equity, which in virtue of the express provisions of the *Judicature Act* prevail in Ontario as they do in England, and, in cases of this kind, recognize the welfare of the child as the predominant consideration. If the general welfare of the child requires that the father's rights in respect of the religious faith in which his offspring is to be reared, should be suspended or superseded, the courts in the exercise of their equitable jurisdiction have undoubted power to override them, as they have power to override all other parental rights, though in doing so they must act cautiously. This, as I take it, is the effect of Lord Justice FitzGibbon's well known exposition of the law on this subject in the *O'Hara* case (1).

Due consideration is, of course, to be given in all cases to the father's wishes but if the court is satisfied in any case upon a consideration of all the facts and circumstances, as shewn by the evidence, that the father's wishes conflict with the child's own best interests, viewed from all angles—material, physical, moral, emotional and intellectual as well as religious—then the father's wishes must yield to the

(1) *In re O'Hara,* [1900] 2 I.R. 232, at 239, 241.

1934

DELAURIER v. JACKSON.

Crocket J.

welfare of the child. As to this see also remarks of Viscount Cave in *Ward* v. *Laverty* (1). It is not a question of the father having forfeited his parental rights by serious misconduct, and it is, therefore, not necessary, in order to justify the court in ignoring the father's or the mother's wishes, that any such serious misconduct should be proved. It is solely a question of what is in the child's best interests.

This is the question to which the learned trial judge clearly addressed himself after a careful review of all the evidence taken before McEvoy, J., and the Assistant Master and after himself further examining the two respondents as well as the female appellant and personally interviewing the child herself, then in her thirteenth year.

There has been no case, so far as I have been able to ascertain, where a child, old enough to form any religious convictions, has, after the lapse of such a period of time, been ordered, against her own expressed wish, from the custody of a Roman Catholic family in which it has been reared, to the custody of a Protestant family, or from the custody of a Protestant family to that of a Roman Catholic family, once settled or strong convictions in favour of either religious faith have been acquired, as well as settled affections for the family in which he or she has been reared. Viscount Cave in the *Laverty* case (2) and FitzGibbon L.J. in the *O'Hara* case (3) point out the grave risks which such an order would involve to the welfare and happiness of the child, apart from all other considerations.

The trial judge's personal interview with the girl herself afforded him an opportunity, of which we have no doubt he fully availed himself, to test the sincerity of her feelings in these all important features.

We are of opinion that there was ample justification for the decision of the learned trial judge to refuse the order asked for in this case, and that the appeal should, therefore, be dismissed.

The appeal is dismissed with costs; the costs of the unsuccessful motion to quash (fixed at $75) to be set off against the respondents' costs.

(1) [1925] A.C. 101, at 110. (2) [1925] A.C. 101.
(3) [1900] 2 I.R. 232.

1934

DELAURIER v. JACKSON.

RINFRET J.—This is a case where the rules of equity must prevail, and a very great discretion is vested in the judge to whom the application is made. Having regard to all the circumstances, I am unable to reach the conclusion that the discretion has been wrongly exercised in the premises, and I agree with the disposition of the case made by my brother Crocket.

HUGHES J.—On the 11th day of January, 1928, an application by Joseph DeLaurier for the custody of Helen (Thelma) DeLaurier came before Mr. Justice McEvoy, who heard evidence *viva voce* and, on the 4th day of September, 1929, being of opinion that the child should remain with the respondents, dismissed the application with costs. The said Joseph DeLaurier appealed to the Court of Appeal for Ontario and that court gave leave to Joseph DeLaurier to move in Single Court for an order for the custody of Helen (Thelma)) DeLaurier and upon such motion to use the evidence taken before Mr. Justice McEvoy and such further evidence as might be presented and heard, and further ordered the appeal to stand over pending the disposition of the motion. Further evidence was taken before the Assistant Master on the 28th day of June, 1932, and, on Friday, the 13th day of January, 1933, Mr. Justice Kerwin heard the application of Joseph DeLaurier and Marie DeLaurier on the evidence adduced before Mr. Justice McEvoy and before the Assistant Master, and dismissed the application without costs.

Mr. Justice Kerwin deemed it advisable to see the parties and the infant. All appeared with the exception of Joseph DeLaurier, whose wife, Marie DeLaurier, stated that they were living in Montreal and that it was not possible for him to leave his position. Mr. Justice Kerwin personally questioned the infant and later gave written reasons. He found that the appellants never definitely gave up their rights to the custody of the child, or their rights to have her brought up in their own faith, namely, the Roman Catholic faith. He was of opinion that the parents had done or omitted nothing since the previous hearing to forfeit whatever rights they then had, but he was of opinion that the child, almost thirteen years of age, should remain where she was, namely, with the respondents.

1934

DELAURIER v. JACKSON.

Hughes J.

Joseph DeLaurier and Marie DeLaurier then renewed their appeal from the order of Mr. Justice McEvoy and appealed from the order of Mr. Justice Kerwin, and the Court of Appeal, on the 12th day of April, 1933, dismissed both appeals with costs.

Written reasons were not given by the Court of Appeal.

The child was born on July 19, 1920. Shortly afterwards it was found that the mother had tuberculosis and she was ordered to go to a sanitarium, and four children, including Thelma, were placed in a preventorium, where she remained until February, 1922. At that time the mother was about to be confined and the Catholic Welfare Bureau agreed to place Thelma in St. Mary's Infants' Home. The Home, however, was quarantined with measles and the Catholic Welfare Bureau arranged with the Home to place the baby temporarily, and they placed it with the respondents. The City of Toronto paid for the child for a while, and later the Catholic Welfare Bureau paid, but, on September 20, 1922, payments ceased. Joseph DeLaurier then made an agreement to pay the respondents four dollars per week for Thelma's care. In the opinion of the father the child was well cared for. Joseph DeLaurier paid for a few weeks and then he was not able to pay any more, and had some negotiations with the respondents for the return of the child. Subsequently the respondents moved to Havelock and took Thelma with them. There was some correspondence between the parties and Marie DeLaurier sent a few dollars to the respondents at Havelock. The respondents later returned to Toronto and, in the month of August, 1927, Joseph DeLaurier told the respondents that he did not have any money but that he wanted the child back.

Marie DeLaurier testified that she saw Thelma in December, 1922, and again the day before Christmas in the year 1927. In the meantime she had telephoned to the respondents asking them to come to some arrangement, and at least to permit her to see the child, but that the respondents had asked her to sign adoption papers before permitting her to see the child. She testified that she had written several letters to the respondents while they were at Havelock and, on one occasion, had sent two dollars for Christmas. The respondents answered twice and then

ceased to write. The mother was of opinion that the respondents were good to Thelma.

Lila Jackson testified that the respondents were to receive $20 per month for the care of the child, but that payments ceased in September, 1922. An arrangement was then made with Joseph DeLaurier whereby he agreed to pay $4 per week, but he paid only $19 in all. Lila Jackson testified that she then asked Joseph DeLaurier by telephone to come and take Thelma home. She finally concluded that the appellants had abandoned the child. Lila Jackson testified that she was quite healthy and that she had two children of her own, both of whom were working. She stated that in September, 1931, Thelma's tonsils and adenoids had been removed and that she had gained nineteen pounds in weight between that date and the date of the last taking of evidence, namely, June, 1932.

The respondent, F. G. Jackson, was a mechanic. He corroborated the evidence of his wife. He stated that the question of pay for Thelma had been forgotten long ago and that the child was very dear to the respondents.

Katherine Hughes, an associate worker of the Catholic Welfare Bureau, stated that on May 27, 1922, she had visited the house of the appellants; that it was a clean, comfortably furnished eight-roomed house. Marie DeLaurier was doing the work and apparently the family was managing very well and was comfortable. The evidence shewed, however, that Joseph DeLaurier had been sentenced to two months' imprisonment for a breach of the *Liquor Control Act*, and one of the boys had been before the Juvenile Court on two occasions for theft.

From the foregoing, it appears clear that the appellants were, at the time Mr. Justice Kerwin examined Thelma, practically strangers to her.

The appellants rely strongly on section 24 of the *Infants Act*, R.S.O., 1927, chapter 186, which reads as follows:—

> Nothing in this Act shall change the law as to the authority of the father in respect of the religious faith in which his child is to be educated.

Section 21 of the *Judicature Act*, R.S.O., 1927, chapter 88, provides as follows:—

> In questions relating to the custody and education of infants, and generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

1934

DELAURIER v. JACKSON.

Hughes J.

In equity a principle was early established that the court might control or ignore the parental right but in so doing it should act cautiously, and should act in opposition to the parent only when judicially satisfied that the welfare of the child required that the parental right should be suspended or superseded.

In the present case, Mr. Justice Kerwin interviewed the infant and then dismissed the application of the appellants, and Mr. Justice McEvoy had some time before dismissed a similar application after seeing the parties and hearing their evidence. The Court of Appeal affirmed these dismissals, and, as the orders of dismissal were in the nature of discretionary orders, I do not know on what principle this Court can now interfere. The appeal, therefore, should be dismissed with costs, against which should be set off the costs of the motion to quash the appeal fixed at $75.

Appeal dismissed with costs.

Solicitor for the appellants: *W. B. McHenry.*

Solicitors for the respondents: *Mulock, Milliken, Clark & Redman.*

1933

*Nov. 23, 24.

1934

*Jan. 26.

WILLIAM G. GOODERHAM, ONE OF THE TRUSTEES OF THE ESTATE OF THE LATE GEORGE GOODERHAM ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Constitutional law—Income received by trustee in Ontario and paid over to persons out of Ontario—Trustee assessed by municipality in 1932 for income so received and paid over in 1931—Assessment Act, R.S.O., 1927, c. 238 (as amended in 1930, c.46), ss. 4, 10, 13 (1) (4) (5) (6)—Nature and validity of the taxation—Direct taxation.

Appellant, a resident of Toronto, Ontario, was a trustee under the will of G. who had died in 1905, a resident of Toronto, Ontario. In 1932 appellant made a return to the assessment commissioner of Toronto shewing income received (in Ontario) during 1931 on a certain trust

PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Hughes JJ.

1934

GOODERHAM v. CITY OF TORONTO.

under G.'s will, which income had been paid over in 1931 to the persons entitled under the trust, who were domiciled and resident in the United States. The city assessor, in the assessment roll prepared in 1932 upon which taxes for 1933 would be levied, assessed appellant for the amount of said income.

Held: The assessment was legal under the provisions of ss. 4, 10 and 13 (1) (4) (5) (6) of the *Assessment Act,* R.S.O. 1927, c. 238 (as amended in 1930, c. 46); which provisions are *intra vires.*

The legislation discussed with regard to its purpose, construction and effect. It does not offend against the requirement that provincial taxation be "direct taxation".

APPEAL by William G. Gooderham, one of the trustees of the estate of George Gooderham, deceased, from the judgment of the Court of Appeal for Ontario dismissing the appeal of said appellant from the judgment of His Honour Judge Denton, Senior Judge of the County Court of the County of York, dismissing the appeal of said appellant from the Court of Revision for the City of Toronto confirming the assessment of the appellant in respect of income, amounting to $73,083, received on a certain trust under the said deceased's will.

The appeal to the Court of Appeal was upon a special case stated by His Honour Judge Denton pursuant to s. 84 of the *Assessment Act,* R.S.O., 1927, c. 238. The special case was as follows:

1. The late George Gooderham died on or about the first day of May, 1905. He was a resident of the city of Toronto, and he duly made his last will and testament, probate whereof was granted on the second day of October, 1905. A copy of such probate is hereto annexed.

2. By his last will and testament the said George Gooderham set aside a share of his estate for his daughter, Mrs. V. D. Bird, and directed his trustees to pay to her the income arising therefrom during the term of her natural life, and on her death the said trustees were directed in the events that have happened to pay the income arising from one-half of said share to the husband of the said daughter in equal quarterly payments on the first days of January, April, July and October in each year, and subject thereto that the income from the said share or so much thereof as the trustees of the said will in their discretion should see fit should be applied towards the support, maintenance and education of the child or children of the said daughter until the youngest child shall have attained the age of twenty-one years, and upon the youngest child of such daughter attaining the age of twenty-one years to divide the whole with accumulations in case the husband be dead, or the one-half share in case he be alive among the surviving children of the said daughter and the issue of any children who may have died leaving issue surviving all as set forth in the said will, a copy of which is attached hereto.

3. The said Mrs. V. D. Bird died prior to the year 1931, leaving her surviving her husband and daughters, all of whom are still living. The said daughters are all under the age of twenty-one years.

1934

GOODERHAM v. CITY OF TORONTO.

4. The said Mrs. V. D. Bird at the time of her death and for a long time prior thereto was domiciled and resident in the state of Massachusetts, one of the United States of America, and her said husband and children were at the time of the death of the said Mrs. V. D. Bird and are still domiciled and resident in the state of Massachusetts, and the income arising from time to time since the death of the said Mrs. V. D. Bird upon one-half of the share of the estate of the said late George Gooderham set apart for the said Mrs. V. D. Bird, pursuant to the direction of his last will and testament as aforesaid, has been paid quarterly to the husband of the said Mrs. V. D. Bird for his own use, and as to the other one-half thereof has been applied towards the support, maintenance and education of the children of the said Mrs. V. D. Bird by paying the same to the said husband upon vouchers for the proper application thereof by him.

5. The trustees of the will of the said late George Gooderham in the year 1932 made a return to the assessment commissioner showing the receipt by them of income to the amount of $73,083, received by them for the year ending December 31, 1931, upon the share of the estate of the late George Gooderham so set aside for the late Mrs. V. D. Bird under the provisions of the said will hereinbefore in part recited.

6. The assessor, in the assessment roll prepared in the year 1932 upon which taxes for the year 1933 will be levied, has assessed William G. Gooderham, one of the trustees under the will of the said late George Gooderham, for the said sum of $73,083 (the income shown by the said return). No objection is taken on the ground that only one of the trustees had been assessed.

7. From such assessment the appellant appealed to the Court of Revision and said appeal was dismissed.

8. The appellant then appealed to the County Judge of the County of York from the decision of the Court of Revision and the appeal came on for hearing before me on the 14th day of December, 1932.

9. On the hearing of the said appeal, the appellant requested me to make a note of the questions of law and construction of statutes raised by him and to state the same in the form of a special case for the Court of Appeal should my judgment be adverse to the appellant.

10. After hearing the evidence and argument I delivered judgment dismissing the said appeal.

At the request of the appellant I have granted this special case, pursuant to section 84 of the Assessment Act. The questions of law and construction of statutes, which I now submit to the Court of Appeal, are as follows:

(1) Was I right in holding that section 13 of the Assessment Act as enacted by section 3 of the Assessment Amendment Act, 1930 [c. 46 of 1930] is *intra vires* of the Legislature of the Province of Ontario?

(2) Was I right in holding that under the provisions of the Assessment Act and the amendments thereto the appellant was properly placed on the assessment roll and assessed in the year 1932 in respect of such income as was received by the said trustees during the year 1931 and paid over in the same year as set forth in paragraph 4, the said assessment being the amount upon which taxes for the year 1933 will be levied?

Dated, January 31, 1933.

J. H. DENTON
J.

By the judgment of the Court of Appeal both questions submitted were answered in the affirmative.

It was contended on behalf of the appellant that s. 13 (1) of the *Assessment Act* (R.S.O. 1927, c. 238, as amended in 1930, c. 46) does not authorize an assessment of the person who receives the income as trustee, but provides for a tax *in rem,* on the income itself; that the intention of the legislation was to get at the income itself and to assess directly; that it does not authorize an assessment to be made in 1932 for the purpose of taxation in 1933 in respect of income received and paid over in 1931; the income cannot then be assessed "in the hands of the trustees"; that if the assessment is to be treated as a personal assessment of the trustee, then it was beyond the power of the legislature to enact the legislation.

It was contended on behalf of the respondent that s. 13 of the Act authorized the assessment of the appellant in respect of income received by him as trustee, which is payable to persons resident out of Ontario; that the Act authorized the assessment of the appellant in 1932 in respect of such income received in 1931; and that the legislation was *intra vires.*

The relevant provisions of the Act are set out in the judgment now reported.

D. L. McCarthy, K.C., and *J. W. Pickup, K.C.,* for the appellant.

C. M. Colquhoun, K.C., and *J. P. Kent* for the respondent.

E. Bayly, K.C., for the Attorney-General of Ontario.

The judgment of the court was delivered by

DUFF C.J.—The facts are set forth in the stated case and it will not be necessary to repeat them. It will be convenient first to consider the question as to the validity of the legislation.

The primary provision of the *Assessment Act* is s. 4, R.S.O., 1927, c. 238, and it is in these terms:

> All real property in Ontario and all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation * * *

1934

GOODERHAM v. CITY OF TORONTO.

Duff C.J.

The purpose of the legislature, clearly expressed in this enactment, is that income received in Ontario by or on behalf of persons not resident in Ontario shall be liable to taxation. The specific provisions dealing with income falling within this rule are to be found in s. 13 of the Act, subsections (1), (4), (5) and (6). But before discussing these provisions we shall first quote s. 10, which is in these words:

10. (1) Subject to the exemptions provided for in sections 4 and 9:

(*a*) Every person not liable to business assessment under section 9 shall be assessed in respect of income;

* * *

(2) The income to be assessed shall be the amount of the income received during the year ending on the 31st of December then last past.

For the elucidation of this provision, it should be mentioned that s. 1 (*l*) provides that the word "person" includes "agent" or "trustee". Where income is received, therefore, in Ontario during a given year by a trustee on behalf of somebody who is resident out of Ontario, that income, by force of the provisions of the Act, is assessable to income tax in the succeeding year. In the ordinary case, as it admittedly was in the present case, the assessment is made upon a return received by the Assessment Department from the trustee after the expiration of the year during which the income was received; and at a time, therefore, when the amount has been definitely ascertained.

We now turn to the provisions specifically dealing with income received in Ontario by trustees for payment to persons not resident in the province. These provisions are as follows:

13. (1) Where a person resident in Ontario creates a trust or agency fund or dies leaving an estate, and income from such fund or estate is payable to a person resident outside of Ontario, the income payable to such non-resident shall be assessed in the hands of the executors, administrators, trustees or agents of such estate or fund, who may pay the amount of taxes out of the income in their hands.

(4) Any executor, administrator, trustee or agent failing to pay the income tax levied upon any assessment made under this section out of the fund or estate shall be personally liable therefor.

(5) The municipality entitled to assess shall be the municipality in which the testator resided at the time of his death, or in which the settlor or principal resided at the date of the creation of the trust or agency fund, or, if the testator, settlor or principal did not reside in Ontario, at such time or date, the municipality where the trustee or agent resides, or if there be more than one, where the chief business of the trust or agency fund is carried on.

(6) Where the person in receipt of income assessable under this section resides or carries on business within the municipality entitled to assess,

the assessment shall be made either at his place of business or residence; and where such person does not reside or carry on business in the municipality entitled to assess, the assessment shall be made at the office of the clerk of such municipality.

In conformity with the general enactment of s. 4, such income is assessable, and it is not disputed that s. 10 (2) governs the procedure. The income described in s. 13 (1), therefore, is to be assessed "in the hands of" the executors, administrators or trustees in the year succeeding the receipt of it. It is assessable because, in the language of s. 4, it is "liable to taxation". By that section, it is placed in precisely the same category purposes as income derived by "a person resident" in Ontario.

There can be no possible question that such income is taxable by the province. It is property in the province and subject to the control of the provincial legislature. Moreover, it belongs to a class of subjects to which Lord Hobhouse, in *Bank of Toronto* v. *Lambe* (1), refers to in these words:

> [It] is always spoken of as [a direct tax], and is generally looked upon as a direct tax of the most obvious kind;

(See also the judgment of the Judicial Committee in *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (2)).

The legislature having determined to do what it was entitled to do, that is to say, to provide for the assessment of such income for the purposes of income tax, might have proceeded in various ways. The legislation intending to carry out this design might have enacted that the executor, administrator or trustee should hold the income in trust, primarily to pay the tax, and, thereafter, to pay over the residue in accordance with the trusts declared by the instrument creating the trust. The legislature adopted a somewhat different course. The statute first declares that income shall be assessed in the hands of the trustees; and then proceeds to empower the trustees to pay the tax "out of the income in their hands", and then (subs. 4) to enact that the trustee "failing to pay the income tax levied upon any assessment made under this section out of the fund or estate shall be personally liable therefor." The intention of the statute appears to be unmistakeable. The income is to be assessed in the hands of the trustees. The

(1) (1887) 12 App. Cas. 575, at 582. (2) (1933) 50 T.L.R. 83, at 86.

1934

GOODERHAM v. CITY OF TORONTO.

Duff C.J.

trustees may pay the tax out of the income in their hands, and, failing to do so, they shall be personally liable. In substance, there appears to be little difference between authorizing the trustee to pay out of the income and penalizing him by making him personally liable if he fails to do so, and constituting him a trustee of the income for the purpose of paying the tax, or requiring him to pay the tax out of the income.

The purpose of the legislature being to levy a tax in respect of income received by the trustee in Ontario, (the trustee being, it may be added, as appears from subs. 5, resident in Ontario) I can see no reason why any one of these methods might not lawfully be adopted.

I do not think such legislation offends against the condition requiring provincial taxation to be "direct taxation". The statute plainly contemplates, as already indicated, the residence of the trustee within the province, and the machinery provided is intended to prevent the frustration of the purpose of the statute by the transfer of the income beyond the boundaries of the province by the trustee without making provision for payment of the tax. The intent is to levy the tax pursuant to the assessment, that is to say, pursuant to the assessment in the hands of the trustee. The machinery is provided for the purpose of giving effect to this intention. It is to be paid out of the property of the person who is ultimately to bear the burden.

There remains a question as to the form of the assessment. The statute directs that the income shall be assessed "in the hands of the trustee". The municipality has acted upon the view that, in compliance with this requirement, the trustee in his representative capacity should be assessed in respect of the income. We think this is a reasonable construction of the statute. The sections immediately under consideration, whatever else may be said about them, do undoubtedly contemplate an assessment of such a character as under the provisions of the municipal law will enable the municipality to levy and collect the tax; but they do not contemplate that the tax shall be levied and collected except in a manner consistent with the specific provisions of the statute dealing with the assessment of such incomes as we have cited above. The form of the assessment, it would appear, can be of little importance.

1934

GOODERHAM v. CITY OF TORONTO.

Duff C.J.

The liability of the trustee is defined in explicit terms by the statute. The form of the assessment cannot, under the general provisions of the municipal law or the taxation law, either cut down or enlarge that liability.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitor for the respondent: *C. M. Colquhoun.*

1933

* Nov. 10, 13.
* Dec. 22.

J. W. PARADIS.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Conspiracy—Evidence—Proof of unlawful agreement—Instances when evidence is relevant—Whether irrelevant evidence, prejudicial to accused, should be merely ruled out, or a new trial ordered, is a matter primarily to be decided by trial judge.

On a charge of conspiracy, the agreement itself, no doubt, is the gist of the offence; but the actual agreement need not be proven by direct evidence. It may be gathered from several isolated doings, having possibly little or no evidentiary value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

Admissions directly from the mouth of the accused of a nature to elucidate the true meaning and the character of his relations with an alleged co-conspirator constitute relevant evidence.

On a charge of conspiracy to set fire to a building, evidence of a recent attempt on the part of the accused to induce another person (not connected with the present charge) to commit the offence, is relevant as tending to establish criminal intent and guilty design, if the defence is trying to assign an innocent purpose to the acts directly charged as establishing the conspiracy.

It is not error for a trial judge to permit proof of acts of the alleged conspiracy to be given in evidence before the agreement to conspire has been established, provided the latter is in fact proved during the course of the trial.

There may be extreme cases where an unexpected and irrelevant reference made by a witness to a statement alleged to have been made by an accused is so prejudicial, that merely ruling out the evidence is insuffi-

* PRESENT:—Duff C.J. and Rinfret, Smith, Crocket and Hughes JJ.

1933

PARADIS v. THE KING

Rinfret J.

cient fully to protect the accused, and the jury should be discharged and the prisoner tried before a fresh jury. But it is primarily for the trial judge to decide whether such a course ought to be followed, under the circumstances of the particular case; and a court of appeal will always approach with great caution a question as to the propriety of that decision.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the jury's verdict of conviction of the present appellant on his trial (before Gibsone J. and a jury) on a charge of conspiracy to commit arson. The material facts for the purposes of the present appeal, and the questions in issue in the appeal, are sufficiently stated in the judgment of Rinfret J., now reported. The appeal to this Court was dismissed.

Lucien Gendron K.C., Oscar Gagnon and *William Paradis* for the appellant.

Valmore Bienvenue, K.C., for the respondent.

The judgment of the court was delivered by

RINFRET J.—This case is the consequence of a fire which partly destroyed a furniture factory at Daveluyville, in the province of Quebec, during the night of the 29th of December, 1931.

In May, 1932, one Donat Pépin, who was night watchman at the factory, was convicted of having wilfully set the fire.

In June of the same year, the appellant was charged with conspiracy to commit the crime with Pépin, or with other persons unknown. He was found guilty by the jury. He appealed to the Court of King's Bench, and the conviction was confirmed by a majority of the judges of that Court, Howard J. dissenting with regard to the admissibility in evidence of certain telegrams and of the testimony of one Bergeron. The points of dissent alone must be considered and determined on the present appeal.

First, as to the telegrams.—

In attempting to place before the jury the facts tending to establish the existence of the conspiracy, it was part of the Crown's case to prove that Pépin had been hired as night watchman at Daveluyville, at the suggestion and through the endeavours of Paradis, in furtherance of the plot to burn the factory.

On December 21, 1931, Paradis was proven to have written to the Victoriaville Furniture Co., owners of the factory, a letter reading as follows:—

Paradis & Pellerin Limitée,
Successeurs de J. W. Paradis & Jean A. Pellerin,
J. W. Paradis, Courtier en Assurances,

Victoriaville, Qué. ce 21 décembre 1931.

Victoriaville Furniture Ltd.,
Victoriaville, P.Q.

Messieurs:—*Attention M. Georges Cantin.*

J'ai examiné les polices d'assurance et je considère qu'il serait mieux pour vous d'avoir un gardien de nuit et un de jour, parce que les compagnies d'assurances croient qu'un homme ne peut pas garder pendant 24 heures, parce que lorsqu'il a gardé pendant 12 heures, c'est tout ce qu'il peut faire.

Alors veuillez donc, s'il vous plaît, vous entendre avec M. Donat Pépin, le garçon de Jules, pour qu'il puisse garder la nuit.

J'ai parlé à M. Pépin qui est allé recevoir un char de bois actuellement, mais il doit revenir mercredi soir, et il serait prêt à commencer jeudi. En attendant je notifie les compagnies d'assurance que vous avez un gardien de jour et un de nuit.

Bien à vous,

(Signé) J. W. Paradis.

In that letter as will have been noted, Paradis stated he had already spoken to Pépin about the suggested engagement.

The next day, December 22, the following telegrams were alleged to have passed between Pépin and Paradis:—

Daaquam, Qué. 22 décembre 1931.

J. W. Paradis,

Veuillez me faire remplacer par Maurice Lachance, rue St-Jean-Baptiste, d'ici quelques jours; je serai pas Victoriaville avant vendredi, tel qu'entendu tous les deux.

Donat Pépin.

Victoriaville, le 22 décembre 1931.

Monsieur Donat Pépin,
Daaquam, Co. Montmagny.

Sur quel train arriverez-vous vendredi?

J. W. Paradis.

Daaquam, 22 déc. 1931.

J. W. Paradis,

Je calcule arriver vendredi par train de nuit.

Donat Pépin.

1933

PARADIS v. THE KING

Rinfret J.

There was ample evidence for the jury to find that the telegrams had been actually exchanged between the parties. But the appellant sought to discount their evidentiary value on the ground—to quote the learned dissenting judge—that

> The language of the telegrams conveys no hint of any concealed, sinister purpose; one has to read into them what is not there to give them any such import. And that is all the writing connected with the accused that there is of record. No one professes to have been present when the alleged plot was formed between Paradis and Pépin or to have overheard it or even to have seen them together in conference before the fire.

We think the objection is untenable. Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. Ordinarily the evidence must proceed by steps. The actual agreement must be gathered from "several isolated doings", (Kenny—"Outlines of Criminal Law", p. 294) having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

In that view, the telegrams exchanged between Pépin and Paradis were undoubtedly receivable. Indeed, when connected with the other facts of the case, they might well be regarded as part of the agreement itself. At least, they formed important links in the chain of detached acts of the parties obviously tending towards the common design and from which the conspiracy might be inferred.

We have no doubt that, in the premises, the telegrams were rightly admitted in evidence by the learned trial judge.

The other question raised by the dissenting judgment refers to the legality of portions of Bergeron's testimony with regard to certain conversations he declared he had with the appellant on the 22nd of December, 1931, and later with Pépin before and after the fire.

Proof of the conversation with the appellant should not have been permitted—so it is contended—" because of its obvious irrelevance ".

Bergeron testified that, on the 22nd of December—and therefore barely six days before the happening of the fire—

the appellant, who was then his employer, called him to his office and offered him five hundred dollars to burn the factory. He stated furthermore that he asked him to drive with him to Daveluyville. On their way, to quote the words of the witness himself,

Dans l'automobile, il m'a proposé de mettre le feu à la manufacture, même de me faire nommer gardien à la manufacture; qu'il pouvait me faire nommer quand il voudrait; que c'était facile pour lui; qu'il n'avait que la peine de donner une lettre etc.

After they had reached Daveluyville, Paradis showed him around the factory and, during the course of this visit, pointed to him a likely convenient place to set the fire ("Ici, ce serait une très bonne place, c'est bien sec"). He added:

Le bon temps pour faire brûler ça, c'est le jour de Noël au soir, pendant la messe de minuit; tout le monde serait à l'église, il y aurait personne pour remarquer le gars qui mettrait le feu.

And, as he was positively indicating his unwillingness to act, Bergeron relates that Paradis then said:

J'aurais bien Donat Pépin pour faire la job . . . (mais) il n'est pas ici; il est rendu au diable au vert. J'ai reçu un télégramme à matin, il ne pourra pas être ici avant le Jour de Noël après-midi . . . Il ne sera pas là; puis, finalement, on pourra pas le faire brûler le jour de Noël.

Thereupon, seeing that Bergeron persisted in his refusal, Paradis is stated to have said:

Pense plus à ça. Parles-en pas même à ta femme çà, je ne voudrais pas que personne sache çà.

We are unable to agree that the above evidence ought not to have been received. So far as it contained admissions directly from the mouth of the accused of a nature to elucidate the true meaning and the character of his relations with Pépin, the evidence was clearly relevant. If, as suggested by counsel for the appellant, it tended to show, on the part of the accused, a previous attempt to commit a similar offence, still in our opinion the trial judge was right in allowing it to be made in the present case. Indeed, in our view, it was more than evidence of a similar offence; it proved an effort by Paradis to pursue the very object of the conspiracy.

Treating the matter merely from the viewpoint of a similar offence, the rule is that acts of the accused, though not forming part of the incriminated transaction, are relevant, if they bear

upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental.

1933

PARADIS v. THE KING

Rinfret J.

(*Makin* v. *Attorney-General for New South Wales* (1); and see *Baker* v. *The King* (2).

It was competent to the Crown to adduce evidence with the object of showing that the appellant had in mind the setting of the fire to the Daveluyville factory. Bergeron's deposition afforded proof on Paradis' part of a recent attempt to induce Bergeron to commit the offence coinciding with the first steps in the conspiracy with which Paradis was charged. To these initial steps in the alleged unlawful agreement, the defence was trying to assign an innocent purpose. The impugned evidence was relevant as tending to establish criminal intent and guilty design; in fact, it was evidence of the intention to do the very thing for which he was indicted.

The other portions of Bergeron's testimony to which exception was taken have reference to statements of Pépin related by Bergeron and alleged to have been made a few days before the fire, on the 26th of December, 1931, as well as after the fire, in January and February, 1932.

In the dissenting judgment, the objection to the admissibility of those statements is put upon exactly the same ground as the objection in respect of the telegrams already discussed. It is said that neither the telegrams, nor the testimony of Bergeron with regard to the conversations with Pépin, should have been admitted "inasmuch as the Crown failed to make by other means *prima facie* proof of the existence of the alleged conspiracy."

We have already indicated that, upon the ground thus stated, the opinion of the learned dissenting judge cannot be upheld; for, in our view, and quite independently of the declarations said to have been made by Pépin, there was evidence in the record establishing *prima facie* that the appellant was engaged in the unlawful conspiracy. Nor would it be error for a trial judge to permit proof of acts of alleged conspiracy to be given in evidence before the agreement to conspire has been established, if the latter is in fact proved during the course of the trial. *The King* v. *Hutchinson* (3).

No further point need be discussed, for that disposes of all the questions of law raised in the dissenting judgment

(1) [1894] A.C. 57. (2) [1926] S.C.R. 92, at 103.
(3) (1904) 8 Can. Cr. Cas. 486.

which alone is the foundation of the jurisdiction of this Court in the matter. Perhaps we may add that Pépin's statements to Bergeron were not received as proof against Paradis. The trial judge so ruled and the jury was so told. But the indictment mentioned Pépin's name as one of the conspirators and, in this way, it was sought to establish Pépin's connection by evidence tending to show the actual consummation of the crime by him. We will deal later on more fully with the statements of the 26th of December, 1931. As for those of January and February, 1932, they do not incriminate Paradis and in no way do they refer to him. In fact, if anything, that part of the evidence rather leads away from him; at most, it was unnecessary. More particularly in view of the express warning in the presiding judge's address, later to be referred to, we are unable to conclude that any harm was done in the special circumstances.

Before us, however, counsel for the appellant strongly urged that a particular statement of Pépin referring to the accused was of such a character that the whole trial was thereby vitiated.

Although we entertain serious doubt as to whether the point is covered by the dissenting judgment,—and our present view would be that it is not—since we have heard counsel for and against it, we may express the opinion that a full consideration of the able argument presented to us would not warrant, on this point, our interference with the judgment of the majority of the Court of King's Bench.

The statement incriminating Paradis was made on the 26th of December by Pépin to Bergeron, under the following circumstances:

In conformity with the telegrams exchanged on the 22nd of December and with the interview between Pépin and Paradis, as stated in the latter's letter of December 21 already referred to, Pépin had come to Victoriaville; and, on the 26th of December, he was preparing to leave for Daveluyville to take charge of his job as night watchman. That morning, so Bergeron testifies, he met Pépin on the street. Pépin was in Paradis' automobile, a Hudson car, on his way to the garage, where he was to take Paradis' truck for the purpose of driving to Daveluyville. The truck had been out of commission for some time; it required to

1933

PARADIS v. THE KING.

Rinfret J.

be looked after; it needed chains and a new battery. Pépin asked Bergeron to help him in this work of preparation. After they were through, and just as Pépin was leaving, he volunteered the statement that he was starting out for a "damned job". Bergeron said to him he would be better not to undertake it, to which Pépin is alleged to have made the unexpected reply: "Oh, well! I am a bachelor and the Paradis have lots of influence" ("Les Paradis ont de l'influence en masse").

Objection was taken immediately. A long discussion ensued at the conclusion of which the trial judge ruled that the reference to Paradis should be struck from the deposition. Notwithstanding the learned judge's ruling, the appellant strongly contends that the reference was so prejudicial to the accused that the jury should have been discharged and the prisoner tried before a fresh jury.

There may be extreme cases where the suggested procedure might be adopted, although we apprehend the question whether such a course ought to be followed is primarily for the trial judge to decide upon the circumstances of the particular case; and a court of appeal will always approach with great caution a question as to the propriety of that decision. In this instance, at all events, there are clearly no adequate grounds for holding that the learned judge ought to have acted otherwise than he did.

Bergeron's testimony as to the preparations made by Pépin, when leaving for Daveluyville, in Paradis' car, was admissible both as tending to show Paradis' connection with the scheme and as being evidence of acts done by Pépin within the scope of the objects of the conspiracy with which Paradis was identified. (*Baker* v. *The King*) (1). It was therefore contended by the Crown that Pépin's remarks, made at the time of doing such acts in pursuance of the common design, should not be regarded as mere admissions uttered by him but as "contemporaneous comments" so related to the incidents reported by Bergeron and so intimately connected with them as to form part of the acts themselves, the evidence of which was properly receivable. (See Russell on Crimes, 8th ed., vol. I, p. 189, and the authorities therein collected.) But it is not necessary to decide that point in this case, in view of the ruling

(1) [1926] S.C.R. 92 at 103.

1933

PARADIS v. THE KING.

Rinfret J.

made by the learned trial judge. We refer to it only to indicate that the mere mention of the appellant's name at the place complained of in Bergeron's testimony did not, in the circumstances, carry the serious consequences represented to us. In the premises, the evidence objected to was ruled out and all mention of Paradis' name by Pépin was ordered struck from the record. We find, moreover, that in his address to the jury the presiding judge gave them a special direction on this point. He reminded them of his decision that Pépin's statements mentioning the name of Paradis were inadmissible, that any such statements were made without right, and he warned them that the evidence in that respect should be regarded as excluded ("Des paroles que Pépin aurait dites, que Paradis était mêlé à l'affaire, ça, j'ai dit que ça ne pouvait pas faire preuve contre Paradis").

We are satisfied that the appellant has no substantial ground of complaint in the premises.

The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *William Paradis.*

Solicitor for the respondent: *Valmore Bienvenue.*

WINNIPEG ELECTRIC COMPANY.....APPELLANT;

AND

THE CITY OF WINNIPEG AND THE CITY OF ST. BONIFACE.....RESPONDENTS.

1933

*Nov. 13, 14.

1934

*Jan. 26.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Railways—Municipal and Public Utility Board Act, Man., 1926, c. 33, s. 119—Board's order requiring street railway company to pay certain costs in connection with construction of new bridges—Jurisdiction of Board to make the order—Company's obligations under agreements with municipalities.

Appellant company operated in the cities of Winnipeg and St. Boniface a street railway system which had crossed the two bridges in question, but service across them had been discontinued as one of them was considered unequal to the strain of increasing general traffic over it, and appellant had provided (with consent of the municipalities) a substituted service. The municipalities replaced the bridges by new and

*PRESENT:—Duff C.J. and Lamont, Smith, Cannon and Crocket JJ.

1934

WINNIPEG ELECTRIC CO. v. CITY OF WINNIPEG AND CITY OF ST. BONIFACE.

stronger ones, the change involving construction on alignments different from those of the old bridges and the substitution of two lines of track for the former single track. On application by the municipalities, the Manitoba Municipal and Public Utility Board made an order requiring appellant to pay the cost of placing rails, ties and foundations therefor on the bridges and one-half the cost of such work in connection with the approaches.

Held: The order was unauthorized. From the Board's memorandum of judgment, its line of consideration of the application, and its finding in former proceedings, the order must be taken as one grounded on s. 119 (*a*) of the *Municipal and Public Utility Board Act,* Man., 1926, c. 33; and to justify it under s. 119 (*a*) it must be an order requiring appellant to perform some duty or obligation imposed upon it by statute or municipal by-law or provisions of its own charter or by agreement with either of the municipalities or other owner; and no such obligation as the Board had ordered was so imposed. Having regard to the respective obligations of appellant and of the municipalities, under the agreements with respect to the old bridges, and it not appearing that the stoppage of service over the bridges was due to any default of appellant, and as no responsibility rested on appellant for the taking down and replacement of the old bridges, the Board had no authority to require the payments ordered from appellant, either as a statutory or contractual liability, or as payments necessitated by renewal of the former service. The taking down of the bridges, without any new agreement with appellant, relieved appellant from further obligation in respect of its agreements. Sec. 15 of by-law 543 (by-law granting franchise to appellant) of the City of Winnipeg, as to the city council's right to demand construction of new lines, had no application, as no such demand was shown to have been made, there was no obligation on appellant under the by-law to share in the cost of a new bridge, and appellant had its track on the bridge when it was taken down.

Judgment of the Court of Appeal for Manitoba, 41 Man. R. 1, affirming the Board's order, reversed.

APPEAL by the Winnipeg Electric Company from the judgment of the Court of Appeal for Manitoba (1), dismissing the Company's appeal from the order of the Municipal and Public Utility Board (the Board created by the *Municipal and Public Utility Board Act,* Statutes of Manitoba, 1926, c. 33), requiring the Company to pay the entire cost of placing rails, ties and foundations therefor on two bridges then in course of construction and one-half the cost of such works in connection with the several approaches to the bridges. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed and the order of the Board set aside, with costs throughout.

(1) (1933) 41 Man. R. 1.

W. N. Tilley, K.C., and *R. D. Guy, K.C.*, for the appellant.

Jules Preudhomme, K.C., for the respondent, City of Winnipeg.

F. Trafford Taylor for the respondent, City of St. Boniface.

The judgment of the court was delivered by

CROCKET J.—In the year 1893 the town council of St. Boniface passed a by-law granting to the Winnipeg Electric Street Railway Co., which was then operating a street railway system in the city of Winnipeg, the right to construct and operate single or double lines of street railway on any of the streets of St. Boniface. This franchise was originally granted for the term of 30 years, which period was within a few days extended to 40 years by an amending by-law, with the right to the town on the expiration of that period on notice to take over the system at a valuation to be determined by arbitration. One of the conditions of the franchise was that the fares to be charged should not exceed the fares then charged in Winnipeg and that no more than one fare should be charged for any continuous trip, "this to include a continuous trip from the Town of St. Boniface to the City of Winnipeg, or from the City of Winnipeg to the Town of St. Boniface." By a later by-law, passed July 31, 1902, it was provided that transfers " shall be given on said railway in Winnipeg to passengers from St. Boniface and to St. Boniface in the same manner as transfers are at present given in Winnipeg ".

In May, 1904, the Street Railway Co. entered into an agreement with the Norwood Improvement Co. Ltd., which had constructed a bridge across the Red River, the centre thread of which forms the boundary between the city of Winnipeg and the town (now the city) of St. Boniface, and was then maintaining it as a toll bridge, whereby the Improvement Co. granted the right to the Street Railway Co. to lay an electric street railway track upon the easterly side of the bridge and the approaches thereto and to operate passenger cars upon the said track for a period of eight years. This agreement provided that the Railway Co. should at all times during its continuance keep so much of

1934

WINNIPEG ELECTRIC CO. v. CITY OF WINNIPEG AND CITY OF ST. BONIFACE.

Crocket J.

the surface of the bridge as may be between the rails of the said track and for the space of two feet on the outside of each rail in good repair, and further, that the Improvement Co. should have the right, whenever it should deem it necessary, to take up the rails or that part of the bridge covered by the rails

for the purpose of altering or repairing the said bridge, or for any other purpose within the province or privilege of the Improvement Company; the same being replaced by and at the expense of the Improvement Company.

There was a further clause that the Railway Co. should assume all responsibility and risk and liability of and in connection with the strength and sufficiency of the bridge "for the purposes for which the leave and licence hereby given is granted" and that

should any strengthening or altering of the said bridge be required now or at any future time, during the continuance of this agreement, to make the same sufficient for such purposes, such strengthening and altering shall be done by the Street Railway Company at its own expense and to the satisfaction of the Improvement Company.

Another clause freed the Improvement Co. from all liability for any loss or damage arising from the construction or operation of the street railway upon and across the bridge.

In March, 1909, the City of St. Boniface purchased this bridge and all the vendor's rights in connection therewith from the Norwood Improvement Co. by an agreement in which the Street Railway Co. joined, and by which the latter accepted the City of St. Boniface in substitution for the Improvement Co. in all contracts and agreements between the Company and the Railway, and released the Company from all liability in respect thereof. By a supplementary agreement entered into a few days later the Railway Co. agreed with the City that whenever the City should pave the balance of the bridge, it would pave and maintain the pavement of that portion of the bridge lying between the railway tracks during the term of the operation of the Company's cars and keep the same "in as good condition as the balance of the pavement on the bridge shall be kept and maintained by the City", and the City on its part agreed to make and keep the bridge as a public highway for the free passage of the public and the cars and passengers of the Company.

The Winnipeg Electric Railway Co. and its successor, the Winnipeg Electric Company, the present appellant,

continued to operate its cars across this bridge under the terms of these agreements until September, 1929. In the year 1926, the bridge having been considered to be unequal to the strain of the increasing motor vehicle and other traffic, the Company put in some stringers at its own expense to strengthen and make it safe for its own cars after unavailingly notifying the city authorities that some means must be found to relieve the traffic conditions on the bridge with an intimation that if this were not done the Company would be compelled to discontinue its service over it.

In August, 1929, the question of the safety of the bridge was again raised, when the Company called the City's attention to the fact that, while it was complying with the recommendations contained in a report prepared by the City's consulting engineer as a result of the complaints of 1925, the City had taken no steps to control other traffic over the bridge, in accordance with its own engineer's report, and that unless something were done to this end, the Company would have to seriously consider discontinuing service over the bridge. The City's consulting engineer thereupon made a further examination of the bridge and recommended that all street cars, trucks and horse-drawn vehicles be stopped from using the bridge. The Company in consequence discontinued its service over the bridge, and immediately applied to the City Council of Winnipeg for permission to extend a bus service it was operating on River Ave. as far north on Main St. as the Union Station, in order that its patrons might not be inconvenienced. This permission was granted as a temporary measure and during the pleasure of the Council. On the St. Boniface side the Company installed a loop near the approach to the abandoned bridge and used the Provencher Ave bridge further down the river for the crossing of its cars to Winnipeg.

Before this stoppage the Street Railway Co. had maintained its St. Boniface-Winnipeg interurban service via the Norwood bridge and South Main St. which afforded the approach to the bridge on the Winnipeg side, running almost due north from and on a straight line with the bridge, and intersecting Bell, River and Mayfair Avenues, before crossing the Assiniboine River by the Main St. bridge on to Main St. These two bridges appear by the plans in evidence to be separated by a distance of some 800 feet.

1934

WINNIPEG ELECTRIC CO. v. CITY OF WINNIPEG AND CITY OF ST. BONIFACE.

Crocket J.

The substituted service provided for as above continued for upwards of a year without any arrangements being made by either the City of St. Boniface or the City of Winnipeg for the strengthening or replacement of the Norwood bridge, or the restoration of the former service. In the fall of 1930 negotiations took place between the two municipalities looking to the construction of new and stronger bridges across the Red River on the site of the abandoned Norwood bridge and across the Assiniboine River on Main St. and to the substitution of two lines of street railway track across both bridges for the single track on which the service had formerly been maintained, the proposal embracing also the widening of Main St. South, though a double track appears to have already been installed on this street between the two bridges. Both cities hoped to secure appropriations from the contributions which it was expected the federal and provincial governments would make for unemployment relief. In the end the two cities obtained estimates of the cost of the proposed two new bridges—$620,000 for the Norwood bridge, and $480,000 for the Main St. bridge, and assurances that the federal and provincial governments would each contribute $180,000 to the cost of the Norwood bridge—about 60 per cent. of the entire cost, and 25 per cent. each to the cost of the Main St. bridge. The balance of the cost of the Norwood bridge was to be shared between the two cities, while that of the Main St. bridge was to be borne by the City of Winnipeg. Efforts were then made to obtain from the Winnipeg Electric an agreement to share in the cost of both bridges. The president of the Company promised to recommend to the directors the approval of an arrangement whereby the Company would pay interest not exceeding 5½ per cent. and sinking fund payments on such amount of money as might be necessary to build street car tracks on both bridges, together with any additional outlay which might be necessary to connect up the existing tracks with the bridges and any other changes which might result from their construction, the entire capital sum for which the Company should be responsible not to exceed $50,000. This proposal, however, was not acceptable, and the two cities went on with the work without effecting any agreement with the appellant, and, in June, 1931, while the bridges were in course of construction, applied to the

Municipal and Public Utility Board to compel a contribution from the Company. This application was dismissed but the Board granted leave to the municipalities to reopen the application for the settlement of the terms by which car services across the bridges might be provided when construction was completed. The two cities, therefore, on June 30, 1931, joined in an application to have fixed the amount payable by the Company as its share of the cost of paving and for placing street car rails on both bridges and for the settlement of the terms by which street car services across the bridges might be provided when construction was completed. On this application the Board made an order requiring the Company to pay the entire cost of placing rails, ties and foundations therefor on both bridges and one-half the cost of such works in connection with the approaches to both bridges, and authorizing the Company to charge the expenses occasioned thereby to its street railway depreciation reserve fund—a fund which, it was stated on the argument, does not exist. The amount of the required payments was not stated, but it is said in the appellant's factum that they will total between $50,000 and $60,000. From this order an appeal was taken to the Appeal Court of the Province of Manitoba. The Appeal Court dismissed this appeal (1), and the Company now appeals from the decision of the Appeal Court.

By s. 119 (*a*) of the *Municipal and Public Utility Board Act,* the Board is given power on notice to and hearing the parties interested to require every owner of a public utility to comply with the laws of the Province and any municipal by-law affecting the public utility or its owner,

and to conform to the duties imposed thereby, or by the provisions of its own charter, or by any agreement with any municipality or other owner;

and by subs. (*c*) of the same section:—

to establish, construct, maintain and operate any reasonable extension of its existing facilities when in the judgment of the Board such extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same, and when the financial condition of the owner reasonably warrants the original expenditure required in making and operating such extension.

It is quite apparent from the Board's memorandum of judgment that it dealt with the application as one for the restoration of an abandoned service, under 119 (*a*), and

(1) (1933) 41 Man. R. 1.

1934

WINNIPEG ELECTRIC CO. v. CITY OF WINNIPEG AND CITY OF ST. BONIFACE.

Crocket J.

not as one for the extension of existing facilities under 119 (*c*). In fact the chairman in his judgment distinctly states that

> notwithstanding that much of the evidence submitted was referable to the extension of existing facilities, the Board regards the application as one for the renewal of the former services which were temporarily abandoned because of the condition of the old bridges.

No consideration was given therefore to the question as to whether the financial condition of the Company reasonably warranted the expenditure which was ordered, without which by the express terms of 119 (*c*) no order could properly be made if the application were treated as one for the extension of existing facilities. As a matter of fact the Board itself, in dismissing the application to compel the Company to contribute to the cost of the new bridges, stated that the evidence was abundant that then and for some time this utility was not meeting and had not met costs properly chargeable to service with little or nothing whatever for the use of large sums of money fixed irrevocably in the assets of the utility, and found that the conditions existing were not those on which it should make an order grounded on 119 (*c*). It is perfectly clear, therefore, that the validity of the order appealed from must rest upon 119 (*a*), and that it can be justified only as an order requiring the Company to perform some duty or obligation which was imposed upon it by some Act of the Legislature or by some municipal by-law or by the provisions of its own charter or by some agreement with either of the two cities or other owner.

It is not contended that there is any provision in the Company's charter by which any such obligation is imposed as that which the Board has ordered. No provision of any Act of the Legislature was cited as the ground of the Company's liability to make the payments which the order requires. The only municipal by-laws and agreements, as regards the City of St. Boniface, which are relied upon by that City, are those which have already been mentioned, viz: the by-law of 1893 granting to the Company the right to construct and operate single or double lines of street railway on the streets of the town; the by-law of 1902; the agreement entered into between the Norwood Improvement Co. and the Railway Co. in 1904; and that of 1909 between the Improvement Co. and the City, in which the Railway Co. joined.

The by-law of 1893 granting the franchise to the Company made no mention of maintaining an interurban service across Norwood bridge or any other bridge. The only provision in it that can be relied upon is that of paragraph 3, that the fares to be charged shall not exceed those then charged in Winnipeg and that no more than one fare was to be paid for any continuous trip, " this to include a continuous trip from the Town of St. Boniface to the City of Winnipeg, or from the City of Winnipeg to the Town of St. Boniface ". In no view can this be said to imply an agreement on the part of the Company to provide a service across the old Norwood bridge which, it would seem, was not even in existence at that time.

The appellant's obligations in respect of maintaining a service across that bridge are grounded wholly on the Company's agreement of 1904 with the Norwood Improvement Co. and in the agreement by which the City purchased the bridge from that corporation in 1909 and in which the Railway Co. joined. These obligations have already been pointed out. They are clearly limited, so far as repairs are concerned, to the surface of the bridge between the rails of a single track and for two feet on the outside of each rail, and, as to the strengthening or altering of the bridge, to making the bridge sufficient for the purpose of running its own street cars over it, and then only during the continuance of that agreement. Neither of these agreements contemplated any obligation on the part of the appellant to strengthen or alter the bridge beyond the requirements of its own single track service. Most assuredly it never contemplated that the Company should be charged with the duty of strengthening or altering the bridge to such an extent as to make it sufficient to endure the increasing load and strain of motor cars and motor trucks and all other traffic. It must be remembered that the Norwood Improvement Co. built and owned the bridge and that the City acquired it from this company, not only with all the latter's rights under its agreement with the Railway Co., but with the Improvement Company's obligations under that agreement as well, and that one of these obligations was that if the Improvement Co. should at any time take up the rails or that part of the bridge covered by the rails for the purpose of altering or repairing the bridge or for any other

1934

WINNIPEG ELECTRIC CO. v. CITY OF WINNIPEG AND CITY OF ST. BONIFACE.

purpose within the province or privilege of the Improvement Co., it should replace them at its own expense; also, that the City, by the supplementary agreement of March, 1909, undertook to make and keep the bridge as a public highway for the free passage of the public and the cars and passengers of the Railway Co.

Crocket J.

The evidence by no means shews that the stoppage of the car service over the bridge was due to any default on the part of the Company. On the contrary it shews that it was brought about by the report of the City's own consulting engineer, and points rather to the conclusion that, while the Company was prepared to discharge its obligations in respect of this service, the City itself failed to heed the recommendations of its own engineer and to take any steps to control or curtail the motor and other traffic which was the real cause of rendering the bridge unsafe.

It is to be borne in mind too, that no responsibility rests on the Company for the taking down of the old bridge and its replacement by the new one. That responsibility rests wholly on the City of St. Boniface as the owner of the structure, which entered into the agreement with the City of Winnipeg to make the change without the consent or approval of the Company. Had the old bridge remained and been kept safe for a single track street car service, the Company's liability would have been at most to keep the pavement between its rails and two feet on either side of its track up to the standard of the pavement maintained on the rest of the bridge by the City, and the City, had it removed the railway tracks for any purpose, would have been required, by the express terms of its agreement, to replace them at its own expense. We think that when it took down the entire bridge in the absence of any new agreement with the Company it relieved the latter of any further obligation in respect of its agreement with the former owner in 1904 or with the City itself in 1909, and are quite unable to appreciate upon what ground it can be said that there was any contractual obligation on the part of the Company either to contribute to the cost of the new bridge or to pay for the substitution of a double track over it and its approaches in lieu of the single track on which it maintained its former service.

The City may have been fully justified on grounds of public convenience and justice to the residents of St. Boniface, who were dependent on the old service for transportation to and from Winnipeg, in undertaking the construction of the new and larger work, designed for a double track and of a strength sufficient to carry street railway cars twice the weight of the cars which have all along been sufficient for the Company's traffic in and about Winnipeg, but, failing the negotiation of any new agreement with the Company, the Municipal and Public Utility Board, in our judgment, had no authority under their Act to require these payments from the Company, either as a statutory or contractual liability, or as payments necessitated by the renewal of the former service. Although it may be, as the Board states, that this service was temporarily abandoned because of the condition of the old bridges, the Company cannot fairly be said to be responsible for such abandonment, as already intimated, while the construction of the new and larger bridges was undertaken and carried to completion without any new agreement being entered into with the Company and at a time when it was providing a substituted service with the consent of both municipalities. Even if the Board had power to order a renewal of a former service—the ground upon which the Board states it dealt with the application—we cannot perceive upon what principle it can impose upon the Railway Co. any further outlay than that for which it was liable in the maintenance of such former service. The plans agreed upon between the two cities provided for the construction of both bridges on different alignments than those of the old bridges, necessitating additional expense in the building of approaches and otherwise, and for a double track instead of the former single track. An order requiring the Company to pay the entire cost of placing two lines of railway, ties and foundations, across the whole length of both bridges and one-half the cost of the new approaches, manifestly cannot be justified as an order for the renewal of the old service, with respect to which, under its agreements with the City of St. Boniface, the City agreed, in the event of its removing the rails of the single track, to replace them at their own expense.

1934

WINNIPEG ELECTRIC CO. v. CITY OF WINNIPEG AND CITY OF ST. BONIFACE.

Crocket J.

As regards the City of Winnipeg and the Main Street bridge over the Assiniboine River, the franchise granted to the Company by the City of Winnipeg is found in by-law 543 of that city. S. 12 of this by-law provides that

> The City shall have the right to take up the streets traversed by the rails, either for the purpose of altering the grades thereof, constructing or repairing drains, or for laying down or repairing water or gas pipes, or for all other purposes now or hereafter within the province and privileges of the City, the same being replaced by and at the expense of the City, without being liable for any compensation or damage that may be occasioned to the working of the railway or to the works connected therewith.

Although it was stated on the argument that there was no definition at that time that a street included a bridge, the Court of Appeal points out that under both the Winnipeg and St. Boniface charters the word "street" includes the word "bridge". In any event, s. 12 of by-law 543 contains practically the same provision in respect of streets as s. 3 of the agreement of 1904 between the Norwood Improvement Co. and the Railway Co. in respect of rails on the Norwood bridge, namely: that if the City should take up any of the streets traversed by the rails of the Company for any purpose within the province or privileges of the City, the same should be replaced by and at the expense of the City—a principle which the Board in its judgment described as not unreasonable.

The situation, therefore, with respect to the taking down of the Main St. bridge is practically the same as that with respect to the taking down of the Norwood bridge, Main St. bridge being owned and controlled by the City of Winnipeg, as Norwood bridge was owned and controlled by the City of St. Boniface.

Reliance was placed, in behalf of the City of Winnipeg, upon s. 15 of by-law 543, which gives the council the right by written notice served on the Company to demand the construction of any new line or lines within the city limits on any street or streets. This section seems to have no application, however, to the present question, for the record does not shew that there was any demand made by the council upon the Company for the construction of any new line of railway, and certainly there was no obligation upon the Company either to build or to share in the cost of building of a new bridge under any provision in the by-law. In point of fact, the appellant had its tracks on Main St. South between the two bridges and over the old Main St.

bridge when it was taken down. There is, then, no more ground for the contention that there was any contractual liability upon the part of the Company to the City of Winnipeg, as the owner of the Main St. bridge, to provide new tracks over that bridge and approaches thereto, than there is for the contention that there was such liability to the City of St. Boniface to provide new tracks over the Norwood bridge and approaches thereto.

The matter seems to be one calling for the negotiation of a new agreement between the two cities and the appellant company. Failing such an agreement between the parties, it will then be for the Board to say whether, in view of all the circumstances and the financial position of the Company, it is justified in ordering the Company to operate a new service over these bridges in lieu of the service which the Company substituted for the former service across the old bridges with the consent of the City, and if the promised revenues from such new service and the financial condition of the Company warrants the Company in assuming any financial responsibility therefor.

In the meantime the Board's order must be set aside and the appeal allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Guy, Chappell, Duval & McCrea.*

Solicitor for the respondent, City of Winnipeg: *Jules Preudhomme.*

Solicitor for the respondent, City of St. Boniface: *F. Trafford Taylor.*

1933
*Dec. 22.
1934
*Jan. 26.

PAPER MACHINERY LIMITED AND GUSTAF HELLSTROM (DEFENDANTS) ..... APPELLANTS;

AND

J. O. ROSS ENGINEERING CORPORATION AND ROSS ENGINEERING OF CANADA, LIMITED (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Practice—Judgments—Power of court to amend judgment.

The court has no power to amend a judgment which has been drawn up and entered, except (1) where there has been a slip in drawing it up, or (2) where there has been error in expressing the manifest intention of the court. (*In re Swire,* 30 Ch. D. 239; *Ainsworth* v. *Wilding,* [1896] 1 Ch. 673; *MacCarthy* v. *Agard,* [1933] 2 K.B. 417, and other cases, cited.)

MOTION for re-hearing of an appeal (treated by the Court, as stated in the judgment, as a motion praying the Court to amend its judgment).

The defendants had appealed to this Court from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiffs' letters patent for new and useful improvements in processes of drying and apparatus therefor were valid and had been infringed by the defendants.

By the judgment of this Court, delivered on June 16, 1933, a new trial was ordered in the terms of the reasons for judgment, which reasons (delivered by Hughes J., with whom the other members of the Court, Rinfret, Lamont, Smith and Crocket JJ., concurred) were as follows:

The respondents brought this action against the appellants for the alleged infringement of a patent.

We are all of opinion that the peculiar circumstances of the case require that the judgment of the Exchequer Court of Canada should be vacated and set aside, and that the appellants should be permitted to supplement the present record by adding to paragraph 10 of the amended particulars of objections, sub-paragraphs (*v*) and (*w*) as set forth in the notice of motion dated the 26th day of June, 1931, which may be found at page 8 of the case; and also by adding further evidence in regard thereto.

*PRESENT:—Duff, C.J. and Rinfret, Lamont, Cannon and Crocket JJ.

(1) [1932] Ex. C.R. 238.

Counsel for the appellants consented, if a new trial were granted for the above purposes, to waive their remaining arguments on this appeal as to absence of subject matter, as to anticipation and other matters, reserving, of course, their full rights to urge these and all other defences on the new trial and on any appeal therefrom.

Nothing in this judgment is intended to be an approval or disapproval of any of the findings of the learned trial judge.

If either party desires any further amendment, application therefor may be made to the Exchequer Court of Canada.

The costs of the last trial will be costs in the cause. The costs of this appeal will be costs to the appellants in any event of the cause.

The judgment was drawn up and duly entered.

Subsequently the plaintiffs (respondents) made the present motion.

O. M. Biggar, K.C., and *R. S. Smart, K.C.*, for the motion.

W. F. Chipman, K.C., contra

The judgment of the court was delivered by

RINFRET, J.—The respondents apply for a re-hearing of this appeal on the following grounds:

(*a*) that the reasons for judgment and the formal judgment failed to provide the usual terms for such orders as settled in the case of *Baird* v. *Moule's Patent Earth Closet Co.* (1) as set out in the report of *Edison Telephone Co.* v. *India Rubber Co.* (2), and followed in subsequent cases;

(*b*) that the reasons overlooked the statement of counsel for the appellants made at the trial before the Exchequer Court that they did not intend to put in any further evidence with regard to the amendment they sought to add to the particulars, and consequently the costs of the appeal should not have been paid by the respondents.

In our view, this is not matter for re-hearing. In effect, it is a motion praying the Court to amend its judgment. Treating it as such, we find the situation to be as follows:

Judgment was delivered by this Court on the 16th June, 1933, setting aside the judgment of the Exchequer Court and directing that the appellants have leave to supplement the record by adding to the particulars of objections

(1) (1876) 17 Ch. D. at 139 (note).

(2) (1881) 17 Ch. D. 137, at 139 (note).

1934

PAPER MACHINERY LTD. ET AL. v. J. O. ROSS ENGINEERING CORP. ET AL.

Rinfret J.

further particulars set forth in the notice of motion dated 26th June, 1931, before the Exchequer Court; also giving leave to add further evidence in regard thereto. Subsequently the judgment was drawn up and duly entered. In fact, the respondents in this Court petitioned His Majesty the King in Council for special leave to appeal from the judgment; and, on 27th November, 1933, the petition for leave was dismissed with costs.

The question really is therefore whether there is power in the Court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think,—and we see no reason why it should not also be the rule followed by this Court—that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the court (*In re Swire* (1); *Preston Banking Company* v. *Allsup & Sons* (2); *Ainsworth* v. *Wilding* (3)). In a very recent case (*MacCarthy* v. *Agard* (4)), the authorities were all reviewed and the principle was re-asserted. In that case, although, indeed, all the judges expressed the view that the circumstances were particularly favourable to the applicant, but because neither of the conditions mentioned were present, the Court of Appeal came to the conclusion that it had no power to interfere. (The rule as stated was approved by the Privy Council in *Firm of R.M.K. R.M.* v. *Firm of M.R.M. V.L.* (5)).

The respondents' application does not come under the so-called slip rule. Nor is it apparent that some matter which should have been dealt with in the reasons has been overlooked; and, in our view, the minutes as settled accord with the judgment pronounced by the Court. Any doubt which might have subsisted on those points must have been made clear by the discussion before their Lordships of the Privy Council and the order made upon the petition for special leave to appeal.

The case involves the validity of a patent. A question of that nature concerns not only the immediate parties; it

(1) (1885) 30 Ch. D. 239.
(2) [1895] 1 Ch. 141.
(3) [1896] 1 Ch. 673.
(4) [1933] 1 K.B. 417.
(5) [1926] A.C. 761 at 771-772.

concerns as well the public to a large extent (*Lightning Fastener Co. Ltd.* v. *Canadian Goodrich Co. Ltd.*) (1). Bearing that in mind and in order to get at the real merits of the question, the Court exercised its powers under secs. 47 and 49 of the *Supreme Court Act;* and a perusal of the reasons shews that the order was intended to be made in the form of the minutes as settled and as interpreted by the Privy Council with regard to the right of both parties to adduce further evidence. Except as to costs of the appeal, which were granted to the appellant on account of circumstances which, in the reasons, are stated to have been "peculiar", the judgment of this Court does not prevent the Exchequer Court from adopting the form of order as settled in the case of *Baird* v. *Moule's Patent Earth Closet Co.* (2), should the respondents elect before it to abandon the suit, as a consequence of the amendments which have been allowed.

The motion will therefore be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondents: *Smart & Biggar.*

OVIDE COLPRON AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CANADIAN NATIONAL RAILWAY CO. (DEFENDANT) ..... } RESPONDENT.

1933
*Nov. 9.
1934
*Jan. 26

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Negligence—Injury to employee—Cause of the accident—Liability of employer—Circumstances when he is exonerated—"Reasonable precautions"—Articles 1053 and 1054 C.C.

Under the terms of article 1054 C.C., an employer is exonerated from his responsibility for the damage caused to his employee "by things he has under his care" if he can establish that the accident has occurred in such circumstances that no reasonable precautions on his part could

* PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Crocket JJ.

(1) [1932] Can. S.C.R. 189, at 196. (2) (1876) 17 Ch. D. at 139 (note).

1934

COLPRON v. CAN. NAT. RY. CO.

have prevented it. *Quebec R.L.H. & P. Co.* v. *Vandry* ([1920] A.C. 662) and *City of Montreal* v. *Watt & Scott Ltd.* ([1922] 2 A.C. 555) foll.

In order to ascertain if such "reasonable precautions" had been taken, the court must, in a case between employer and employee, ask itself whether the facts in evidence, in themselves or in the inferences properly arising from them, establish that the occurrences which caused the damage complained of would not fall within the risks reasonably foreseeable by an employer applying himself to the matter of the safety of his employees, under a proper sense of his duty in that respect. If the facts in evidence are such as properly to satisfy the tribunal of fact that this proposition has been established, then the exonerating paragraph (art. 1054 C.C., par. 6) applies and the employer has brought himself within its terms.

Per Rinfret, Lamont, Cannon and Crocket JJ.—Upon the evidence in the record, it is impossible to find any reasonable means which the respondent might have employed to prevent the abnormal fact which caused the damage.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Martineau J. and dismissing the appellants' action.

The facts of the case and the questions at issue are fully stated in the judgments now reported.

Charlemange Rodier K.C. for the appellant.

C. A. de L. Harwood K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the conclusion expressed by my brother Cannon negativing the liability of the respondents, the Canadian National Railway Co., and with the substance of the reasons, as I understand them, which he has assigned for that conclusion.

There are certain elements of the reasons which govern the determination of the appeal to which I shall devote a few sentences of my own.

The appellants, en reprise d'instance, are children of Absolon Colpron who, while in the employ of the Canadian National Railway Company, met with an accident on the 20th of June, 1927, of which he died on the 28th of July following. The appellants' claim was for $10,000 damages for loss of support in consequence of the death of their father under arts. 1053, 1054 and 1056 C.C. The victim was struck by a flying plank (thrown by mechanical action), one of the utensils or appliances in use in the work in which the victim was engaged at the time of the accident.

Art. 1054 C.C., the application of which is involved in the consideration of the appeal,

establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of faute and a liability defeasible by proof of inability to prevent the damage. (*Quebec Ry. L.H. & P. Co.* v. *Vandry* (1).

The conditions giving rise to this defeasible liability are (*Vandry's* case, p. 675), (1) that a certain thing was under the defendant's care, and (2) that the plaintiff was hurt by it. The question of the existence of these conditions need not detain us. The immediate and direct cause of the death of the workman was the impact of the flying plank upon the workman's body, which occurred in the employer's shop in the course of the employment of the victim. The plank, as already mentioned, was one of the appliances or utensils used by the employer in the workshop for the purpose of the work there being carried on; and was thrown by mechanical action. I am satisfied that the plank was a thing in the company's care and under their control when it started upon its flight which terminated with the blow from which Colpron's death ensued; but I do not stop to discuss the point,—it may be assumed as against the company.

We now turn to a consideration of the clause of the article which provides for the exoneration of the defendant in certain circumstances. That clause is textually in these words,

The responsibility attaches * * * only when the person subject to it fails to establish that he was unable to prevent the act (le fait) which has caused the damage.

In the *City of Montreal* v. *Watt and Scott, Ltd.* (2), the Judicial Committee, speaking through Lord Dunedin, placed upon this clause an authoritative interpretation. The passage in which that interpretation occurs, so far as now pertinent, is in these words.

If, therefore, the storm in question could be described as a cas fortuit * * * there would, in their Lordships' view, have been a case where the exculpatory paragraph would have applied.

Article 1054 C.C. is of wide scope and applies to many classes of cases. In what I am about to say, it must be understood that I am considering the application of this defeasance paragraph in a case of the kind which we have

(1) [1920] A.C. 662, at 677. (2) [1922] 2 A.C. 555.

1934

COLPRON v. CAN. NAT. RY. CO.

Duff C.J.

now before us, in which a claim is made against an employer under art. 1054 C.C. on the ground that something in his care has been the cause of injury to one of his employees.

It is not open to dispute that the language of the Judicial Committee just quoted embraces and, indeed, actually contemplates a case in which "the damage complained of" has occurred in such circumstances that no reasonable precautions on the part of the employer could have prevented it. Nor do I think there is any room for controversy as to what "reasonable precautions" means as applied to an issue raised by such a claim. I think one must put oneself in the position of an employer assumed to be both prudent and competent and to have applied his mind seriously to the risks of harm to which his employees might be exposed in the course of their employment. Then, I think, one must ask oneself whether the facts in evidence, in themselves or in the inferences properly arising from them, establish that the occurrences which caused the damage complained of would not fall within the risks reasonably foreseeable by such an employer so applying himself to the matter of the safety of his employees, under a proper sense of his duty in that respect. If the facts in evidence are such as properly to satisfy the tribunal of fact that this proposition has been established, then I think the exonerating paragraph applies and the defendant has brought himself within its terms.

In the present case there is some doubt, unfortunately, as to the precise effect of the findings of the lamented Mr. Justice Martineau who tried the case in the Superior Court. I shall assume that there is no finding in the courts below against the appellants—a manner of looking at the case which I think is most favourable to them. Assuming there are no findings, one must consider the facts oneself for the purpose of eliciting an answer to the interrogatories already indicated; and one must approach the examination of the facts much as a competent jury would do.

I have given the case the most anxious consideration and have come to the conclusion that the respondents have neglected no precaution, and have disregarded no risk, which one could find to have been reasonably appropriate or reasonably foreseeable.

The appeal should be dismissed with costs.

The judgment of Rinfret, Lamont, Cannon and Crocket JJ. was delivered by

CANNON, J.—L'action a été prise en recouvrement de dommages soufferts par Albert et Marguerite Colpron, enfants de feu Absolon Colpron, victime d'un accident du travail le 20 juin 1927, alors qu'il était à l'emploi de l'intimée. Depuis l'institution de l'action, savoir le 31 mars 1930, Albert Colpron est devenu majeur et, à la demande du procureur de l'intimée, a repris ou continué l'instance qui avait été commencée par son tuteur pour l'exercice de ses droits. Le procureur des appelants avait comparu pour lui, le 17 octobre 1932, dans les délais d'appel à cette cour. Nous pouvons, nonobstant les objections de l'intimée, considérer que Albert Colpron est régulièrement devant nous comme partie appelante aux lieu et place du tuteur dont les fonctions ont cessé et lui permettre, en conséquence, d'y faire valoir les droits ci-devant exercés par son tuteur.

Le père des appelants, le 20 juin 1927, travaillait comme journalier à l'emploi de l'intimée au transbordement de pièces de fer d'un hangar, dans le port de Montréal, à des wagons de l'intimée longeant ledit hangar. Ces pièces de fer en forme de poutres pesaient trois tonnes chacune et avaient une longueur variant de quarante à cinquante pieds et une largeur de sept à huit pouces. Les instruments dont Colpron et ses compagnons devaient se servir pour cette opération, sous la direction générale d'un contremaître du nom de Renault, étaient un bloc de bois que l'on plaçait au bout de la poutre d'acier et sur lequel on appuyait un madrier de bois de douze pieds de long pour servir de levier pour soulever la poutre de façon à l'entourer d'une chaîne dont on se servait pour le transbordement. Au bout de cette poutre se trouvait une cavité où l'on introduisait le madrier sur lequel deux des compagnons de Colpron pesaient pour soulever la pièce d'acier suffisamment pour permettre à Colpron d'introduire en dessous la chaîne en question. En cette occasion l'on procéda comme d'habitude. Les témoins Paris et Harvey, après que Colpron eût ceinturé la pièce d'acier avec la chaîne, la laissèrent retomber sur la chaîne au-dessus du bout du madrier sans retirer ce dernier. A ce moment, un bout de la poutre en acier repo-

1934

COLPRON v. CAN. NAT. RY. CO.

Cannon J.

sait sur une autre poutre en métal et l'autre partie sur la chaîne. Harvey et Paris laissèrent le madrier pour aller s'occuper du "chain block" à une distance de vingt à vingt-quatre pieds pour continuer l'opération. Dans cet intervalle, alors qu'aucun des ouvriers ne touchait soit au levier, soit au bloc, soit à la chaîne, soit à la poutre, cette dernière fit un mouvement, et obéissant à la loi de la pesanteur, frappa le bout du madrier, le lança dans l'espace, infligeant à Colpron un coup dont il mourut à l'hôpital cinq semaines plus tard.

L'action, qui est en recouvrement de $5,000 pour chacun des demandeurs, était basée à la fois sur les articles 1053 et 1054 du code civil. Le juge de première instance a renvoyé l'action pour les considérants suivants:

Considérant que les ouvriers occupés audit travail n'ont pu donner qu'une seule explication de l'accident; c'est que la chaîne avait été mise autour de la poutre d'une manière un peu lâche, que quelques mailles étaient les unes sur les autres, qu'elles auraient glissé sous le poids de la poutre qui elle-même aurait oscillé suffisamment pour donner un contre-coup au madrier;

Considérant que la faute déterminante de l'accident serait alors la négligence du défunt lui-même;

Considérant, cependant, que si cette explication n'est pas acceptée, la cause déterminante de l'accident serait inconnue;

Considérant que le fait pour les deux ouvriers en question d'avoir laissé le bout du madrier sous la poutre alors qu'elle reposait solidement sur un autre, ne constituait pas un acte de négligence, ce madrier ne présentant pas alors et ne pouvant présenter aucun danger quelconque;

Considérant dès lors que la défenderesse ne saurait être responsable dudit accident en vertu de l'article 1053;

Considérant que les demandeurs ne peuvent non plus invoquer l'article 1054, ledit accident n'étant pas le fait autonome de la chose, mais le fait de ceux qui venaient de manœuvrer lesdits madrier, poutre et chaîne;

La Cour du Banc du Roi a confirmé cette décision avec les dissentiments du juge-en-chef de la province de Québec et de M. le juge Rivard, qui, tous deux, auraient condamné l'intimée pour négligence dans la conduite de cette opération.

Avec respect, je crois que nous sommes en présence du fait dommageable d'une chose dont l'intimée avait la garde. Suivant les termes de l'article 1054 C.C., tel qu'interprété par le Conseil Privé dans *Quebec Ry. L. H. & P. Co.* v. *Vandry* (1), Lord Sumner nous dit qu'il suffit au demandeur de prouver: premièrement qu'une chose était sous la garde

(1) [1920] A.C. 662, at 675.

du défendeur; et, deuxièmement que cette chose lui a causé préjudice, pour imposer à la défense le poids de la preuve qu'elle n'a pu empêcher le fait qui a causé le dommage.

Le Conseil Privé dans *Cité de Montréal* v. *Watt Scott Ltd.* (1), a complété cette décision en ajoutant qu'il suffisait de prouver que la défenderesse n'avait pu empêcher le dommage "par des moyens raisonnables".

Nous croyons que toutes les choses inanimées sont susceptibles d'échapper au contrôle et à la garde matérielle de l'homme, même celles qui sont "inertes". Ces dernières, en effet, demeurent soumises aux lois physiques, à l'action des forces naturelles (pesanteur, vent, etc.). Sous l'empire de ces forces, elles peuvent échapper à l'action de leur gardien; elles ne lui obéissent plus; il y a "fait de la chose" et non "fait de l'homme".

Dans l'espèce, nous pouvons conclure que nous sommes en présence d'un fait dommageable causé par une chose qui a échappé à la garde de l'intimée, qui l'a laissée inerte dans une position telle qu'obéissant aux lois de la pesanteur, elle est tombée sur le madrier, blessant mortellement Colpron. Dès que la victime ou ses représentants ont établi que la chose a échappé au contrôle de son gardien, il ne reste à ce dernier qu'une ressource: démontrer la cause étrangère; faute de la victime, cas fortuit ou force majeure. Dans l'espèce, il n'est pas nié que l'intimée avait le contrôle et la direction des choses qui ont causé le dommage. Ce pouvoir juridique lui permettait et ne permettait qu'à elle seule d'exercer, ou de faire exercer par autrui, la garde matérielle de la chose.

Le juge de première instance n'a pas trouvé catégoriquement que l'accident avait été causé par la victime elle-même. Il nous dit:

> C'est lui-même qui avait passé la chaîne autour de la poutre, et quand il eut fini il donna ordre aux deux hommes de la descendre, ce qu'ils firent, laissant probablement le bout du madrier en dessous de la poutre. Ils n'étaient pas encore rendus à l'endroit où était suspendue la seconde chaîne que le madrier, brusquement déplacé par un mouvement quelconque de la poutre, vint frapper le père des demandeurs.
>
> Qu'est-ce qui a pu occasionner ce mouvement de la poutre solidement placée sur une autre et qui y est restée? Une seule explication a été donnée; c'est que la chaîne avait été mise autour de la poutre d'une manière un peu lâche, que quelques mailles étaient les unes sur les autres,

(1) [1922] A.C. 555, at 563.

1934

COLPRON v. CAN. NAT. RY. CO.

Cannon J.

qu'elles auraient glissé sous le poids de la poutre, qui elle-même aurait oscillé suffisamment pour donner un contre-coup au madrier.

De ce qui suit, il me paraît que si la faute déterminante de l'accident n'a pas été commise par le défunt lui-même, il faut dire qu'elle est au moins inconnue, mais dans un cas comme dans l'autre, la défenderesse ne serait pas responsable.

Nous croyons, avec déférence, que le juge de première instance a fait erreur en imposant aux appelants le poids de la preuve. Au contraire, c'est à l'intimée d'établir que la poutre avait échappé à son contrôle par la faute de la victime ou qu'elle n'avait pu "par des moyens raisonnables, empêcher" cette perte de contrôle. Mais peut-on lui reprocher de ne pas avoir pris les moyens de prévenir l'accident, s'il lui était impossible de prévoir qu'un pareil concours de circonstances pourrait amener le mouvement de cette poutre ou de la chaîne? Après avoir procédé de la même façon, sans accident, depuis plusieurs années, il était invraisemblable qu'une poutre de trois tonnes, placée au-dessus d'une autre poutre reposant sur elle avec cette chaîne, tomberait sur ce madrier de façon à le projeter dans l'espace. Nous croyons être en présence d'un pur accident; et, comme l'a indiqué le juge de première instance, l'on ne saurait dire que, par des moyens raisonnables, l'intimée aurait pu éviter cet accident. Dans l'espèce, il ressort de l'ensemble de la preuve que rien ne pouvait faire prévoir cette perte de contrôle de la chose; et, en conséquence, il serait impossible d'indiquer par quel moyen raisonnable l'intimée aurait pu empêcher le fait anormal qui a causé le dommage.

Il est bon de remarquer qu'il n'appartient pas à la Cour de suppléer d'elle-même comme susceptibles d'être adoptés des moyens qui n'ont été suggérés ni d'un côté, ni de l'autre, au cours de l'enquête et sur lesquels les parties n'ont eu aucune opportunité de s'expliquer. Toute conclusion qu'on pourrait en déduire ne s'appuierait sur aucune preuve. Dans une question de cette nature, la Cour n'est pas en état d'ajouter d'office ses propres vues à celles qui ont été fournies par les intéressés.

Il nous faut donc renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Rodier & Rodier.*

Solicitors for the respondents: *Beckett & Harwood.*

HIS MAJESTY THE KING..... APPELLANT;

AND

THE SHEARWATER COMPANY LIMITED (CLAIMANT)..... RESPONDENT.

1933
* Oct. 16, 17.
1934
* Feb. 6.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Customs—Shipping—Constitutional law—Regulations under ss. 13 and 125 (3) of Customs Act of 1877 (40 Vict., c. 10)—Effectiveness—Nature of Legislation—Requirement, by s. 4 (1) of Merchant Shipping (Colonial) Act, 1869, Imp. (32 Vict., c. 11), of suspending clause in Act or Ordinance of legislature of British possession "regulating (its) coasting trade"—Construction of regulations—Effect of non-publication of later substituted regulation in Canada Gazette (Customs Act, R.S.C. 1927, c. 42, s. 301).

Regulations 4 and 12 of those brought into force by Order in Council of April 17, 1883, which regulations 4 and 12 were made under ss. 13 and 125 (3) of the *Customs Act*, 1877 (40 Vict., c. 10, Dom.), and provided, *inter alia*, that an officer of customs might go on board a coasting vessel and if any goods had been unladen therefrom before the master had reported to a customs officer, the goods and vessel should be forfeited, etc., and that no goods should be put out of any coasting vessel while on her voyage by river, lake or sea, were legally operative, notwithstanding that the procedure described by s. 4 (1) of *The Merchant Shipping (Colonial) Act, 1869*, Imp. (32 Vict., c. 11), requiring that an Act or Ordinance of the legislature of a British possession regulating its coasting trade should contain a suspending clause providing that the Act or Ordinance should not come into operation until Her Majesty's pleasure thereon had been publicly signified in the British possession, was not observed. The matters dealt with in said ss. 13 and 125 (3) of the *Customs Act*, 1877, and said regulations 4 and 12 were not "regulation of the coasting trade" within the meaning of said s. 4 (1) of the Imperial Act of 1869.

That s. 4 (1) of the Imperial Act of 1869 was not intended to apply to matters such as those dealt with in ss. 13 and 125 (3) of the Dominion *Customs Act*, 1877, or in said regulations, is indicated by its context, the effects and unreasonableness of a contrary construction, and especially from the circumstances in which it was passed. The Imperial Act of 1869 should be construed as an enabling statute creating legislative powers which did not previously exist, powers subject to prescribed conditions and exercisable according to a prescribed procedure. A statute of such a character, or even fairly capable of being so construed, should not be applied in such a way as to impose conditions upon the exercise of the plenary authority which had been conferred by the *B.N.A. Act*, 1867, upon the Dominion to legislate in respect of customs.

The word "goods" in the phrase "or if any goods had been unladen therefrom" in said regulation 4 should not be construed as limited to dutiable goods or goods prohibited or smuggled (mentioned previously in said regulation).

* PRESENT:—Duff C.J. and Rinfret, Smith, Crocket and Hughes JJ.

1934

THE KING
v.
THE SHEARWATER CO. LTD.

By Order in Council of May 31, 1901, the regulations of April 17, 1883, were amended by rescinding regulation 12 and substituting a new regulation 12, which new regulation was not published in the *Canada Gazette* as required by what is now s. 301 of the *Customs Act* (R.S.C. 1927, c. 42). *Held,* that the part of the Order in Council rescinding the old regulation could not be severed from that part enacting the new one; the Order in Council was, in substance, an amendment of the existing regulations and, as such, fell within s. 301; if any part of the amendment did not take effect by reason of non-publication, then the whole was inoperative; the present case stood to be decided on regulations 4 and 12 as they stood under the Order in Council of 1883.

Judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 1, holding that the regulations in question, and the statutory provisions authorizing them, never became effective, and that the seizure of the vessel in question could not be maintained, reversed.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the seizure of the steamship *Vedas* could not be maintained, and that the steamship should be released to its owner, the claimant (the present respondent).

The steamer *Vedas* is a British ship registered at Halifax, Nova Scotia, the registered owner being the claimant (respondent), which is a British company incorporated under *The Nova Scotia Companies Act* and has its registered office at Halifax. At all times material to this proceeding the ship was under verbal charter to one Low.

On August 16, 1930, the *Vedas* reported outwards coastwise from Windsor, Ontario, for Montreal, Quebec, with a cargo consisting of 12,900 cases of beer and ale and one ton of steel, and before sailing its master signed a "Report Outwards Coastwise", which, after setting out particulars, read as follows:

I, the undersigned, Master of the above-named vessel, do solemnly declare that I am bound for and will proceed directly to the Port of Montreal and that I will not, during the said voyage, touch at any foreign port, nor take on board, nor land, nor put off from said vessel any goods liable to Customs duty or other Revenue Impost, before arriving at the above-named port of destination.

Between August 16 and August 30, 1930, after the *Vedas* had sailed from Windsor, and before she had arrived at Montreal, approximately 8,900 cases of the said beer and ale were put out of the vessel and lightered or transhipped. The vessel, after said Report Outwards Coastwise from Windsor, did not proceed directly to the port to which she

(1) [1934] Ex. C.R. 1.

was bound and the 8,900 cases of beer and ale were put out of the vessel and unladen as aforesaid while on her said voyage, without permit of the Collector or proper Officer of Customs. On August 30, 1930, the *Vedas* with her remaining cargo of approximately 4,000 bags or cases of beer and ale was seized by customs officers on Lake Erie about 20 miles southwest of Erieau, by reason of the matters and things above set forth, and upon such seizure was brought to Windsor, and the seizure reported to the Commissioner of Customs in accordance with s. 171 of the *Customs Act*, R.S.C. 1927, c. 42. Notice of seizure was given in accordance with s. 172 of said Act, which notice was in Department Form K. 30 and read in part as follows:

> That contrary to the requirements of the Customs Act and Coasting regulations, the said vessel after report outwards coastwise from the port of Windsor, Ont., bound for Montreal, Que., on or about the 16th day of August, 1930, did not proceed directly to the port whither bound as declared; that goods were put out of the said vessel and unladen therefrom while on her voyage without permit of the Collector or proper officer of Customs and before report by the Master to a Customs officer; and that goods were carried contrary to the Customs Act and Regulations made by the Governor in Council.

No penalties were paid and the vessel was detained under s. 245 of the *Customs Act*. The value of the vessel was appraised by a duly qualified appraiser at approximately $50,000.

The matter came before the Exchequer Court by way of a reference by the Minister of National Revenue under s. 174 of the *Customs Act*.

By Order in Council of April 17, 1883, regulations were made respecting the Coasting Trade of Canada. These regulations were duly gazetted in the *Canada Gazette*. Secs. 4 and 12 of these regulations were as follows:

> Sec. 4. The master of any such vessel or boat shall produce his licence to any officer of Customs, whenever the same shall be demanded, and answer all questions put to him, and such officer of Customs shall be at liberty to go on board any such coasting vessel when he may deem proper, and if he should find any dutiable goods therein which have not been entered at the Customs, or any prohibited or smuggled goods, or if any goods had been unladen therefrom before the master had reported to a Customs officer the goods and vessel shall be forfeited, and the master shall incur a penalty of $100.
>
> Sec. 12. No goods can be carried in any Coasting Vessel or Boat, except such as are laden to be so carried at some port or place in Canada, and no goods shall be taken into or put out of any Coasting Vessel or Boat while on her voyage by River, Lake or Sea.

1934

THE KING v. THE SHEARWATER CO. LTD.

By Order in Council of May 31, 1901, the regulations made by Order in Council of April 17, 1883, were amended by rescinding s. 12 and substituting a new s. 12 which read in part as follows:

> 12. No goods shall be taken into or put out of any coasting vessel or boat, while on her voyage by river, lake or sea, without permit of the Collector or proper officer of Customs.

The substituted regulation was, however, never published in the *Canada Gazette.*

By the judgment now appealed from, Maclean J. held that the regulations in question never became effective, as neither they nor secs. 13 and 125 of the *Customs Act* of 1877 (Dom.) (40 Vic., c. 10), under which they were made, were enacted in the form required by the Imperial Act of 1869, *The Merchant Shipping (Colonial) Act, 1869* (32 Vict., c. 11), as they did not contain the suspending clause required by s. 4 (1) of the said Imperial Act and they were never approved of and proclaimed as required by that Act. (Secs. 4 and 5 of the said Imperial Act of 1869 are set out in the judgment now reported).

It was contended on behalf of the Crown (appellant) that the provisions of the said Imperial Act of 1869 did not apply to ss. 13 and 125 of the said *Customs Act* of 1877, or to the regulations in question; that the Imperial Act of 1869 was by its very terms an enabling and not a restricting Act; its object was clearly not to restrict the power of the Dominion with regard to customs legislation or customs regulations, but to confer power under certain conditions upon the Dominions to legislate with regard to a matter previously withheld from them, namely, the ships to be engaged in the coasting trade; that the regulations in question were in reality customs regulations with regard to the coasting trade, and power over such matters was conferred on the Dominion by the *B.N.A. Act,* 1867. An argument was also grounded upon s. 151 of the Imperial *Customs Consolidation Act,* 1876, c. 36, and it was contended that the sanction required thereby would be effectively given when the Governor General assented to a Canadian Customs Act on behalf of the Sovereign.

It was also contended on behalf of the Crown that s. 12 of the regulations as amended in 1901 was not ineffective by reason of failure to publish it in the *Canada Gazette;* that it was not a general regulation requiring publication

1934

THE KING v. THE SHEARWATER CO. LTD.

within the intent of what is now s. 301 of the *Customs Act* (R.S.C. 1927, c. 42); that if, however, s. 12 of the regulations as amended never became effective by reason of the fact that it was not gazetted, the amendment was effective for no purpose and could not repeal the original s. 12, which was therefore still in effect and sufficient to justify the seizure and detention in question; and that in any case the seizure and detention could be justified under s. 4 of the regulations, which was not affected by the Order in Council of 1901.

It was contended on behalf of the claimant (respondent) that ss. 13 and 125 (3) of the Canadian *Customs Act* of 1877 and the regulations made thereunder were regulation of coasting trade within the meaning of the said Imperial Act of 1869, and as the Canadian Act did not contain a suspending clause and Her Majesty's pleasure thereon was not publicly signified in Canada, the said sections of the Canadian Act and regulations thereunder never came into operation; that regulation 12 as passed by the Order in Council of May 31, 1901, never came into force because of failure to publish it in the *Canada Gazette*, as required by what is now s. 301 of the *Customs Act* (R.S.C. 1927, c. 42); that said Order in Council was effective to rescind regulation 12 as it then stood, even though the new regulation 12 did not come into operation; that regulation 4 in question could not support the seizure because the words "any goods" (in the phrase "or if any goods had been unladen therefrom" etc.) in the regulation must be read as meaning dutiable or prohibited or smuggled goods, in the light of the earlier portion of the regulation and the wording of the forms of the "Report Outwards Coastwise" and the "Report Inwards"; and it was conceded that the goods on the *Vedas* were not dutiable or prohibited or smuggled goods; that regulation 4 was not applicable to goods unladen from a coasting vessel "while on her voyage by river, lake or sea" (the words in regulation 12) but was intended to apply only to a coasting vessel while in port; that regulation 4 was *ultra vires* in so far as it purported to impose forfeiture of a vessel of the value of $400 or upwards.

By the judgment now reported, the appeal was allowed and the claim of the respondent dismissed with costs throughout.

1934

THE KING v. THE SHEARWATER CO. LTD.

J. McG. Stewart K.C. for the appellant.

A. W. Greene K.C. for the respondent.

The judgment of the court was delivered by

DUFF C.J.—We shall consider presently the view advanced that this case does not fall within the regulations in question, (4) and (12), brought into force by the Order in Council of the 17th of April, 1883. The important question is whether or not these regulations are legally operative. The learned President of the Exchequer Court has held they are not so, on the ground that the statute under which they were promulgated (ss. 13 and 125 (3) of c. 10, 40 Vict.) had no legal effect because the procedure described by c. 11, 32 Vict., *The Merchant Shipping (Colonial) Act,* (1869), s. 4 (1), was not observed.

It is, perhaps, most convenient to reproduce verbatim ss. 4 and 5 of the statute of 1869. They are as follows:

Coasting Trade

Regulation of coasting trade by colonial legislature.

4. After the commencement of this Act the legislature of a British possession, by any Act or Ordinance, from time to time, may regulate the coasting trade of that British possession, subject in every case to the following conditions:

(1) The Act or Ordinance shall contain a suspending clause, providing that such Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

(2) The Act or Ordinance shall treat all British ships (including the ships of any British possession) in exactly the same manner as ships of the British possession in which it is made.

(3) Where by treaty made before the passing of this Act Her Majesty has agreed to grant to any ships of any foreign state any rights or privileges in respect of the coasting trade of any British possession, such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding.

Sects. 328 and 163 of 16 & 17 Vict., c. 107, repealed.

5. The following sections of The Customs Consolidation Act, 1853, are hereby repealed; namely,

Section three hundred and twenty-eight as from the commencement of this Act:

Section one hundred and sixty-three as from the date in the case of each British possession at which either an Act or Ordinance with respect to the coasting trade made within two years after the commencement of this Act in such British possession comes into operation, or if there is no such Act or Ordinance, at which the said two years expire.

The controversy as to the validity of the regulations, as it was envisaged by the learned President, turns almost en-

tirely upon the point whether the contention of the respondents is well founded that, in enacting sections 13 and 125 (3) of the *Customs Act* of 1877, the Dominion Parliament was, as a condition of the validity of the legislation, required to observe the procedure laid down in s. 4 (1) of the Act of 1869, in respect of Acts and ordinances falling within the statute; in conformity with which the Act or ordinance must contain a suspending clause providing that it shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

It will be desirable at the outset to understand clearly what it is that the respondents put forward as the construction of the enactment of 1869. This is that the procedure laid down in s. 4 (1) was, down to the date of the Statute of Westminster, imperative in respect of all legislation by the Parliament of Canada enacting or sanctioning, as applied to the coasting trade, (we quote from the factum)

> regulations usually made under Customs Acts, dealing with what goods shall be carried in such trade, the reports inwards and outwards which must be made to Customs officers, the examination by Customs officers of a ship, the warehousing of goods unladen from ships, and other matters;

that is to say, by the contention of the respondents, an Imperial statute of 1869 subjected the legislative jurisdiction of the Parliament of Canada with regard to these ordinary matters of customs regulation to this condition, that such regulations must contain the suspending clause prescribed, if they were to be operative in respect of coastwise trade. This, of course, is a very sweeping proposition and the acceptance of it, as the respondents present the argument, would have the effect of invalidating most of the provisions of the Customs Acts passed by the Parliament of Canada since Confederation, as respects their application to the coasting trade.

The underlying assumption of the contention of the respondents is that where you have a regulation which in its nature is a customs regulation of the usual character, dealing, for example, with customs entries, with reports inwards and outwards and so on, that applies to the coasting trade, then you have a "regulation of coasting trade" within the meaning of the Act of 1869, which could only be com-

1934

THE KING v. THE SHEARWATER CO. LTD.

Duff C.J.

petently enacted or sanctioned by complying with the procedure laid down in the statute.

On this point we do not find the argument of the respondents entirely convicing. As a rule, customs regulations do, no doubt, affect trade. It does not follow that every customs regulation applying to goods or ships in overseas trade, in coasting trade or in inland waters trade, is necessarily a regulation of that particular phase of trade within the intendment of a particular statute.

The respondents rest their argument upon two Imperial statutes. The Act of 1853, upon which they chiefly rely, is entitled "The Customs Consolidation Act, 1853", and deals primarily, of course, and almost entirely with customs matters. There are sections, such, for example, as ss. 163 and 328, which plainly regulate trade directly but the long title of the Act itself which is in these words,

> An Act to amend and consolidate the Laws relating to the Customs of the United Kingdom and of the Isle of Man, and certain Laws relating to Trade and Navigation and the British Possessions,

is sufficient evidence that, in legislative practice, the distinction is not overlooked between legislation in relation to customs and legislation in relation to navigation and trade. The line, no doubt, is not drawn with rigour, but it seems an extraordinary procedure to take a section which is obviously a regulation of customs matters, and, merely because it is found in juxtaposition with a section which deals with trade generally, to treat the customs regulation as the evidentiary basis of a definition of the phrase "regulate the coasting trade" in the Act of 1869. There is a group of clauses in the Act of 1853 under the heading "As to the Coasting Trade of the United Kingdom" and among these clauses there are some which are obviously customs regulations. There are others which deal with trade directly: s. 152, for example, prohibits the carriage of goods or passengers coastwise from one part of the United Kingdom to another except in British ships. But one is a little puzzled to find a good reason for holding that a customs regulation under such a heading, and, therefore, presumably a customs regulation specially applicable to the coasting trade, in an Act consolidating the laws with regard to customs, and dealing (*inter alia*) with customs matters as affecting the coasting trade of the United Kingdom, provides a solid basis for a definition of the phrase

we are considering, in the Act of 1869. The statutes referred to by the respondents contain a variety of provisions upon a variety of subjects, but we are quite unable to discover in them anything which would justify the conclusion that the phrase "regulate the coasting trade" necessarily includes minute regulations as to customs entries and the like; or imposes upon that phrase, in the statute of 1869, a reading which requires the procedure of s. 4 (1) to be followed whenever a customs regulation touching matters of detail, such as those mentioned above, is to be amended in any British possession.

The Act must, of course, be construed in light of the history of the legislation upon the subjects with which it specifically deals, as well as in light of the circumstances in which it was passed. Subs. 1 of s. 4 must be read together with subss. 2 and 3 and with s. 5. S. 5 repeals two former enactments, s. 163 and s. 328, of the *Customs Consolidation Act* of 1853. These two sections both deal with the coasting trade in the aspect in which the regulation of it was of importance to the United Kingdom, in respect, that is to say, to the vessels eligible to engage in it. S. 328, which applied to all Her Majesty's British possessions abroad, enabled Her Majesty, by Order in Council, on petition from a legislative authority of a British possession, to regulate the coasting trade as between two ports of the same possession, or between two possessions, "so far as relates to the vessels in which it is to be carried on". The repeal of s. 328 was to take effect from the commencement of the statute.

S. 163 enacts a prohibition against the carriage of goods or passengers from one port of a British possession abroad to another port in the same possession except in British ships. This section (163) was repealed conditionally, that is to say, as appears from the text above set out, at the expiration of two years from the commencement of the Act, or at the date at which, within that period, an Act or ordinance "with respect to the coasting trade" shall come into operation.

We call attention to this provisoin because it does not seem probable that repeal was to take effect upon the passing of some regulation with respect to some trivial customs matter, which would seem to be the logical consequence of

1934

THE KING v. THE SHEARWATER CO. LTD.

Duff C.J.

the contention of the respondents. The main purpose of the Act would appear to be to substitute the enactments of s. 4 for the enactments repealed by s. 5; and it seems probable that s. 4 was intended to authorize the regulation of the subject matters of the repealed enactments or cognate subject matters. Subss. 2 and 3 of s. 4, moreover, seem to indicate that the essential character of the legislation is not customs legislation but shipping legislation. It seems a not unreasonable application of *noscitur a sociis* to read the principal enactment of s. 4 "regulate the coasting trade" in the light of subss. 2 and 3 of that section and of s. 5 and the earlier legislation thereby affected.

But there are broader considerations derived from the circumstances in which the statute was enacted which seem to supply a conclusive answer to the argument addressed to us by the respondents.

The statute applies to all British possessions, enjoying, it is perhaps needless to say, self-government in varying measure and degree. It seems right to read it, in view of what has been said, as an enabling statute devolving upon local legislatures and legislative authorities powers which they did not previously possess. Observe that, by ss. 163 and 328 of the Act of 1853, which the Act of 1869 replaced by the provisions of s. 4, the legislative authority of a British possession was invested with no legislative power, but only with a status to initiate legislative proceedings by presenting a petition to Her Majesty.

The respondents have, as we have mentioned, rested their contention mainly upon legislation of the Imperial Parliament enacted from ten to twenty years before, dealing with customs, navigation and trade. In respect of the particular matter with which we are now concerned, it is of vastly greater importance to take into account the fact that the *British North America Act* had gone into effect only two years previously. It is true that after the passing of the *B.N.A. Act* the Imperial Parliament retained the legal authority to enact measures amending the constitutional statute, by limiting the powers thereby vested in the Dominion Parliament, or conditioning the exercise of those powers by imposing upon Parliament a procedure such as that set up by s. 4 (1) of the Act of 1869. We should not, however, be justified in construing Imperial

legislation (applying to British possessions generally) enacted after the passing of the *B.N.A. Act*, as having any such effect unless the intention was not only unequivocally, but precisely, expressed.

The jurisdiction of the Parliament of Canada under the *B.N.A. Act* in relation to customs is not susceptible of debate.

The Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs.

(*Croft* v. *Dunphy*). (1). This power is, indeed, explicitly recognized in s. 122 which is in these words,

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

It follows from *Croft* v. *Dunphy* (2), that the "customs laws", in respect of which the Parliament of Canada received full authority in 1867, are not limited to laws imposing customs duties. Nor is it easy to see how the application of the phrase in s. 122 could be limited so as to exclude laws proceeding from the enactments of the Imperial Parliament; although this latter observation does not strictly enter into our decision.

There is here a recognition of the plenary authority of the Canadian legislature "to legislate regarding customs". Nor is there any distinction here or elsewhere in the *B.N.A. Act* between customs laws affecting overseas trade and those affecting the coasting trade.

The Act of 1869 ought, we repeat, for the reasons already explained, to be construed as an enabling statute creating legislative powers which did not previously exist, powers subject to prescribed conditions and exercisable according to a prescribed procedure. A statute of such a character, or even fairly capable of being so construed, ought not to be applied in such a way as to impose conditions upon the exercise of the plenary authority conferred by the *B.N.A. Act* upon the Dominion to legislate in respect of customs. We are not necessarily concerned with the scope that may properly be given to s. 4 (1) in respect of the classes of Acts and ordinances of any British possession that may take effect under the authority of s. 4, and would be incompetent but for the authority conferred by that

(1) [1933] A.C. 156, at 166. (2) [1933] A.C. 156.

1934

THE KING v. THE SHEARWATER CO. LTD.

Duff C.J.

enactment. It seems clear that, whatever be the scope of that section in that respect, the enactment, being enabling, or capable of being so construed, ought not to be so applied as to prejudice the Dominion of Canada in the exercise of the unqualified powers indubitably committed to her by the constitutional enactment.

There are some further considerations in support of our conclusion which it may be worth while to mention. No purpose or object has been suggested, and we can think of none, which, in respect of customs matters, could afford a ground for distinguishing between overseas trade and coasting trade, by fettering the authority of Parliament in one case, and leaving it, as is not disputed, free and untrammelled in the other.

More important than this is a consideration which has already been suggested, viz., that it is extremely difficult to discover any purpose or object which could be served by subjecting, in a so-called self-governing country like Canada, customs regulations of the ordinary type to a procedure such as that prescribed in s. 4 (1). It seems incredible that anybody should have thought of requiring the Dominion Parliament to follow such a procedure when amending, in order the better to adapt it to local circumstances, some regulation touching bonded warehouses or reports inward or outward.

We have emphasized the argument founded upon the improbability that the British legislature in 1869 would have so qualified the powers of the Dominion Parliament under the *B.N.A. Act* as the respondents now contend. It should be mentioned, perhaps, that the force of this argument is not in the least weakened by the possibility that there may have been customs legislation (affecting the coasting trade) in force under Imperial enactments which (it might be contended), by virtue of the provisions of the *Colonial Laws Validity Act,* the Canadian Parliament would, notwithstanding the general provisions of the *B.N.A. Act,* and notwithstanding the explicit terms of s. 122, have been incompetent to amend or repeal (*Nadan* v. *The King* (1).)

No such legislation has been called to our attention; but assuming such legislation did exist, and that it con-

(1) [1926] A.C. 482.

stituted an obstacle in the way of the complete exercise by the Dominion of its powers of legislation under the constitutional statute, that circumstance could not explain an enactment by the Imperial Parliament virtually amending the *B.N.A. Act* by imposing on the Canadian Parliament the procedure of s. 4 (1) of the Act of 1869 in respect of all regulations of customs affecting the coasting trade.

In this view, there seems to be no ground upon which the regulation of the 17th of April, 1883, can successfully be impeached or the sections of the *Customs Act* of 1877 under which those regulations were made. Of the last mentioned sections (s. 13 and s. 125 (3) of the *Customs Act* of 1877), s. 13 empowers the Governor General in Council by regulation to

> declare any trade or voyage on the seas, rivers, lakes or waters, within or adjacent to Canada, * * * to be a coasting trade or a coasting voyage within the meaning of this Act * * *

It is to be observed that the declaration is to be made for the purposes of the *Customs Act*. Then, the section goes on to authorize the Governor General in Council to dispense with any of the requirements of the next preceding four sections of the statute and to make further regulations as he may think expedient.

Now, these four sections of the Act are concerned with matters which are, in substance and, indeed, strictly, customs matters. As to the general power to make further regulations, that power should not be considered to authorize the passing of any regulation inconsistent with s. 1 of ch. 14 of the statutes of 1870 which prohibits goods or passengers being carried from one port of Canada to another except in British ships, or with subss. 2 or 3 of s. 4 of the Imperial Act of 1869.

As to s. 125 (3), that, in substance, does not in any pertinent sense differ from s. 13 and the same observations apply.

Turning to the regulations themselves, ss. 1 and 2 embody the substance of s. 1 of the Canadian statute of 1870 and recognize at the same time the enactments of subs. 3 of s. 4 of the Imperial Act of 1869. The remaining sections, dealing with subject matters within the scope of ordinary customs regulations, are entirely within the competence of the Canadian Parliament under the *B.N.A. Act*, and, on

1934

THE KING v. THE SHEARWATER CO. LTD.

Duff C.J.

the view above expressed, are not affected by the Imperial Act of 1869.

The *Customs Act* of 1877 and the regulations made under it, were supported by Mr. Stewart in his argument on behalf of the Crown on another ground. He invokes s. 151 of ch. 36 of the statute of 1876, which was the first general customs consolidation in the United Kingdom after the passing of the *B.N.A. Act*. That section is in these words,

> 151. The Customs Acts shall extend to and be of full force and effect in the several British possessions abroad, except where otherwise expressly provided for by the said Acts, or limited by express reference to the United Kingdom or the Channel Islands, and except also as to any such possession as shall by local Act or ordinance have provided, or may hereafter, with the sanction and approbation of Her Majesty and her successors, make entire provision for the management and regulation of the Customs of any such possession, or make in like manner express provisions in lieu or variation of any of the clauses of the said Act for the purposes of such possession.

His contention is that this section impliedly confers authority upon British possessions abroad, with the sanction and approbation of Her Majesty and her successors, to make "entire provision" for the management and regulation of customs; and it is argued that, whatever be the effect of the statute of 1869, the statute of 1876 authorizes the passing of the *Customs Act* of 1877. As to the condition requiring "the sanction and approbation of Her Majesty and her successors", it is contended that, in Canada, such sanction and approbation was effectively given when the Governor General assented to the Act on behalf of the sovereign. We do not think it necessary to consider this argument, although we think it is by no means without force (*Attorney-General for Canada* v. *Cain* (1); *Webb* v. *Outrim* (2)).

We have still to consider the question whether the present case falls within the regulation. As to that, two points arise. In order to discuss them it is necessary to have the regulations before us. They are in these terms:

> 4. The master of any such vessel or boat shall produce his licence to any officer of Customs, whenever the same shall be demanded, and answer all questions put to him, and such officers of Customs shall be at liberty to go on board any such coasting vessel when he may deem proper, and if he should find any dutiable goods therein which have not been entered at the Customs, or any prohibited or smuggled goods, or if any goods had been unladen therefrom before the master had reported to a Customs

(1) [1906] A.C. 542. (2) [1907] A.C. 81, at 88.

officer the goods and vessel shall be forfeited, and the master shall incur a penalty of $100.

12. No goods can be carried in any Coasting Vessel or Boat, except such as are laden to be so carried at some port or place in Canada, and no goods shall be taken into or put out of any Coasting Vessel or Boat while on her voyage by River, Lake or Sea.

By regulation 4, there are two cases in which a forfeiture is declared: first, where there are dutiable goods not entered at the customs or prohibited or smuggled goods; and, second, where goods have been unladen from the ship before the master had reported to a customs officer. We cannot agree that goods in the second case can properly be limited to dutiable goods or goods prohibited or smuggled. Indeed, the absence of any expression indicating that goods within the second case are so limited seems to be conclusive on the point. We do not think that the forms can prevail against what appears to us to be the plain construction of the regulation.

Then it is argued that, by force of the Order in Council of May 31, 1901, regulation 12 and, incidentally, regulation 4, were rescinded and that the regulation which was intended to be substituted never came into force. We do not think that in the regulation of the 31st of May, 1901, it is possible to sever that part of the Order which rescinds the old regulation 12 from that part which enacts the new regulation. We think the Order in Council is, in substance, an amendment of the existing regulations and, as such, falls within s. 301. If any part of the amendment did not take effect by reason of non-publication, then the whole was inoperative.

We think the case stands to be decided on sections 4 and 12 as they stood under the Order in Council of 1883. We, therefore, think the Crown is entitled to succeed on the appeal.

There will be judgment dismissing the respondents' claim with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondent: *L. A. Ryan.*

1934
* Feb. 3.

IN THE MATTER OF JOYCE DRESS CORPORATION LIMITED, IN LIQUIDATION.

MAX HOROWITZ..... APPLICANT;

AND

ISAACHER GREENBERG (TRUSTEE). RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Bankruptcy—Application to judge of Supreme Court of Canada for special leave to appeal—Judgment declaring a person to be a contributory—Liability of the latter being over $2,000—No order for immediate payment of any sum of money—Winding up Act, R.S.C., 1927, c. 213, ss. 58, 59, 108.

A judge of the Supreme Court of Canada has jurisdiction to grant leave of appeal to this Court, under section 108 of the *Winding Up Act*, from a judgment ordering that the name of a person should be put on the list of contributories, its effect being to fix his liability at an amount over $2,000, although such judgment does not condemn him to pay immediately a definite sum of money. As a direct result of that judgment, such person may at any time be ordered by the bankruptcy court to make payments to the extent of the liability so fixed (ss. 58 and 59) and, therefore, the amount to which that liability extends is truly the amount involved in the appeal within the meaning of section 108.

APPLICATION for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, sitting in bankruptcy, Boyer J., and declaring the appellant a contributory of the Joyce Dress Corporation, Limited, in liquidation, for the sum of $2,524.25.

The application came before Rinfret J. who dismissed it, holding that, although he had jurisdiction to hear it, no principle of law or matter of public interest was involved such as would justify the granting of the petition.

B. Robinson for the applicant.

J. G. Ahern K.C. for the respondent.

RINFRET J.—The appellant was declared a contributory of the Joyce Dress Corporation, Limited, in liquidation, to the amount of $2,524.25, by judgment of the Superior Court

* Rinfret J. in chambers.

1934

In re JOYCE DRESS CORP. LTD.

HOROWITZ v. GREENBERG.

Rinfret J.

(Boyer J.), unanimously confirmed by the Court of King's Bench (appeal side). He prays that he be given leave to appeal from that judgment to the Supreme Court of Canada.

This matter is covered by the *Winding Up Act* (R.S.C. 1927, c. 213). The authority to grant leave is given by section 108 of the Act, which requires that the amount involved in the appeal should exceed two thousand dollars. It was contended by the respondent that, in the premises, no amount was involved, since the decision goes merely to put the name of the appellant on the list of contributories, and does not condemn him to pay any specified sum. On that ground, objection was made to my jurisdiction to hear or to grant the appellant's petition.

In my view, the objection was not well taken. It may be that the judgments do not condemn the appellant immediately to pay a definite sum of money; but their effect is to fix the liability of the appellant as a contributory at the amount of $2,524.25. As a direct result of the judgments, the appellant may at any time be ordered by the court to make payments to the extent of the liability so fixed (sections 58 and 59). The amount to which that liability extends is truly the amount involved in the appeal within the meaning of section 108. The respondent's objection, therefore, fails.

It is not sufficient, however, that the amount involved in the appeal should exceed two thousand dollars, the appellant must get "leave". That implies that he must show special reasons in support of the petition, which may not be granted as a matter of course, but only in the exercise of judicial discretion (In the matter of: *Ontario Sugar Company*) (1). The object of the enactment is undoubtedly to avoid unnecessary delay and improvident incurring of costs in the winding up of insolvent estates.

After having considered very carefully the record of proceedings in this case, I am unable to convince myself that any principle of law or matter of public interest is involved such as would justify the granting of the petition now presented to me. As I understand the judgments rendered against the appellant without a dissenting opinion, they

(1) (1911) 44 Can. S.C.R. 659.

1933

In re JOYCE DRESS CORP. LTD.

HOROWITZ *v.* GREENBERG.

Rinfret J.

are based on concurrent appreciations of the special facts of the case rather than on a particular construction of the relevant statutes, or the application of any new point of law.

The petition will therefore be dismissed with costs.

Application dismissed with costs.

1933

* Dec. 22.

1934

** Mar. 2, 15.

IWAN KOWAL (PLAINTIFF)..... APPELLANT;

AND

NEW YORK CENTRAL RAILROAD COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Appeal—Jurisdiction—Judgment dismissing petition in revocation of judgment—"Final judgment"—"Amount in controversy"—Appeal per saltum—Application to adduce new evidence before Supreme Court of Canada—Negligence—Liability—Money offered and paid to injured—Acknowledgment of liability—Supreme Court Act, ss. 2 (e), 37, Section 68, as amended by 18-19 Geo. V, c. 9, s. 3—Art. 1184 C.C. P.

A judgment of the Court of King's Bench, affirming a judgment of the Superior Court which had dismissed a petition in revocation of judgment, is a "final judgment" within the provisions of section 2 (*e*) of the *Superior Court Act Act*. *Hudon* v. *Tremblay* ([1931] S.C.R. 624) discussed.

On an appeal from a judgment dismissing a petition in revocation of judgment and merely refusing leave to reopen the case and to "replace the parties in the same position as they were in before the fact which gave rise to the petition" (art. 1184 C.C.P.), there is no "amount or value * * * in controversy in the appeal"; and the appellate court lacks in jurisdiction to grant special leave of appeal to this Court *per saltum*. (Section 37 of the *Supreme Court Act*).

The provision whereby the Supreme Court of Canada may "receive further evidence upon any question of fact" (section 68, *Supreme Court Act*, as amended by 18-19 Geo. V, c. 9, s. 3), while leaving the matter to the discretion of the Court, may be taken advantage of only "on special grounds and by special leave". An application to adduce further evidence directed solely to affect the credibility of witnesses is clearly not an application of the nature contemplated by the provision of the Act. Moreover, in this case, the question whether the evidence brought out in the petition in revocation could be relied on by the appellant had been finally decided and had become *res judicata* between the parties.

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

** PRESENT:—Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

The mere fact that the respondent had offered and paid to the appellant a sum of money (a cheque of $500 not cashed by the latter and offered back by him in his action for $15,000) to compensate for the damages he may have suffered on the condition that he would abandon all right of action he may have, does not constitute in itself an acknowledgment of liability on the part of the respondent. In this case, the appellant cannot succeed on that ground raised in his statement of claim, when all the surrounding circumstances are taken into consideration. (*a*)

Judgment of the Court of King's Bench (Q.R. 53, K.B. 568) aff.

The material facts of the case and the questions at issue are as follows:

The appellant brought an action for damages which he sustained when alighting from the locomotive or coal tender of a train of the respondent company on which he had been stealing his passage and he alleged that the accident had been caused through the sole fault, negligence and violence of the respondent's employees. Before the issue of the writ, while the appellant was still in the hospital, the respondent company offered to him a cheque of $500 as compensation for the damages he may have suffered and upon the condition that he would abandon all right of action. The appellant accepted the cheque and signed the discharge; but he did not cash it and offered it back to the respondent with his action, asking for its nullity on the ground that he had acted through ignorance and while being gravely ill. The respondent did not insist on any right it may have through such discharge of liability, assenting to its being declared of no value and took back the cheque. The appellant's action was dismissed with costs by a judgment rendered by the Superior Court at Montreal, on December 26th, 1930, which judgment was unanimously confirmed by the Court of King's Bench on April 19th, 1932, from which the appellant appealed to the Supreme Court of Canada. On November 2nd, 1932, the appellant made a motion before this Court for an order granting a new trial to allow him to produce newly discovered evidence contained in another case in the Superior Court of Quebec between one Lafontaine and the respondent company; or, alternatively, to suspend the hearing of the appeal until the appellant had filed before the Superior Court of Montreal a petition in revocation of the judgment appealed from. Upon the motion, this Court ordered that the proceedings of the appeal should be suspended for fifteen days to allow the appellant

1934

KOWAL v. NEW YORK CENTRAL RAILROAD CO.

to present such petition in revocation, which later on was dismissed by the Superior Court. The appellant then petitioned the appellate court, asking leave to appeal *per saltum* to this Court from the judgment just referred to, which leave was granted. Such an appeal having been taken by the appellant, the respondent made a motion before the Court to quash for want of jurisdiction, which motion was granted on December 22nd, 1933. The appellant thereupon, on February 16th, 1934, again petitioned this Court asking that he be allowed to join with the present appeal the record in the Lafontaine case already referred to which had been filed with the petition in revocation in the Superior Court and asking also for a final adjudication on his motion presented on November 2nd, 1932. The Supreme Court of Canada dismissed this petition on March 2nd, 1934, and the main appeal on March 15th, 1934.

MOTION by the respondent to quash for want of jurisdiction an appeal *per saltum,* upon leave granted by the Court of King's Bench.

C. Dessaulles K.C. for the motion.

John T. Hackett K.C. contra.

The judgment of the Court (Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.) was delivered by

RINFRET J.—The appeal in the original action between the parties is now pending before this Court.

Before the appeal was inscribed for hearing, the appellant moved this court, on 2nd November, 1932, for an order allowing him to file, so as to form part of the record, certain evidence given in another case bearing number 6230 of the Superior Court of the province of Quebec, district of Beauharnois, between one H. Lafontaine and the respondent. The ground for the application was that such evidence had a bearing on his own case, that it was of a conclusive nature and that it had only been discovered by the appellant after judgment rendered against him. Upon that motion, the court ordered that the proceeding of the pending appeal should be suspended for fifteen days to allow the appellant to present a petition in revocation of judgment in the Superior Court.

(*a*) Reporter's note: The decision of the appellate court on that point has been favourably commented upon by La Revue Trimestrielle de Droit Civil, 1933, p. 560.

The appellant availed himself of the order and presented the petition in revocation to the Superior Court at Montreal, where Mr. Justice Philippe Demers, after "having heard the parties, examined the proceedings and upon the whole deliberated," dismissed the petition in revocation, or *requête civile,* on the merits, for the reason, amongst others, that the alleged new evidence, even if admitted, was not of a conclusive nature and it was not shewn that it would probably have changed the result.

The appellant thereupon petitioned the Court of King's Bench (appeal side), asking that he be allowed to appeal *per saltum* to this court from Mr. Justice Demers' judgment, and leave to appeal *per saltum* was granted.

The respondent now moves to quash for want of jurisdiction. A motion of that character must of course succeed upon any proper ground, raised by the court *proprio motu,* even although not advanced by the parties.

The power to grant leave of appeal *per saltum* is given to the highest court having final jurisdiction in the province in which the proceedings were originally instituted by section 37 of the *Supreme Court Act,* as amended by c. 24 of statute of Canada, 20-21 Geo. V.

One of the conditions for the application of section 37 is that the judgment appealed from should be a *final* judgment; and it was suggested at bar that the judgment dismissing the *requête civile* was only interlocutory.

We think, however, that the judgment comes within the terms of the definition of a *final judgment* in section 2 (*e*) of the *Supreme Court Act.* In this connection, the appellant was entitled to rely on what was said by this court in *Hudon* v. *Tremblay* (1), although perhaps it should be pointed out that the dictum, therein referred to, of Lord Esher's judgment in *Salomon* v. *Warner* (2), would no longer be considered as correctly expressing the test adopted in England for ascertaining whether an order is final or interlocutory, in view of other and later pronouncements, not cited to us and to which our attention was not drawn in Hudon v. Tremblay. See: *Bozson* v. *Altricham Urban District Council* (3).

(1) [1931] S.C.R. 624. (2) [1891] 1 Q.B. 734.
(3) [1903] 1 K.B. 547.

1934

KOWAL
v.
NEW YORK CENTRAL RAILROAD CO.

Rinfret J.

But another condition of section 37, and which is also an essential requisite of the power to grant special leave of appeal *per saltum*, is that the amount or value of the matter in controversy in the appeal should exceed the sum of $2,000. For that purpose, the amount or value depends, not on what is claimed in the action, but on what may be contested in the proposed appeal (*Dreifus* v. *Royds* (1); *Jack* v. *Cranston* (2)). Now, the matter in controversy in the appeal on the *requête civile* is whether the case ought to be reopened in order to allow the appellant to adduce the alleged new evidence. That this is not appreciable in money is concluded by our decision in *Gatineau Power Company* v. *Cross* (3) and in *Tremblay* v. *Duke-Price Power Company* (4).

It follows that, in our view, no amount is involved in what may be contested in the appeal on the *requête civile*, and, as a consequence, that the Court of King's Bench was lacking in jurisdiction in this case to grant to the appellant special leave of appeal *per saltum*. The motion to quash should therefore be allowed with costs.

This, of course, should be without prejudice to the recourse, if any, which the appellant might yet possess before the Court of King's Bench against the judgment of Mr. Justice Demers

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (5) affirming the judgment of the Superior Court at Montreal, Archer J. and dismissing the appellant's action for damages.

C. Dessaulles K.C. for the appellant.

John T. Hackett K.C. and *F. R. Hannen* for the respondent.

The judgment of the Court (Rinfret, Lamont, Cannon, Crocket and Hughes JJ.) on the appeal and on the motion of February 16th, 1934, was delivered by

RINFRET, J.—La cour a annoncé séance tenante qu'elle ne pouvait accorder la motion de l'appelant pour qu'il lui

(1) (1922) 64 S.C.R. 346.
(2) [1929] S.C.R. 503.
(3) [1929] S.C.R. 33.
(4) [1933] S.C.R. 44.
(5) (1932) Q.R. 53 K.B. 568.

soit permis de faire devant nous une preuve additionnelle, ou de verser au dossier de l'appel ou bien les témoignages rendus dans une autre cause ou bien le dossier complet de la Cour Supérieure sur la requête civile.

Il ressort des pièces produites à l'appui de la motion que la preuve que l'appelant tentait d'introduire n'avait aucun rapport avec les faits de la cause soumise à cette cour. Elle n'avait pas pour but de modifier la version des témoins déjà entendus, ou d'établir un fait nouveau. Elle portait uniquement sur la crédibilité qu'il fallait accorder à l'un des principaux témoins de l'intimée.

Nous fûmes unanimes à décider qu'une preuve de cette nature ne pouvait constituer un des motifs particuliers pour lesquels la cour peut, à sa discrétion et par permission spéciale, recevoir plus ample preuve sur une question de fait (art. 68 de la loi de la Cour Suprême, tel qu'amendé par les statuts du Canada 18-19 George V, 9). Dans le cas présent, il y avait d'ailleurs deux autres motifs pour refuser la permission que demandait l'appelant:

En ce qui concerne la preuve faite dans l'autre cause entre d'autres parties, la demande était déjà contenue comme conclusion alternative dans une motion antérieure de l'appelant. La cour avait alors permis à ce dernier de se pourvoir au moyen de la requête civile. A cette fin, elle avait suspendu les procédures de l'appel en déclarant qu'elle réservait de se prononcer sur les autres conclusions alternatives au cas où l'appelant ne présenterait pas sa requête civile en Cour Supérieure. La requête civile ayant été présentée, entendue et jugée, il n'y avait plus lieu pour cette cour d'adjuger sur les autres conclusions de la motion.

En ce qui concerne la demande d'être autorisé à verser au dossier toutes les procédures de la requête civile, cette question, suivant nous, était déjà définitivement réglée par le fait que le jugement de la Cour Supérieure refusant de maintenir la requête civile était devenu final. Ce jugement a décidé que la nouvelle preuve invoquée par l'appelant ne pouvait affecter le litige. L'appelant tenta d'amener le dossier de la requête civile devant nous au moyen d'un appel *per saltum*; mais l'appel fut rejeté par défaut de juridiction, avec réserve à l'appelant de se pourvoir devant la Cour du Banc du Roi, s'il en avait encore le droit et s'il le jugeait à propos. L'appelant n'a pas tenté d'exercer ce

1934

KOWAL
v.
NEW YORK CENTRAL RAILROAD CO.

Rinfret J.

droit qui lui était ainsi réservé. La conséquence est que le jugement de la Cour Supérieure rejetant la requête civile est devenu définitif. Il ne pouvait plus être question d'accueillir la demande de l'appelant à l'effet de recevoir ici, comme faisant partie de l'appel, le dossier de la requête civile. La Cour Supérieure avait jugé que la prétendue preuve nouvelle qu'elle invoquait n'était pas concluante et que, même si elle avait été faite en temps, le résultat n'eût pas été différent (art. 1177-505 C.P.C.). Sur ce point, dès lors, il y avait chose jugée entre les parties.

Dans les circonstances, l'appelant a dû soumettre son appel sur le dossier originaire, et le résultat ne pouvait faire aucun doute. Il dépendait exclusivement de la décision sur les faits rapportés par les témoignages. A la suite d'une preuve contradictoire, la Cour Supérieure et la Cour du Banc du Roi furent unanimement d'avis que l'appelant n'avait pas réussi à établir le bien-fondé de ses allégations. Sans doute, nonobstant ce résultat, l'appelant avait le droit de porter sa cause en appel devant cette cour; mais, en vertu d'une jurisprudence bien établie, il ne pouvait espérer obtenir l'infirmation des deux jugements concordants à moins de nous démontrer dans l'appréciation de la preuve une erreur particulière et évidente. Nous sommes d'avis que l'appelant n'a pas réussi à faire cette démonstration.

Il reste cependant un moyen soulevé par l'appelant et sur lequel nous croyons devoir faire une observation.

A la suite de l'accident, et alors que l'appelant était à l'hôpital, la compagnie lui a offert un chèque pour la somme de $500 en échange duquel l'appelant lui a consenti une quittance de toute réclamation et droit d'action et l'a libérée de toute responsabilité en dommages.

L'appelant n'a pas encaissé le chèque. Au contraire, il l'a déposé avec le rapport de son action; et, dans sa déclaration, il allègue que la quittance a été obtenue de lui alors qu'il était trop malade pour en comprendre la portée; qu'elle est donc entachée de nullité; et demandant acte de l'offre qu'il fait du chèque, il conclut à ce que la quittance soit annulée. Tout en refusant d'admettre que cette quittance avait été consentie dans des conditions qui la rendaient annulable, l'intimée n'a pas insisté sur son droit de faire valoir cette quittance. Dans sa plaidoirie, elle a accepté de reprendre le chèque et consenti à ce que la quittance fût tenue pour non avenue.

L'appelant invoque maintenant le geste de l'intimée comme un aveu de responsabilité et demande que, de ce seul fait, elle soit condamnée à lui payer les dommages qu'il a prouvés.

Sur ce point, la Cour Supérieure s'est contentée de dire que, dans les circonstances, il n'y avait plus lieu d'adjuger sur la validité de la quittance; et la Cour du Banc du Roi a refusé d'y voir "absolument rien qui comporte un aveu".

Nous sommes arrivés à la même conclusion. Pour qu'un acte ou une déclaration puisse être regardé comme un aveu, il faut qu'il comporte l'intention de reconnaître comme légalement avéré le fait auquel il s'applique, c'est-à-dire la pensée que celui au profit duquel il a eu lieu se trouvera, en l'invoquant, dispensé de prouver les faits qui en forment l'objet (Larombière, *Obligations,* tome 7, sur l'article 1354, nº 3; Aubry et Rau, 5e éd., tome 12, page 107, §751).

Naturellement, en règle générale, le paiement constitue une admission que la somme est due. Mais cela s'entend surtout d'une obligation liquide dont la cause n'est pas discutée. Il n'en résulte cependant pas une déduction inéluctable, puisqu'un paiement fait dans certaines conditions prévues aux articles 1047 et 1140 du code civil est sujet à répétition. En plus, le seul fait de se charger, par un motif de compassion, des frais d'hôpitaux ou de médecins de la victime d'un accident ne constitue pas nécessairement une admission de responsabilité. La chose a été souvent jugée. En l'espèce, la quittance ne réfère pas aux motifs qui ont poussé l'intimée à faire à l'appelant la remise de la somme de $500. Mais le représentant de la compagnie, au cours de son témoignage en a donné l'explication suivante:

> I gave consideration to paying the man anything on his own request. He wanted to know if I could pay him anything to help him out. He did not have any money. His home was not here, and he had no money, and for that reason, more than anything else, I gave consideration to paying him something. It was more in the way of charity.

En outre, il ressort des termes de la quittance que le montant a été remis à l'appelant à la condition qu'il renonce à tout droit d'action.

Ici, l'appelant a allégué avoir souffert des dommages s'élevant à au delà de $15,000. La disproportion entre cette somme et le montant qui a été offert indique en elle-

1934

KOWAL v. NEW YORK CENTRAL RAILROAD CO.

Rinfret J.

même que l'intimée n'entendait pas reconnaître et payer la réclamation. L'offre qu'elle a faite est plutôt compatible avec le motif pour lequel le représentant de la compagnie déclare avoir agi. Son témoignage indique d'ailleurs qu'il a été induit à agir de cette façon à la sollicitation de l'appelant lui-même et que ce dernier savait à quoi s'en tenir sur l'intention de la compagnie lorsque la somme lui a été remise. L'acte de la compagnie n'est sûrement pas un aveu exprès. Il pourrait tout au plus être considéré comme un geste ambigu susceptible de différentes interprétations. En soi il ne constitue pas nécessairement un aveu tacite. Les circonstances de l'espèce conduisent plutôt à la conclusion qu'il n'y a pas eu aveu de responsabilité; et, suivant nous, la Cour du Banc du Roi a eu raison de les interpréter comme indiquant une offre faite "par un sentiment d'humanité à l'égard de la malheureuse victime et aussi en vue de s'exempter les ennuis d'un procès avec un insolvable, en déboursant environ ce qu'il devrait en coûter (à l'intimée) même après une contestation heureuse".

En se basant sur la preuve rapportée, l'acte de la compagnie a plutôt le caractère d'une transaction par laquelle les parties prévenaient une contestation à naître (art. 1918 C.C.). Cette transaction ayant été écartée de consentement mutuel, les parties se sont trouvées remises dans la même situation qu'elles étaient auparavant. La condition du paiement était que l'appelant renonçait à ses droits d'action. Il a intenté sa poursuite. L'intimée a été forcée de se défendre devant trois tribunaux successifs. La condition du paiement, ou, si l'on veut, les conditions de l'offre, n'ayant pas été remplies, l'appelant ne peut maintenant retirer aucun bénéfice de la transaction qu'il a répudiée (*Galibert* v. *Atteaux,* Cour de revision (1)). Il ne restait pas d'autre alternative que de le débouter de son action.

Pour ces motifs, l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Dessaulles, Garneau & Hébert.*

Solicitors for the respondent: *Foster, Place, Hackett, Mulvena, Hackett & Foster.*

(1) (1902) Q.R. 23 S.C. 429, at 435.

THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT; 1933 * Nov. 22, 23.

AND

ONTARIO JOCKEY CLUB..... RESPONDENT. 1934 * Feb. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Land used as race course—Potential value as subdivision—Basis of assessment—Assessment of buildings—Business assessment—Assessment Act, R.S.O. 1927, c. 238, ss. 4, 40 (1) (2) (3), 9 (1) (j), (2), (12).

The land in question was owned by respondent, the "Ontario Jockey Club", an incorporated company, and it used the land as a race course, carrying on and managing race meetings thereon. Under the *Assessment Act*, R.S.O. 1927, c. 238, the appellant city assessed the land on the basis of its potential value as a subdivision, and also assessed for the value of the buildings thereon and for business assessment. The assessments were upheld (with variations in amounts) by the Ontario Railway and Municipal Board. The Court of Appeal for Ontario confirmed the assessment of the land alone at the amount fixed by the Board, but struck off the amounts for buildings and for business assessment. The city appealed.

Held: (1) The buildings should be assessed only at their value for the purpose of being wrecked and removed, as, except to that extent, they added nothing to the potential value of the land as a subdivision. It was improper to value the land as for purpose of a subdivision and then value the buildings on the basis of their being used for purposes of a race track. (Secs. 4, 40 (1) (2) (3), of the Act particularly considered).

2. The fact that s. 9 (2) of the Act deals with clubs, and makes liable to a business assessment "every proprietory or other club in which meals are furnished * * *" does not necessarily exclude all clubs from the operation of s. 9 (1) (*j*), making liable for business assessment every person carrying on any of certain specified businesses "or any business not before * * * specially mentioned". The question of whether or not respondent came within s. 9 (1) (*j*) could only be determined by investigating the facts concerning its organization and its operations; and there was evidence on which the Board could properly arrive at its conclusion that respondent was occupying or using the land for the purpose of a business within the meaning of s. 9 (1) (*j*), in view of s. 9 (12) which excludes the application of the *ejusdem generis* rule.

A corporation's liability to business assessment in connection with its lands on which it carries on its affairs does not depend on whether or not a profit is being made.

In the result, the judgment of the Court of Appeal, [1932] O.R. 637, was varied, by increasing the valuation for assessment purposes by a sum for the value of the buildings for wreckage purposes, and by declaring respondent liable for business assessment (based on the valuation of the property as fixed by this Court).

* PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Hughes JJ.

1934

CITY OF TORONTO v. ONTARIO JOCKEY CLUB.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which allowed an appeal by the present respondent from the judgment of the Ontario Railway and Municipal Board. The Board had fixed the assessment of certain land and buildings thereon (owned by the present respondent) at $765,308, being $565,308 on the land and $200,000 on the buildings, and had fixed a business assessment of $191,325. The Court of Appeal reduced the assessment of the land and buildings to $565,308, being $565,308 (as fixed by the Board) on the land and no amount on the buildings, and also struck out the business assessment.

The material facts of the case are sufficiently stated in the judgment now reported.

C. M. Colquhoun K.C. and *J. P. Kent* for the appellant.

D. L. McCarthy K.C. and *F. W. Fisher* for the respondent.

The judgment of the court was delivered by

SMITH J.—This is an appeal concerning the assessment of the respondent's Woodbine Race Course, situated in the city of Toronto.

The Assessor of the appellant, in the year 1931, assessed the respondent, in respect of the 85·88 acres of land owned by the respondent, for $622,630, and the buildings for $202,500, making a total of $825,130. The residence of the Superintendent, with the land on which it was erected, was assessed separately for $4,000, which amount was deducted from the total of $825,130, leaving an assessment of $821,130, to which was added 25 per cent. for business assessment, amounting to $205,282.

The respondent appealed to the Court of Revision, which confirmed the assessment except as to the business assessment, which was reduced to $191,385.

An appeal was taken to His Honour Judge Denton, who confirmed the decision of the Court of Revision.

From this decision the respondents again appealed to the Ontario Municipal Board, which placed the assessment of the lands used for race track purposes at $565,308, and the buildings at $200,000, making together $765,308, to which was added 25 per cent. for business assess-

(1) [1932] O.R. 637; [1932] 4 D.L.R. 423.

ment, amounting to $191,325. In addition to these items, there was added an assessment of $4,000 for land and house occupied by the Superintendent, which has not been in dispute.

The respondent further appealed to the Court of Appeal for Ontario, which confirmed the assessment of the land at the amount fixed by the Ontario Municipal Board, namely, $565,308, but struck off the $200,000 on buildings and the $191,325 for business assessment.

From that judgment this appeal is taken.

The Court of Appeal held that, as the assessment on the land fixed by the Ontario Municipal Board was arrived at on the basis of its potential value as a subdivision, which would involve the destruction and removal of the buildings, nothing should be added for the value of these buildings.

Section 4 of the *Assessment Act*, R.S.O. 1927, ch. 238, enacts that all real property in Ontario shall be liable to taxation, subject to certain exceptions that have no application to this case.

Section 40 (1), (2) and (3), reads as follows:

40. (1) Subject to the provisions of this section, land shall be assessed at its actual value.

(2) In assessing land having any buildings thereon, the value of the land and buildings shall be ascertained separately, and shall be set down separately in columns 14 and 15 of the assessment roll and the assessment shall be the sum of such values. The value of the buildings shall be the amount by which the value of the land is thereby increased.

(3) To remove doubts it is hereby declared that the cost of a building is only one of the matters which should be considered in ascertaining the amount for which a building should be assessed, and if it is found that a building, either because of its condition as to repair or of its inappropriateness to the location in which it is found or because of any other circumstances affecting its value, increases the value of the land by less than the cost of the building, or the cost of replacing it, such less sum shall be the amount for which the building shall be assessed under subsection 2; the meaning of that subsection being that buildings shall be assessed for the amount of the difference between the selling value of the whole property and the selling value of the land if there were no buildings on it.

Mr. Justice Riddell, in his reasons, says:

The actual value is to be determined by the evidence, and, not only the present use of the land and the benefits derived therefrom by the owner, but all the potentialities are to be taken into consideration.

He cites a long list of authorities for this proposition, which has been accepted and acted upon by both sides throughout and was not questioned here. On this prin-

1934

CITY OF TORONTO v. ONTARIO JOCKEY CLUB.

Smith J.

ciple the City Assessor, Mr. Harry Nixon, states in his evidence that he assessed the lands of the respondent on the basis of their potential value as a subdivision, and not on the basis of their value as now used by the respondent, as a race course; and neither he nor any other witness gave any evidence as to the value of this land for the purposes of a race course.

The whole evidence of both sides before the Municipal Board was directed to establishing the potential value of the land as a subdivision. It was evidently assumed throughout that the highest actual value that could be given to the land was on the basis of its potential value as a subdivision.

The Assessor, at p. 179, produced his plan of a subdivision, Exhibit 23, and testified that he made his estimate of the value at which he arrived for assessment on the frontage value of the various lots shown on this plan for building purposes, arriving at these values from the assessed values and sale prices of lands surrounding and in the neighbourhood of the lands of the respondent. On the same page he says, speaking of this plan:

> We used that in the land revision work to estimate the present assessment.

At p. 180:

> The information that we used, Mr. Geary, has to do with the property surrounding, north and east, of Woodbine Park.

He goes on to say that he got the valuations by comparing in that way, and arrived at a total lot frontage of 21,072 feet, and in that way arrived at the value of $791,175, the foot frontage value varying according to the situation of the various lots. At pages 189, 198 and 199 he refers to the use of the land for a going concern as one of the elements to be taken into consideration in arriving at the value, and says he knows "of no other way of arriving at a piece of property, that is, in the city limits." Finally, however, he abandons this, as shown in the following abstract from his evidence at p. 205:

> Exhibit 27. Statement of figures on proposed plan of subdividing Woodbine Park.
>
> Q. In this you eliminated all the buildings?
>
> A. Yes, sir.
>
> Q. And you treat it purely as a subdivision?
>
> A. Yes.

Q. Now, I want to ask you: did you arrive at any figures as a going concern?

A. No.

Q. You never adopted that?

A. No, sir.

The learned Chairman of the Municipal Board in his reasons says:

> There was considerable evidence offered, both by the appellants and by the City of Toronto, setting out the way in which the assessment of this property had been originally made, and setting out the value of the property both for race track purposes, and as a subdivision in the City of Toronto in the event of the racing being abandoned and the property sold as a subdivision.

I am unable to find any evidence from any witness as to the actual value of this property for race track purposes, and it is evident that the value fixed by the Board was on the evidence offered as to its potential value as a subdivision, there being no evidence that would justify the finding of value arrived at on any other basis. The Board, therefore, having arrived at its valuation of these lands on the basis of a subdivision, which involved the destruction of all the buildings before the land could be used and disposed of in lots as a subdivision, the buildings added nothing to that potential value of the property beyond their value for the purpose of being wrecked and removed. On this branch of the case I am in entire agreement with the reasons clearly set out by Mr. Justice Riddell, and also with his view that the question involved is one of law.

It is manifestly improper to value the land for the purpose of a subdivision, which would involve the destruction of the buildings, and then value the buildings on the basis of their being used for the purposes of a race track. If the buildings were to be valued on that basis, the land would have to be valued on that basis also.

I find that the Court of Appeal has overlooked the evidence at p. 95 as to the value of the buildings for wrecking purposes, and it was not, I think, referred to on the argument here. The witness, Joseph Teperman, called by the respondent, examined as to the cost of wrecking and removing the buildings and the value of the wreckage, says:

> We would take the entire site and we would still be prepared to pay $5,000.

1934

CITY OF TORONTO v. ONTARIO JOCKEY CLUB.

Smith J.

Q. For all the buildings?

A. For all the buildings, everything that is situated on the ground.

The CHAIRMAN: Q. So you would lose $5,000 on the one stand and you would make up on the other?

A. Make up on the other.

There should therefore be added to the amount fixed by the Court of Appeal this sum of $5,000 as the value of the buildings for wreckage purposes.

The question of whether or not the respondent is liable for business assessment is, perhaps, not so clear. Mr. Colquhoun, on behalf of the appellant, presented a very able argument in support of his contention that the respondent was liable to a business assessment by virtue of sec. 9 of the Act, which reads in part as follows:

9. (1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "Business Assessment" to be computed by reference to the assessed value of the land so occupied or used by him, as follows:

(*j*) Every person carrying on the business of a photographer or of a theatre, concert hall, or skating rink, or other place of amusement, or of a boarding stable, or a livery, or the letting of vehicles or other property for hire, or of a restaurant, eating house, or other house of public entertainment, or of a hotel or any business not before in this section or in clause (*k*) specially mentioned, for a sum equal to twenty-five per centum of the assessed value.

(2) Every proprietory or other club in which meals are furnished, whether to members or other, shall be liable to a business assessment for a sum equal to twenty-five per centum of the assessed value of the land occupied or used for the purposes of the club.

He argues that the respondent carries on a business, and therefore comes within the language of subsection 1 (*j*) quoted above, although not expressly mentioned, because the *ejusdem generis* rule does not apply, by virtue of sec. 9 (12) which reads as follows:

(12) Wherever in this section general words are used for the purpose of including any business which is not expressly mentioned, such general words shall be construed as including any business not expressly mentioned, whether or not such business is of the same kind as or of a different kind from those expressly mentioned.

It seems clear that the mere fact that an organization styles itself a club will not finally settle the question of whether or not it is liable to assessment under subsection 1 (*j*).

The Ontario Jockey Club is an incorporated company, having a fixed capital represented by stock shares issued to stockholders in the ordinary method. There is in the organization a system by which people who are not stock-

holders may become what is called "members" of the club, endowing them with certain privileges at race meetings, and perhaps on other occasions, not accorded to the public. These members, however, have no voice in the management of the corporation affairs. The race meetings are carried on and managed by the corporation. The moneys received for admission to the races from the parimutuel betting system and from other sources are all paid to the corporation, and are applied and paid out as the corporation directs. The earnings or profits derived from these race meetings or any other uses to which the property of the corporation may be put may be applied to payment of dividends to the shareholders if the corporation so determine. The evidence is that for the past two years there have been no profits, so that dividends could not properly be paid except out of accumulated surplus, and none have been paid during these two years. Whether any were paid in preceding years is not disclosed.

It is clear that the question of whether or not a corporation is liable for business assessment in connection with the lands occupied by it, upon which its affairs are carried on, does not depend on whether or not a profit is being made. A corporation, or an individual, for instance, carrying on a mercantile business in a shop, is liable to business assessment, quite regardless of whether the business is realizing a profit or not.

It is no doubt a question of law whether or not sec. 9 (2) quoted above, dealing with clubs, necessarily excludes all clubs from the operation of sec. 9 (1). Having concluded, as stated above, that sec. 9 (2) is not conclusive upon this point, the question of whether or not this particular club comes within the provision of sec. 9 (1) can only be determined by an investigation of the facts concerning its organization and the operations which it carries on. It seems to me that there is evidence upon which the Municipal Board could properly arrive at the conclusion which it reached, that the respondent was occupying or using the land in question for the purpose of a business within the meaning of sec. 9 (1), in view of the provisions of subsection 12, which excludes the application of the *ejusdem generis* rule.

1934

CITY OF TORONTO v. ONTARIO JOCKEY CLUB.

Smith J.

The appeal, therefore, upon this point must be allowed. The valuation of the land for asssessment purposes, fixed by the Court of Appeal, will be increased by the $5,000 referred to, and upon that valuation the respondent is declared liable for business assessment, as provided by the statute.

The appellant was obliged to come to this Court, and is entitled to its costs of this appeal.

Appeal allowed, as above set forth, with costs.

Solicitor for the appellant: *C. M. Colquhoun.*

Solicitors for the respondent: *Ludwig, Shuyler & Fisher.*

1933

*Nov. 16, 17.

1934

*Feb. 6.

IN THE MATTER OF THE BANKRUPTCY OF STEWART E. TOD, DEBTOR.

EDWARD GUY CLARKSON, TRUSTEE OF THE PROPERTY OF STEWART E. TOD, DEBTOR ..... APPELLANT;

AND

STEWART E. TOD ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Property divisible among creditors—Bankruptcy Act, R.S.C. 1927, c. 11, s. 23 (a)—Future unearned salary of debtor—Allowance for maintenance—Competency to make, and form of, order.

Where a debtor in bankruptcy is in receipt of a yearly salary payable in weekly sums, his future weekly payments of salary, as they fall due, vest in the trustee in bankruptcy, under s. 23 (*a*) of the *Bankruptcy Act*, R.S.C. 1927, c. 11, but (under a rule long recognized by the courts) subject to a fair and reasonable allowance to the debtor for maintenance of himself and his family according to their condition in life; and it is competent for the court to make an order, declaring that such future payments, to the extent that they exceed the allowance for maintenance fixed by the court, vest in the trustee from the time or times that they are received by or become owing to the debtor, and ordering the debtor, as he receives such payments, to pay the same (to the extent aforesaid) to the trustee, until creditors' claims and trustee's costs are satisfied.

Review of cases.

Judgment of the Court of Appeal for Ontario, [1933] O.R. 519, reversed, and order of Sedgewick J., [1931] O.R. 147, restored.

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*PRESENT:—Duff C.J. and Lamont, Smith, Crocket and Hughes JJ.

APPEAL (by special leave granted by a judge of this Court) from the judgment of the Court of Appeal for Ontario (1) which reversed the judgment of Sedgewick J. (2) who made an order declaring that all salary in excess of $100 per week as may be received by or owing to the debtor (the present respondent, who had made an authorized assignment under the *Bankruptcy Act*) is from the time or times such excess is received by or becomes owing to the debtor, the property of the debtor divisible among his creditors and from such time or times vests in the trustee for creditors, and ordering that the debtor pay to the trustee such excess of salary forthwith after the same is received by the debtor, until the claims of his creditors and the trustee's costs have been fully satisfied. (The order also permitted to the debtor a reference as to the propriety of the amount allowed for maintenance of himself and his family, and reserved leave to the debtor and to the trustee to move at any time to vary the order in the event of a change in the debtor's situation with respect to salary.)

By the judgment now reported, the appeal to this Court was allowed and the order of Sedgewick J. restored, with costs to the appellant in this Court and in the Court of Appeal.

W. N. Tilley K.C. for the appellant.

R. S. Robertson K.C. and *J. H. Greenberg* for the respondent.

The judgment of the court was delivered by

SMITH J.—The respondent, the Assistant General Manager of the Great Atlantic & Pacific Tea Company, made an assignment for the benefit of his creditors on 3rd December, 1932, and the appellant was subsequently appointed trustee. Creditors' claims amounted to $23,033.69, and the sole asset disclosed was $100 cash on hand.

The respondent, under examination, stated that he is in receipt of a salary of $10,000 a year, paid to him in amounts of $196 each week.

(1) [1933] O.R. 519; 14 C.B.R. 329; [1933] 3 D.L.R. 422.

(2) [1933] O.R. 147; 14 C.B.R. 205; [1933] 1 D.L.R. 675.

1934

In re TOD

CLARKSON v. TOD.

Smith J.

On the 2nd day of February, 1933, upon the application of the trustee, an order was made by the Hon. Mr. Justice Sedgewick in Chambers, containing the following provision:

IT IS DECLARED that all salary in excess of $100 per week as may be received by or owing to the said debtor (until the claims of his creditors and the costs of the said trustee have been fully satisfied) is from the time or times such excess is received by or becomes owing to the said debtor, the property of said debtor divisible among his creditors and from such time or times vests in Edward Guy Clarkson as trustee for said creditors AND IT IS ORDERED ACCORDINGLY.

AND IT IS FURTHER ORDERED that the said debtor do pay to the said trustee such excess of salary forthwith after the same is received by the said debtor, until the claims of his creditors and the costs of the said trustee have been fully satisfied.

An appeal was taken to the Court of Appeal, which set aside the order with costs, and from that decision the present appeal is taken.

The Court of Appeal, purporting to follow its own decision in *Re Rung* (1), sets out that it was there held that the earnings of a bankrupt by the exercise of his personal skill are not within the Act as property to be distributed amongst his creditors. The authorities cited in the reasons for that decision are: *Ex parte Benwell, In Re Hutton* (2), and *In re Jones, Ex parte Lloyd* (3).

In the former case the bankrupt was a bonesetter, earning a large amount each year from fees. It is pointed out that his earnings were dependent on the accident of whether people come to consult him or not, and upon whether he chooses to be consulted, and it was held that the trustee was not entitled to any order.

This case was followed in the case of *In re Jones, Ex parte Lloyd* (3), where the bankrupt was a workman employed in a colliery company, and was earning about 25s. a week. Cave, J., referring to the *Benwell* case (2), says that

inasmuch as he (the bankrupt) was not entitled to receive that money with respect to any particular period, such as a year or some part of a year, irrespective of the amount of work he did, the money so received was not "income", *ejusdem generis* with "salary".

The reasons in *Re Rung* (1) show that, upon the above authorities, the case was made to turn upon the uncertainty of the earnings of the debtor, and at p. 560 there is the following statement:

Nor do I go into the wide question whether, under our Act, subsequent "salary, income * * * * or compensation" is ever assets for the trustee—such enquiry is unnecessary.

(1) (1928) 62 Ont. L.R. 557. (2) (1884) 14 Q.B.D. 301.
(3) [1891] 2 Q.B. 231.

The case of *Hamilton* v. *Caldwell* (1) is expressly distinguished on the ground that in that case the bankrupt was entitled to a salary at the rate of £500 per annum, and was receiving that salary with respect to the year, irrespective of the amount of work he did, and consequently the money so received was properly to be taken by the trustee. It is therefore evident that the present case is distinguishable from the case of *Re Rung* (2), because here the debtor is in receipt of a definite yearly salary, as in the case of *Hamilton* v. *Caldwell* (1).

The further reason advanced by the Court of Appeal in this case is, that we are not bound by decisions in Scotland, Ireland and the English Court of Appeal, and that our laws are to be interpreted in the sense in which, we believe from the language employed, the legislature intended; and it is pointed out that words may have a certain meaning in England and a different meaning here.

It is necessary, however, to examine the exact language of the *Bankruptcy Act,* and, by the application of the ordinary rules of construction, having regard to decisions binding on us and the reasoning of decisions not strictly binding, to determine the two neat questions raised in this appeal.

We have been referred to a long list of cases decided under the various English Bankruptcy Acts from time to time in force, many of which do not directly touch the precise points here in question, which are, whether or not future unearned salary passes to the trustee in bankruptcy by virtue of sec. 23 (*a*) of the *Bankruptcy Act,* R.S.C., 1927, ch. 11, and, if they do pass, whether or not it is competent to make such an order as is in question here.

Section 23 defines property of the debtor divisible amongst his creditors and sets out that it shall comprise

> (*a*) All such property as may belong to or be vested in the debtor at the date of the presentation of any bankruptcy petition or at the date of the execution of an authorized assignment, and, all property which may be acquired by or devolve on him before his discharge.

The corresponding section of the English Act of 1869 is 15 (3), carried into the Act of 1883 as sec. 44 (*i*), and into the Act of 1914 as sec. 38 (*a*). Sec. 15 (3) of the Act of 1869 reads as follows:

> (3) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance.

(1) (1919) 88 L.J. N.S., P.C. 173. (2) (1928) 62 Ont. L.R. 557.

1934

In re TOD

CLARKSON v. TOD.

Smith J.

The only change in the wording in the two later Acts is the substitution for the concluding words " during its continuance " of the words " before his discharge." Sec. 23 (*a*) of our Act would seem to have exactly the same meaning and effect as the corresponding section in the English Acts, unless there is something in our Act indicating a distinction.

In many early cases in England it is laid down that, notwithstanding the provisions of the *Bankruptcy Act*, a bankrupt may sue for his personal earnings if the trustee does not interfere, but that any amount recovered beyond what is reasonably necessary for the support and maintenance of himself and family will belong to the trustee.

Chippendall v. *Tomlinson* (1); *Silk* v. *Osborn* (2); *Kitchen* v. *Bartsch* (3); *Coles* v. *Barrow* (4).

In the argument in *Chippendall* v. *Tomlinson* (1), the following from Blackstone's Commentaries, Vol. 2, p. 485, was relied on:

> The property vested in the assignees is the whole that the bankrupt had in himself at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for.

In *Kitson* v. *Hardwick* (5), Willes J. quotes from Smith's Mercantile Law, 8th Ed., 646, language to the same effect.

Williams v. *Chambers* (6) is a case where the assignee sued for amount owing for personal earnings of the bankrupt, earned during the bankruptcy, which were claimed to be not more than sufficient for maintenance of the bankrupt and his family. On demurrer the action was dismissed on the ground that the pleading claimed the amount as a debt directly due to the assignee, and that, to hold the assignee entitled to recover,

> we must go the length of deciding that the assignee might, in the words of Lord Mansfield in *Chippendall* v. *Tomlinson* (7), let the insolvent out to hire, and contract himself for his personal labour.

The reasons refer to

> the comprehensive words of this section, which would entitle the assignee to recover any debt accruing to the insolvent before his final discharge, either for work and labour or any other cause.

Wadling v. *Oliphant* (8). A bankrupt procured employment as editor of a newspaper, and, six years after the

(1) (1785) 4 Doug. 318.
(2) (1794) 1 Esp. 140.
(3) (1805) 7 East, 53.
(4) (1813) 4 Taunt. 754.
(5) (1872) L.R. 7 C.P. 473.
(6) (1847) 10 Q.B. Rep., 337.
(7) Cooke's Bankruptcy Laws, 431, at 432.
(8) (1875) 1 Q.B.D. 145.

bankruptcy, and before his discharge, obtained a judgment for £104 as six months' salary in lieu of proper notice of dismissal. Held, that the trustee could claim this money before it was paid to him as against any creditors subsequent to and without notice of the bankruptcy, on the ground that the money was not the proceeds of the bankrupt's personal labour subsequent to his bankruptcy, but a compensation for the breach of a contract which became a part of his estate in bankruptcy.

Blackburn, J., points out that *Beckham* v. *Drake* (1) decides that such a sum would pass to the assignee where the breach was before the bankruptcy. He goes on to say that it is unnecessary to decide whether, if an undischarged bankrupt were to make a large salary beyond what he could reasonably require for his support, the surplus amount in his possession is or is not protected from his assignee. And Archibald, J., says:

> Now the cases do shew that there is a rule, the extent and limit of which is not exactly defined, by which the bankrupt, after the date of his bankruptcy, may, in certain cases, keep the produce of his personal labour.

Ex parte Vine, In re Wilson (2). The bankrupt, before his discharge, recovered judgment for £250 damages for slander, which amount was paid into court. The assignee applied for payment of the amount to him, but the application was dismissed by Bacon, C.J. On appeal, James, L.J., says in his reasons that the general principle always has been that, until a bankrupt has obtained his discharge, all his property is divisible amongst his creditors. But an exception was absolutely necessary in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his own living.

In *Ex parte Huggins, In re Huggins* (3), the question was as to the right of the trustee in bankruptcy to receive part of the pension of a retired judge of a colony, amounting to £875 per annum. On appeal from an order made by the Registrar restraining the bankrupt from receiving the moneys payable to him in respect of the pension, the trustee offered to assent to the bankrupt receiving for his maintenance £350 per annum out of the pension. It was held that

(1) (1849) 2 H.L.C. 579. (2) (1878) 8 Ch. D. 364.
(3) (1882) 21 Ch. D. 85.

1934

In re TOD

CLARKSON v. TOD.

Smith J.

the pension was income, coming within the provisions of sec. 90 of the statute of 1869, and that property to be dealt with is not property in the abstract, but property divisible amongst the creditors under the Act, defined by sec. 15 (3), as quoted above. Lindley, L.J., then proceeds to say:

> All money therefore to which the bankrupt may become entitled in any manner during the continuance of the bankruptcy is within sect. 15. Then, looking a little further, we find a group of sections, sects. 87 to 95, which relate to "property devolving on the trustee". As I understand them, these sections are modifications and qualifications of sect. 15. The different kinds of property with which they deal vest in the trustee, but subject to the modifications and qualifications contained in this group of sections.

The reasons of Jessel, M.R., are to the same effect. According, therefore, to this decision, if secs. 87 to 95 were not in the English Act, sec. 15 (3) would vest all the salary and income in the trustee, without any modification. Sec. 90 makes special provision as to salary and income, but there is no such section in the Canadian Act.

Re Brindle, Ex parte Brindle (1). The bankrupt was employed as a commercial traveller at a salary of £100 per year, terminable by a week's notice. An order was made for payment by him of £20 every year out of such salary. Held on appeal that the order was right, and notwithstanding that the employment was terminable by a week's notice, sec. 53 (2) of the Act of 1883, which is the same as sec. 90 of the Act of 1869, applies.

Two cases are cited to show that an assignment of money to be acquired in future and future debts will be enforced:

In *re Clarke—Coombe* v. *Carter* (2), approved in the House of Lords in *Tailby v. Official Receiver* (3), holds that an assignment for value of all moneys which the assignor should become entitled to under a will operates as a contract which the court would enforce.

Tailby v. *Official Receiver* (3) decided, reversing the Court of Appeal, that a security of all book debts due and owing, or which might during the continuance of the security become due or owing, was good as to future debts, though not limited to book debts of any particular business.

In re Rogers, Ex parte Collins (4). The only part of this case that seems to have any bearing is the statement of Vaughan Williams, J., at p. 431, where he says:

(1) (1887) 56 L.T. 498.
(2) (1887) 36 Ch. D. 348.
(3) (1888) 13 App. Cas. 523.
(4) [1894] 1 Q.B. 425.

I conceive that, subject to the rule of not depriving the bankrupt of the means of livelihood, if it be shown that after providing fairly and liberally for the support of the bankrupt there would be a balance of salary, that that balance of salary, even though the salary is a salary for personal exertions, might be made the subject of an order under the 53rd section.

In re Shine, Ex parte Shine (1). The bankrupt had an agreement to act at a theatre for a term of two years at a salary of £30 per week, payable weekly. During the bankruptcy, and before the trustee intervened, he entered into an arrangement with the manager that the manager should buy up his debts and should reimburse himself by retaining £20 a week out of the bankrupt's salary. It was held that this agreement with the manager was valid, and no order was made.

In re Graydon, Ex parte Official Receiver (2), holds that the principles which underlie sec. 53 of the *Bankruptcy Act* of 1883, with respect to the salary or income of a bankrupt, are also applicable to his personal earnings. In each case it is a question of amount, and he will be allowed to retain only such sum as is sufficient for the reasonable maintenance of himself and his family, and the residue will pass to his trustee in bankruptcy. In his reasons, Vaughan Williams, J., says:

Now it seems to me, on the authorities, that it is not true to say that no personal earnings of the bankrupt after bankruptcy pass to his trustee. The authorities are not very clear; but I think that the balance of the authorities (see *Wadling* v. *Oliphant* (3), and cases there cited) shows that it is only the personal earnings reasonably necessary for the maintenance of a bankrupt and his family which do not pass to the trustee.

In re Roberts (4). The bankrupt claimed as personal earnings a quantity of billiard balls that he received under a contract to use this make of balls only in practice. It was held that the assignee was entitled to the balls. Lindley, M.R., in his reasons, says:

The alleged exception is not to be found in the Act itself, but is said to be an implied exception based upon a long series of authorities and well recognized for the last hundred years.

but he holds that these authorities have no application to the case before him. He reviews the authorities that he mentions, and concludes that the language of sec. 44, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his

(1) [1892] 1 Q.B. 522.
(2) [1896] 1 Q.B. 417.
(3) (1875) 1 Q.B.D. 145.
(4) [1900] 1 Q.B. 122.

1934

In re TOD

CLARKSON v. TOD.

Smith J.

personal exertions which are necessary to enable him to live. But on the other hand, the necessity is the limit of the exception. This, he says, is in entire accordance with modern decisions, quoting most of those referred to above, and ending with *Benwell's* case (1), which he says turns entirely on sec. 53, and is only an authority for the proposition that a prospective order cannot be made impounding the future personal earnings of a bankrupt. The bankrupt may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family.

Bailey v. *Thurston & Co. Ltd.* (2). In this case Cozens-Hardy, L.J., says:

> It has been established for many years that, notwithstanding the generality of the language used in the Bankruptcy Acts, there are some contracts and some rights that do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. * * * As to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation.

Affleck v. *Hammond* (3). It was held that, as the money claimed by the bankrupt was his personal earnings, it was excepted from the property passing to the trustee in bankruptcy, and as the whole or part was required for his maintenance, he was not a mere nominal plaintiff, and could not be ordered to give security for costs.

Vaughan Williams, L.J., quotes with approval the language of Cozens-Hardy, L.J., in *Bailey* v. *Thurston* (4). Buckley, L.J., quotes the language of James, L.J., in *Ex parte Vine, In re Wilson* (5), and the language of Willes, J., in *Kitson* v. *Hardwick* (6). Kennedy, L.J., says:

> By s. 44 of the *Bankruptcy Act*, 1883, the trustee in bankruptcy has a general right to intervene. But on that general right of intervention there has been grafted an exception in favour of the personal earnings of the bankrupt, so far as those earnings are necessary for his support, and this exception has been recognized for at least a hundred years. It is true that the generality of s. 44 is emphasized by the fact that particular things are particularly excluded from its operation; but it is nevertheless clear that the Act does contemplate the possibility of the acquirement by an undischarged bankrupt of future property.

(1) (1884) 14 Q.B.D. 301.
(2) [1903] 1 K.B. 137.
(3) [1912] 3 K.B. 162.
(4) [1903] 1 K.B. 137.
(5) (1878) 8 Ch. D. 364.
(6) (1872) L.R. 7 C.P. 473, at 479.

Hollinshead v. *Hazleton* (1) merely decides that the salary of a Member of Parliament is within the meaning of sec. 51 of the Act. There is no corresponding provision in the Canadian Act.

Hamilton v. *Caldwell* (2). The appellant Hamilton, at the date of the bankruptcy, was earning, and thereafter continued to earn, under a contract of service terminable on notice, a fixed salary of £500, his total annual income being £670. It was held that the instalments of salary, as they accrued from time to time, beyond what was required for his reasonable maintenance, vested in the trustee under sec. 98 (1) of the *Bankruptcy Act* of 1913 as *acquirenda* of the bankrupt, and an order was made for payment to the trustee of the instalments of salary receivable *in futuro* to the extent of £150 yearly.

Sec. 98 (1) of the Scottish Act reads in part as follows:

> 98. (1) If any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee, as at the date of the acquisition thereof or succession, for the purposes of this Act; * * *

The section, continuing, lays down the procedure to be followed by the trustee to obtain the after acquired property.

The order was opposed on two grounds, namely: (1) that the personal earnings of the appellant, after the date of the sequestration, do not pass under the sequestration to the trustee; and (2) that it was not competent to make an order against the bankrupt with reference to any instalments of the salary before they accrued due.

In the House of Lords, Viscount Finlay says it was admitted by the counsel for the appellant "that the personal earnings of the bankrupt would pass to the trustee under sec. 98 (1) when they accrued, subject to the *beneficium competentiae*;" and that the second ground alone was argued, the ground advanced against the order being that nothing could be done by the court until the trustee's title had accrued when each instalment of salary had been earned

(1) [1916] 1 A.C. 428.

(2) (1919) 88 L.J., N.S., P.C. 173; [1919] Sess. Cas. (H.L.) 100.

1934

In re TOD

CLARKSON *v.* TOD.

Smith J.

and was payable, and that the trustee should then follow the procedure laid down in sec. 98 (1). He goes on to say:

> This argument appears to me to overlook the fact that it must be open to the court to take proceedings to prevent the right of the trustee to each instalment as it falls due being defeated by the bankrupt's receiving and spending the money himself, and that, if there be no such power, there might be a most inconvenient and unseemly scramble between the trustee and the bankrupt as each instalment fell due. The trustee surely might take steps, as any one instalment was about to fall due, for the purpose of preventing the bankrupt from defeating his title by receiving and spending it, and, if he can do it with regard to each particular instalment, there is no principle or law to prevent him from obtaining a general order of this kind for the protection of his title to receive each instalment as it falls due.

Viscount Cave says:

> It is admitted that there is no precedent for such an order, and the question raised by this appeal is whether there was jurisdiction to make it.

He says that a terminable contract for personal services, such as that which is in question in the present case, does not vest in the trustee, and points out that the Scottish Act contains no provision similar to sec. 51 of the English *Bankruptcy Act* of 1883, enabling the court to attach the salary or income of a bankrupt; and, after quoting sec. 98 (1), says that, so long as the bankrupt continues in his present employment, and has not obtained his discharge, each instalment of his salary as it becomes due will fall within the subsection and will be capable of being impounded by an order made under the subsection. He states that sec. 98 (1) does not, according to its terms, authorize the making of such a declaration until after the property has been acquired and notice has been given inviting persons interested, such as new creditors, to appear and object; and expresses some doubt as to the competency to make the order, and finally states that if a similar question should arise under the English Bankruptcy Act, it would be necessary, in view of the observations of Lord Lindley in *In re Roberts* (1) and the cases there referred to, to consider the matter afresh, with special reference to the English law and practice.

Lord Dunedin discusses the Scottish law, and says:

> I do not think that the point is without difficulty, but, on the whole, I am of opinion that the order as made is a competent order. Although each periodical payment is not vested until it becomes due, yet it is known now that such periodical payments will be made from time to time. It would be an almost senseless proceeding that there should have to be a repeated application each time payment became due.

(1) 69 L.J.Q.B., at 23; [1900] 1 Q.B., at 129.

He points out that precaution should be taken to guard the interests of others who may be interested in the future earnings, because the trustee's right is only an inchoate right, which may be defeated by diligence carried through by a subsequent creditor; and that therefore there should be in the order a reservation as to the rights of other persons interested.

Lord Shaw and Lord Wrenbury agree with Lord Dunedin. The latter supports the competence to make the order upon grounds similar to those stated by Viscount Finlay.

The language of sec. 98 (1), quoted above, is not, I think, more comprehensive than that of our sec. 23 (*a*) also quoted, which sets out that the property divisible among creditors is "all property which may be acquired by or devolve on him (the bankrupt) before his discharge."

Section 2 (*ff*) of the Canadian statute reads as follows:

"Property" includes money, goods, things in action, land, * * *

The English decisions referred to above seem to establish beyond any question that, by the language of the English Act, "all such property as * * * may be acquired by or devolve on him before his discharge," the instalments of salary such as are in question here vest in and belong to the trustee as they fall due, subject to the alimentary provisions referred to.

This precise language is adopted in the Canadian Act and is not capable of any difference of meaning in Canada from its meaning in England.

As already pointed out, there is no section in the Canadian Act, or in the Scotch Act, corresponding to section 90 of the English Act of 1869 (sec. 51 (2) of the Act of 1914) which provides that the court may from time to time make such order as it thinks just for the payment of salary or income of the bankrupt or any part thereof to the trustee during the bankruptcy. As we have seen, however, it is laid down in *Ex parte Huggins* (1) referred to above, that sections 87 to 95 of the English Act are only modifications and qualifications of section 15 of that Act, and that, if these sections were not there at all, salary and income would vest in the trustee without any modification, except that which has been engrafted by the decisions referred to.

(1) (1882) 21 Ch. D. 85.

1934

In re TOD

CLARKSON v. TOD.

Smith J.

The meaning and effect of the concluding portion of section 23 (*a*) of the Canadian Act would therefore seem to be the same as that of the same words in the English Acts, which meaning has been settled, not only by the various decisions in the English Court of Appeal referred to, but also by the decision of the House of Lords in *Hamilton* v. *Caldwell* (1). The latter case, as mentioned above, expressly holds that the instalments of salary, as they become due, vest in the trustee, and lays it down as beyond doubt that the trustee would be entitled to an order as each instalment falls due, the only question being as to the competency to make an order covering all future instalments. While the language of the statute that was being dealt with in that case is different from the language of the Canadian statute, it is not more comprehensive.

The decision is that it is competent to the court to make such an order, and this decision is arrived at on the general principles of equity, and not by virtue of any special provisions in the Scottish Act.

In *Clarkson* v. *White* (2), Boyd, C., held that future earnings, subject to the modification mentioned, pass to the trustee, and made an order accordingly.

Section 23 (*ii*) of the Canadian Act provides that the property divisible amongst creditors shall not comprise

> Any property which as against the debtor is exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.

In *Asselin and Cleghorn* (3), it was held that a judgment creditor is not entitled to have a receiver appointed to receive all debts due to the judgment debtor; that section 58 of the *Judicature Act,* R.S.O. 1897, ch. 51, is intended only to confer on the courts the former jurisdiction of equitable execution. This follows *Holmes* v. *Millage* (4).

Future earnings, therefore, cannot be reached by equitable execution in Ontario, but may be attached after they become due.

Barry, C.J., K.B.D., New Brunswick, held, in *In re Herbert H. James* (5), that future earnings do not pass to the trustee, and are exempt within the meaning of sec. 23 (*ii*) quoted above.

(1) (1919) 88 L.J.N.S., P.C. 173.
(2) (1882) 4 Ont. R. 663.
(3) (1903) 6 Ont. L.R. 170.
(4) [1893] 1 Q.B. 551.
(5) (1931) 13 Can. Bktcy. Rep., 247.

I am of opinion that this subsection refers only to property exempt from execution or seizure under legal process by virtue of the Execution Act.

Riddell, J., is probably right in his view that the Canadian Parliament never contemplated that sec. 23 (*a*) would have the effect of transferring future personal earnings of a bankrupt to the trustee. The draughtsman copied this section practically verbatim from the English Act, and deliberately left out sec. 90 of the English Act—sec. 51 (2) of the Act of 1914—which deals specially with salary and income. It would seem to be quite probable that he and Parliament, in leaving out that section, were of the impression that they were excluding from the operation of the statute future salary or earnings, and I would willingly adopt that view, if there were proper justification for it. This, however, would be a mere speculation as to the intention of Parliament, in which we are not entitled to indulge. We have, as pointed out, the precise provisions in reference to property to be acquired in future, copied from the English Act, without its modifications, the meaning and effect of which have been settled in England for more than a hundred years. When the Parliament of Canada adopted these provisions, we must, I think, assume that the intention was to apply to them the meaning thus long established.

I am of opinion, therefore, that it was competent for the Judge in Bankruptcy to make the order in question.

The amount allowed to the bankrupt by this order is $100 per week out of his salary of $10,000 per year. No question was raised by either side as to the reasonableness of this amount under the circumstances.

The general rule stated in the cases is that the bankrupt is entitled to the fair and reasonable amount required for the maintenance of himself and family according to their condition in life. Lord Esher, in *In re Shine* (1) referred to, says, at p. 532:

> I think the court ought not to cut down the bankrupt's means of livelihood too closely, but ought to leave a liberal margin for his support;

and it will be seen that in the quotation from the reasons of Vaughan Williams, J., in *In re Rogers, Ex parte Collins* (2),

(1) [1892] 1 Q.B. 522. (2) [1894] 1 Q.B. 425.

1934
In re TOD
CLARKSON
v.
TOD.
Smith J.

at p. 431, set out above, he speaks of "providing fairly and liberally for the support of the bankrupt," while throughout the various judgments in the cases referred to the judges are shocked at the idea of making a slave of the bankrupt. This feeling gave rise to the engrafted rule referred to, and to the remarks of Esher, M.R., and Vaughan Williams, J., as to making the allowance to the bankrupt liberal.

The appeal must be allowed and the order restored with costs to the trustee here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Tilley, Johnston, Thomson & Parmenter.*

Solicitors for the respondent: *Mercer, Bradford & Co.*

1933
*Nov. 6, 8.
1934
*Mar. 6.

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

VANDEWEGHE LIMITED (SUPPLIANT) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Dyers and dressers—Actual selling price—Current market value—Special War Revenue Act, R.S.C., 1927, c. 179, s. 86 (a) (b), (c), s. 87.

The respondent company was engaged in the business of wholesale dealers in, and dyers and dressers of, raw furs: it purchased raw furs or skins, dressed and dyed them and then sold them to other furriers or to retailers. The respondent paid the tax computed on the actual selling price; but, claiming that it should have been computed on the current market value of the dressed furs, under the regulation quoted below, the respondent sued to recover the amount alleged to have been overpaid, i.e., it urged that it should have only paid the tax imposed on dyers and dressers who were performing that work for others.

Held that the sales made by the respondent were sales within the scope of section 86 of the *Special War Revenue Act;* and that the tax payable by the respondent should be computed on the actual selling price of the dressed furs and not on its current market value.

Judgment of the Exchequer Court of Canada ([1933] Ex. C.R. 59) rev.

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. (1), maintaining the petition of right by the respondent asking that the amount alleged to have

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*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) [1933] Ex. C.R. 59.

been overpaid to the Crown in connection with certain sales tax be refunded.

The material facts of the case and the questions at issue are stated in the head-note and in the judgment now reported.

The following regulation was enacted under the *Special War Revenue Act,* 1915:

> Furriers are not to be granted a consumption or sales tax licence on and after the 1st September, 1924. Licences issued to furriers prior to that date are to be cancelled. Dressers and dyers of furs, however, are required to take out a sales tax licence and account to the Collector of Customs and Excise for consumption or sales tax on furs dressed or dyed by them. Such tax is to be computed on the current market value of the dressed furs whether the dresser or dyer is the owner of the furs or not.

J. A. Mann K.C. for the appellant.

L. A. Forsyth K.C. and *J. de M. Marler* for the respondent.

The judgment of the Court was delivered by

DUFF C.J.—The respondents are a company engaged in the business of wholesale dealers in, and dyers and dressers of, raw furs. They purchase raw furs or skins from trappers and other persons, dress and dye these skins and sell them to furriers who make them into fur garments. Occasionally they sell to retailers. Other dyers and dressers in Canada it seems dress and dye furs for furriers, but, as a rule, they are not owners of the furs. The respondents, on the other hand, dress and dye their own furs and resell them. The respondents insist upon the importance of the fact that the furs, in the operations to which they subject them, are neither cut nor "trimmed" by them, but that they confine themselves to cleaning, combing and dyeing the raw furs.

The controversy concerns the basis of taxation, under the *Special War Revenue Act,* in respect of furs sold by the respondents. Before and after the promulgation of Regulation 17, to which reference will be made hereafter, the respondents held a licence under the *Special War Revenue Act* (1915) and amendments, in which they were variously described as fur dressers and dyers, and manufacturing fur dressers and dyers. Prior to the passing of the regulation mentioned, they, being licensed in the same form, sold mainly to furriers who were licensed manufac-

1934

THE KING
v.
VANDEWEGHE LTD.

Duff C.J.

turers, although there were sales also to persons who were not licensees. As regards the former sales, they were, by the proviso of 19BBB (1), exempt from sales tax. As regards the latter, they did not dispute their liability to pay, and did pay sales tax. After the promulgation of the regulation, their customers, the furriers, ceased to be licensees and, consequently, (assuming that s. 19BBB (1) applied to them and that they were liable to pay sales tax thereunder), they continued to pay the tax. Other dyers and dressers, however, by force of the regulation, came under another rule. They, dyers and dressers, that is to say, who performed the work of dyeing and dressing for others, were obliged by the regulation to pay a tax on the "current market value" of the dressed furs. The respondents paid taxes under s. 19BBB (1), or duty on the sale price of the goods. A discrimination was thereby effected, the respondents complain, between them and their competitors, who, being the owners of furs, had them dyed and dressed by dyers and dressers. In practice, it appears that in these last mentioned cases, the market value of the fur was taken by the revenue department to be the cost price of the fur plus the amount paid to the dyer and dresser, and the sales tax at the statutory rate was calculated thereon. The respondents, on the other hand, who paid their tax pursuant to the provisions of s. 19BBB (1), paid upon the price which they charged the purchaser, that is to say, they paid, not only upon the cost of dyeing and dressing and the original cost of the fur, but they paid the tax rate on their profit as well.

There appears to be no manner of doubt about the facts, and the primary question is whether or not the respondents are right in their contention that they ought to be taxed upon the same footing as their competitors. The question does not seem to be susceptible of elaborate discussion. Perhaps the most convenient way of putting it is first of all to set out the provisions of s. 86 (*a*), (*b*) and (*c*) and 87 of c. 179, R.S.C. 1927, which contain the material parts of s. 19BBB (1), in respect of which there has been no substantial change:

86. In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four per cent on the sale price of all goods;

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him; or

(*b*) imported into Canada, payable by the importer or transferee who takes the goods out of bond for consumption, at the time when the goods are imported or taken out of warehouse for consumption; or

(*c*) sold by a licensed wholesaler to another than a licensed manufacturer, and (if the goods were manufactured or produced in Canada) the tax shall be computed on the price for which the goods are sold by the licensed manufacturer to the said licensed wholesaler, and the said price shall include the amount of the excise duties on goods sold in bond.

87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

(*a*) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or

(*b*) such goods have a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or

(*c*) such goods are manufactured by contract for labour only and not including the value of the goods that enter into the same, or under any other unusual or peculiar manner or conditions; or

(*d*) such goods are for use by the manufacturer or producer and not for sale;

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

The first contention on behalf of the respondents is that they are not producers or manufacturers within the meaning of s. 86. Although the point does not in any way govern our decision, we cannot properly proceed to the consideration of the substance of this contention without first observing that if the article sold by the respondents is not an article produced or manufactured in Canada within the meaning of s. 86, it is difficult to understand upon what ground it can be contended that it is an article "manufactured or produced" within the meaning of s. 87. If the skin or fur as cleaned, "made pliable," to use the expression of one of the witnesses, and dyed by them and sold by them, as "merchantable stock-in-trade," to use an expression assented to by the principal witness on behalf of the respondents, does not fall within the description "* * * goods produced or manufactured in Canada" (s. 86), it is not, at all events, immediately obvious how it can fall within the description "goods * * * manufactured or produced in Canada" within the meaning of s. 87.

Furthermore, there is nothing before us to indicate that the goods, which were the subject of sales in respect of which the respondents paid the taxes now reclaimed, fall within s. 87 (*c*); that is to say; that they are goods manu-

1934

THE KING v. VANDEWEGHE LTD.

Duff C.J.

factured under contract for labour only, and, indeed, if they are not "manufactured," it is difficult to bring them within the verbal frame of s. 87 (*c*).

We are not able to agree with the view advanced by the respondents that these articles sold by them are not within the contemplation of s. 86. The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe. S. 19BBB (1) gives us some assistance. Goods which are to be used in, or wrought into, or attached to, articles to be manufactured or produced for sale may still be "goods produced or manufactured" in Canada within the meaning of the section. And the matter is further elucidated by reference to s.s. 4, which enumerates many exceptions. By that subsection, the section shall not apply to "sales or importations" of a number of different things. Among these there is a significant item in these words,

> pulpwood, tan bark and other articles the product of the forest when produced and sold by the individual settler or farmer.

This suggests rather pointedly that the phrase "goods produced or manufactured" contemplates such things as pulpwood and tanbark, to which it appears to be assumed the section will apply when produced and sold by others than the "individual settler or farmer," by, for example, the holder of a timber berth or licence. Light is thrown upon the meaning of the word "produced" by the fact that pulpwood and tan bark and other articles, the product of the forest, are contemplated as being produced within the meaning of the statute. We have further the item "wool no further prepared than washed" which seems to imply that wool still further prepared, by dyeing for example, if sold, comes within the incidence of the tax. Then we have "raw furs" which is not without its implication. It is not easy to see why a raw fur which is separated from the animal upon which it grew, when combed, "made pliable" and dyed and thereby turned into "merchantable stock-in-trade," has not become something which is "produced" if the term "produced" is properly applicable to such things as "pulpwood" and "tan bark." Nor does the case appear to be very different if the operation begins by a purchase of the fur which has already been taken from the animal and ends with the last stage of preparation which fits it to be

sold as a fur that can be described as "dressed and dyed."

We think the sales made by the respondents are sales within the scope of s. 86.

This seems to be sufficient to dispose of the case. It may be that in working out the statute there has been some regrettable inequality, but the respondents' claim necessarily rests upon the proposition that they were taxable only under the regulation which we think very plainly is not intended to apply to sales within the contemplation of s. 86.

Although it does not strictly enter into the argument, it may not be out of place to observe that the dyer or dresser who neither owns the fur nor sells the fur, within the proper meaning of the word, is clearly not within s. 86. He may come within s. 87 and, if so, the transaction between him and the owner of the fur, which is not truly a sale at all, is deemed to be a sale for the purposes of the Act. The respondents, as we have already observd, are not shewn to be within s. 87, but, if they are a "producer" or "manufacturer" they are within s. 86.

We do not think it necessary to express any opinion upon the question of law that might arise for discussion if we had taken a different view of the statute and the regulation.

The appeal should be allowed and the action dismissed but, in the circumstances there should be no costs.

Appeal allowed, no costs.

Solicitor for the appellant: *J. A. Mann.*
Solicitor for the respondent: *L. A. Forsyth.*

DAME YVONNE PESANT (PLAINTIFF). APPELLANT;

AND

Z. PESANT AND OTHERS (DEFENDANTS). RESPONDENTS.

1933
* May 15.
1934
* Jan. 26.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Promissory note—Consideration—Note given by mother to daughter—Mother critically ill—Died soon after—Obligation "naturelle" to make provision for daughter without means—Donatio mortis causa—Don manuel—Delivery and acceptance—Articles 755, 758, 762, 776, 777, 982, 984, 989, 1140, 2268 C.C. Bills of Exchange Act, ss. 53, 58, 186.

The appellant's and respondents' mother, suffering since many years from tuberculosis and diabetes, made her will on the 11th of February,

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Cannon JJ.

1934

PESANT. v. PESANT

1930, by which she made legacies, by particular title, of $10,000 and $5,000 to each of her children except the appellant, the latter to inherit only of an equal division of the residue of the estate: such partition to take place only "when the youngest of the children in the first degree shall have attained the age of majority", which condition, according to the evidence, was postponing for a number of years the time of the division. The appellant was a widow having four young children and without any means; and, since the death of her husband, was provided for her living entirely through the care of her mother. But at the time of the will the appellant had expressed her intention to re-marry and the mother did not quite agree with her on that point, being of opinion that the wedding had better be postponed, at least for some time; this being the apparent reason for the exclusion of the appellant from the will, it happened that her fiancé died, and the mother, being informed of the fact, changed her sentiments towards the appellant. On the 5th of December, 1930, the mother, although gravely ill and aware of her critical condition but with a perfectly sound mind, signed a promissory note in the usual form "for value received" and payable on demand to the appellant or to her order for $10,000 with interest at 7 per cent; and she delivered the note to the appellant on the same day, with a verbal agreement that the latter would not claim payment before the expiration of four months from the date of the note. The appellant, in her evidence accepted by the trial judge, stated that her mother told her that the note was given to her in order "to provide for her living (and that of her children) after she, herself, had passed away". The mother died on the 25th of December, 1930, and, four months later, the appellant claimed from the estate the payment of the note which was refused, and then took the present action. The trial judge maintained the action on two grounds, holding that the mother had signed the promissory note in recognition of her legal obligation to provide for her daughter and therefore there was valid consideration; and that the note was also valid as constituting a manual gift. The appellate court dismissed the appellant's claim on the ground that the transaction evidenced by the promissory note was in truth a *donation à cause de mort,* and, consequently, null and void by force of article 762 C.C.

Held that, under the circumstances of this case, the appellant was entitled to recover from the estate of her mother the amount of the promissory note sued upon.

Held, also, that it is unnecessary to consider whether there was an "antecedent liability", within the meaning of s. 53 of the *Bills of Exchange Act,* which would constitute a valid consideration for the document as a promissory note; or whether the document was enforceable as a promissory note. Rinfret J. expressing no opinion; Cannon J. *contra.*

Held, further, that the document given to the appellant by her mother is sufficient evidence of a contract to pay the sum mentioned according to the terms of it; and, upon the whole of the evidence, this was the true character of the transaction and there was sufficient "cause" or "consideration" within the meaning of arts. 984 and 989 C.C., to support the legal obligation assumed by the promissor in the *obligation naturelle* to make a proper provision for her daughter. Rinfret J. expressing no opinion.

Per Rinfret J.—The gift which the Civil Code (art. 758) declares invalid and void is the "gift made so as to take effect only after death." It follows that the gift forbidden by the article is that gift which will become effective only in the case of the death of the donor, which has no effect before such death, and whereby the donee acquires no right until such death.

In fact, article 758 C.C. contains a definition. Under the circumstances of this case, the gift in question does not fall within that definition and was not a *donatio mortis causa*.

The provision in article 762 C.C., whereby gifts made during the supposed mortal illness of the donor are presumed to be made in contemplation of death, creates a presumption which may be rebutted by the proof of circumstances tending to render the gifts valid. It does not mean that a real *donatio mortis causa* may be validated. It means that the donee is entitled to establish that, under the circumstances surrounding it, the gift is not one made in contemplation of death. The consequence is, therefore, that the presumption is completely rebutted when the gift is shewn to have the characteristics of a gift *inter vivos*.

The circumstance that a gift is made payable only after death does not necessarily imply that the gift is made in contemplation of death. Confusion should not be made between the date of payment of a *créance* and the present right of a donee which became vested immediately upon his acceptance of the gift. C.C., arts. 755 and 777, first and last paragraphs.

The mother's promissory note, given as it was for a lawful consideration, "accompanied by delivery" and accepted by the daughter, was sufficient to meet the requirements of the second paragraph of article 776 C.C. and to constitute a valid manual gift.

The mother's promissory note was "moveable property" within the meaning of that paragraph. The "moveable property" which may become the subject of a manual gift comprises, of course, corporeal moveables, but also *titres de créance*, the delivery of which is capable of effectually operating the transfer of ownership therein (Judgment of the Privy Council in *O'Meara* v. *Bennett*, ([1932] 1 A.C. 80) discussed and applied). In such case, the negotiable document and the *créance* which it represents are identified with one another to such an extent that the *créance* itself is transferred by the sole delivery of the document from hand to hand, which is the characteristic of the manual gift ("don manuel").

In that respect, no distinction ought to be made between the promissory note of a third party and the promissory note of the donor himself.

Per Cannon J.—There was valid consideration for the note given by the mother to the appellant, and such note was not a gift *inter vivos* and *mortis causa* made by gratuitous title and was enforceable. The mother intended first to fulfill towards her daughter her "obligation naturelle" to make a proper provision for her daughter, which obligation was binding upon the mother during her lifetime, and, further, to discharge a duty of justice or fairness by making such provision immediately, knowing that the partition of the estate would be delayed at least for six years after her death.

Judgment of the Court of King's Bench (Q.R. 54 K.B. 38) reversed.

1934

PESANT v. PESANT

APPEAL from the judgment of the Court of King's Bench,(a) appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, Duclos J. (2) and dismissing the appellant's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

L. E. Beaulieu K.C. and *J. C. Lamothe K.C.* for the appellant.

Oscar P. Dorais K.C. for the respondents.

The judgment of Duff C.J. and Lamont and Smith JJ. was delivered by

DUFF C.J.—The claim in the action out of which this appeal arises is based upon a document in the form of a promissory note by which Dame Emma Martineau, whose executor is the respondent, promised to pay on demand for value received to the appellant or order, the sum of $10,000 with interest at the rate of seven per cent.

Dame Emma Martineau died on the 25th December, 1930, and, some months later, the document was presented for payment.

The Court of King's Bench (1) has held that the appellant's claim must fail on the ground that the transaction evidenced by the document was in truth a *donation à cause de mort* and, consequently, invalid by force of Art. 762 C.C. The grounds of the decision of that court are very clearly stated in the following paragraphs of the formal judgment:

Considérant que la demanderesse admet que sa mère était consciente de la gravité de sa maladie et qu'elle savait qu'elle en mourrait;

Considérant que, bien que le billet fût fait payable à demande, la signataire avait exigé que le paiement n'en fut demandé que quatre mois après sa signature, et que la demanderesse avait accepté cette condition;

Considérant que, de fait, la demanderesse n'a fait connaître l'existence de ce billet à ses frères et sœurs que quatre mois après la date du

(a) Reporter's note.—The *Revue Trimestrielle de Droit Civil* (1933, p. 557) has commented adversely upon the decision of the appellate court.

(1) (1933) Q.R. 54 K.B. 38. (2) (1931) Q.R. 69 S.C. 507.

5 décembre 1930; et bien qu'elle ait assisté à l'inventaire de la succession fait par le notaire Isidore Coupal, n'a fait aucune mention de ce billet;

Considérant qu'il résulte du témoignage de la demanderesse elle-même, que sa mère lui a donné ce billet pour assurer sa vie, après qu'elle serait partie elle-même, et que sa mère aurait consenti ce billet, parce que "elle avait des regrets de ne pas lui avoir donné des biens comme les autres", et qu'elle aurait ajouté: "Si tu veux accepter mon billet, je ne puis pas te donner autre chose pour le présent."

Considérant que la défunte, Madame Pesant, ne devait rien à sa fille à ce moment-là, si ce n'est l'obligation naturelle et légale qu'elle pouvait avoir de lui aider dans ses besoins;

Considérant que Madame Pesant, en signant ce billet de $10,000, n'a pas voulu s'engager elle-même à en faire le paiement, mais a entendu le mettre à la charge de sa succession;

Considérant que l'on reconnaît bien, dans les circonstances qui ont accompagné et précédé la signature du billet, dans les déclarations faites par la défunte, les traits caractéristiques d'une donation à cause de mort; la donatrice manifestant clairement qu'elle continuait de se préférer à la donataire, puisqu'elle n'entendait pas payer elle-même le montant du billet, mais qu'elle préférait la donataire à ses héritiers, vu qu'elle mettait le paiement de ce billet à leur charge;

Considérant que le 5 décembre 1930, Madame Pesant, sachant qu'elle était atteinte d'une maladie mortelle, ne pouvait pas faire une telle donation et qu'en conséquence le billet sur lequel la demanderesse fonde son action, n'a aucune valeur légale, est nul et doit être déclaré tel par cette cour;

Considérant que, par les conclusions de la défense, il est demandé que le billet soit annulé, et déclaré nul et de nul effet; qu'il y a lieu de faire droit à ces conclusions;

Considérant, de plus, qu'aux termes du testament de ladite feu Dame Pesant, ses biens ne doivent pas être partagés avant l'âge de majorité du plus jeune de ses enfants, et que jusque-là, c'est l'exécuteur-testamentaire, seul, qui en a la saisine;

The trial judge had taken the view that the document was given by Dame Martineau as a promissory note in recognition of a legal obligation to provide for her daughter who was without means; and that, in such circumstances, a present legal obligation arose which was enforceable against the mother's estate.

The question of substance upon which we have to pass is whether the findings of fact expressed in the passages quoted from the judgment of the Court of King's Bench which had the effect of reversing the findings of the trial judge can be sustained by reference to the evidence.

I have come to the conclusion that it is not necessary to consider whether in this case there was an "antecedent liability," within the meaning of s. 53 of the *Bills of Exchange Act*, which could constitute a valid consideration for this document as a promissory note. By force of the

1934
PESANT.
v.
PESANT
Duff C.J.

Bills of Exchange Act, s. 58, Dame Martineau is presumed to have been a party for value to the document which bears her signature, and the learned trial judge has found that there was an " antecedent liability " which consisted in the obligation to make in favor of the appellant an alimentary allowance which she had been paying her. It is, no doubt, an arguable question whether, upon the testimony of the appellant, the presumption that the promissory note was given for value, in the sense of the *Bills of Exchange Act,* has been rebutted, and that, therefore, the document is not and never was enforceable as a promissory note. As I say, I do not consider it necessary to express any opinion upon this point.

Assuming the document to be not so enforceable, this circumstance would be by no means incompatible with the admissibility of the document as evidence of an intention to enter into a contract to pay money for a sufficient " *cause* " or " *considération,*" within the meaning of articles 984 and 989 C.C., or, indeed, with the intention to execute and deliver a valid and enforceable promissory note. If the transaction had not the character which has been ascribed to it by the Court of King's Bench; that is to say, if it was not a *donation à cause de mort* but, in intention, as well as in form, a contract to pay, presently binding as an obligation *inter vivos,* with a postponement of the date of payment, then I have no difficulty in holding that, in the circumstances, there was a sufficient " *cause* " or " *considération.*" (5 Planiol & Ripert 335; *Legris* v. *Baulne* (1); *Hutchison* v. *Royal Institution of Learning* (2), 2 Pothier, p. 85, No. 173 (3); 24 Demolombe No. 351, 352, pp. 334-5).

I come then to the critical question. Was the transaction in intent, as well as in form, the execution and delivery of a presently obligatory promissory note with an understanding that the date of payment was to be deferred?

Let me say at once that, in my view, the document is the solid fact upon which the answer to that question rests. The trial judge found that Dame Martineau was, on the occasion of the execution of the document, although gravely ill and aware of her critical condition, in such a state that " *son intelligence était restée intacte.*" She had been

(1) (1914) Q.R. 23 K.B. 571. (2) (1931) Q.R. 50 K.B. 107.
(3) [1932] S.C.R. 57.

accustomed to transacting business. It has not been seriously suggested that she did not understand the significance of signing a promissory note.

I have been unable to convince myself that the evidence of the appellant reveals anything which seriously militates against the natural and logical inferences to be drawn from the fact that she executed and delivered this document. Any doubts which may exist as to the legal enforceability of the document as a promissory note do not weaken the inference that she intended to execute a valid and binding document of that character.

The circumstances mentioned in the judgment of the Court of King's Bench are, no doubt, weighty circumstances, but, weighing, as best I can, the considerations which affected the judgment of the Court of King's Bench, I am forced to the conclusion that the finding of the learned trial judge that Dame Martineau intended to enter into a presently binding contract, by way of promissory note, and that she executed and delivered the document in question to her daughter, with that intention, could not properly be set aside; although, as I have already observed, I express no opinion upon the point with which the learned trial judge would appear to have dealt, viz., whether or not the consideration for the promissory note as executed and delivered was, in whole or in part, an "antecedent liability" within the meaning of s. 53 of the *Bills of Exchange Act.*

In a word, my view is that the document is sufficient evidence of a contract to pay the sum mentioned according to the terms of it; and, having considered the whole of the evidence, that this was the true character of the transaction, and that there was a sufficient "*cause*" or "*considération*" whithin the meaning of articles 984 and 989 C.C., to support the legal obligation assumed by the promissor, in the *obligation naturelle* to make a proper provision for her daughter.

It follows that the appeal should succeed and the judgment of the learned trial judge restored with costs of all parties throughout to be paid out of the estate.

RINFRET, J.—Madame Zéphirin Pesant est morte le 25 décembre 1930. Elle souffrait depuis au moins deux ans de tuberculose et de diabète. Ces maladies se sont aggravées

1934

PESANT. v. PESANT

Rinfret J.

graduellement; et il n'y a pas de doute que ce sont elles qui ont causé sa mort.

Le 5 décembre 1930, elle signa un billet promissoire en la forme ordinaire causé "pour valeur reçue" et payable à demande au bureau de la Banque de Commerce, rue Masson, à Montréal, à Yvonne Pesant, ou ordre, pour la somme de $10,000, avec intérêt de 7 p. 100 l'an après échéance. Puis elle remit ce billet à Yvonne Pesant, qui est la demanderesse et l'appelante en la présente cause.

Yvonne Pesant est la fille de Madame Zéphirin Pesant. Au moment où ce billet fut souscrit à son ordre et lui fut remis, elle était veuve avec quatre enfants en bas âge, et sans aucuns moyens. Depuis la mort de son mari, c'était sa mère qui la faisait vivre.

Or, Madame Zéphirin Pesant, qui avait fait son testament le 11 février 1930, bien qu'elle léguât des sommes de $10,000 et de $5,000, à titre de legs particuliers et hors part à la plupart de ses enfants, n'avait fait aucun legs particulier de ce genre à l'appelante. Cette dernière était simplement appelée au partage du résidu des biens de la succession, en commun avec ses frères et sœurs; et ce partage ne devait avoir lieu que "lorsque le plus jeune (des) enfants au premier degré aura atteint son âge de majorité". D'après la preuve, cette condition retardait l'époque du partage de quelques années. Dans l'intervalle, les exécuteurs testamentaires avaient le pouvoir de différer la distribution aux légataires universels des fruits et revenus des biens de la succession, et même de les imputer en déduction de certaines créances chirographaires et hypothécaires. D'ailleurs, les legs particuliers étaient relativement considérables; et après qu'ils eussent été satisfaits, malgré que la succession fût assez importante, il est douteux que les revenus échéant aux légataires universels, qui étaient nombreux, aient représenté pour chacun d'eux une somme appréciable.

Il semble y avoir eu une raison pour que Madame Pesant ne traitât pas sa fille Yvonne sur le même pied que la plupart de ses autres enfants dans son testament. Sa fille devait se remarier, et Madame Pesant n'était pas tout à fait d'accord avec elle sur ce point. Elle pensait qu'elle devait au moins retarder son mariage pour quelque temps. A tout événement, l'appelante était fiancée; mais son fiancé mourut; et, depuis le moment où sa mère en fut informée,

un changement s'opéra dans ses sentiments, à l'égard de sa fille. Elle se prit à regretter de ne pas lui avoir donné des biens comme aux autres; et c'est alors qu'elle décida de lui donner $10,000—ce qui était, comme on l'a vu, le montant du legs fait à plusieurs des autres enfants—"pour assurer (sa vie et celle de ses enfants) après qu'elle serait partie elle-même". Ce sont là les raisons pour lesquelles elle signa le billet de $10,000 et le remit à l'appelante.

Cette version est celle de l'appelante; mais nous n'en avons pas d'autre. Le juge du procès l'a acceptée et en a fait une des bases de son jugement. L'appelante a ajouté dans son témoignage d'autres déclarations qui peuvent influer dans un sens ou dans l'autre sur la décision de cette cause et que, pour cette raison, il est utile de mentionner. Elle ignorait les termes du testament de sa mère; sa mère savait qu'elle mourrait de la maladie dont elle souffrait alors; sa mère lui

a demandé de ne pas réclamer le billet avant l'expiration de quatre mois de la signature du billet, chose que (l'appelante) a faite.

Il convient de noter que le billet porte la signature comme témoin de Marie Coderre, qui était la garde-malade de Madame Pesant à l'époque où le billet fut souscrit par elle.

Quatre mois après le décès de sa mère, l'appelante réclama de la succession le paiement du billet. Jusque-là, elle n'en avait parlé à personne. Le paiement lui ayant été refusé, elle intenta la présente action. Les autres légataires universels déclarèrent s'en rapporter à justice, et l'exécuteur testamentaire seul produisit une défense où il invoque plusieurs moyens:

Défaut de considération du billet, qui était en réalité une donation faite pendant la maladie réputée mortelle de la donatrice et, par conséquent, faite à cause de mort;

A tout événement, donation nulle parce qu'elle n'était pas dans la forme notariée et parce qu'elle n'avait pas été enregistrée;

Enfin subsidiairement, donation qui devrait être annulée parce qu'elle a été la conséquence d'une suggestion indue et de la captation de l'appelante, à une époque où Madame Pesant n'avait pas la capacité mentale requise pour disposer librement de ses biens.

Le juge de première instance a écarté l'imputation de suggestion indue et de captation. Se prononçant sur le fait

1934

PESANT. v. PESANT

Rinfret J.

de la maladie et de la capacité mentale de Madame Pesant, il dit ce qui suit:

"La preuve de cet état est tout à fait insuffisante. Il est vrai que Dame Martineau (Madame Pesant) était malade depuis longtemps d'une maladie très grave, dont tôt ou tard elle devait mourir; mais son intelligence était restée intacte."

Cette décision est justifiée par la preuve; elle n'est pas contredite dans le jugement de la Cour du Banc du Roi; et elle n'a plus été discutée devant la Cour Suprême. Nous devons donc partir de ce point que le billet a été consenti sans fraude de la part de la bénéficiaire et par une personne qui "avait toute sa connaissance et savait ce qu'elle faisait".

Le juge de première instance a été d'avis que, dans les circonstances, il ne s'agissait pas d'une donation entre vifs, ni d'une donation à cause de mort ou, en d'autres termes, d'une libéralité.

La mère devait une pension alimentaire à sa fille sans moyens; et, en reconnaissant cette obligation légale, elle signa le billet en question; il y avait donc valeur et considération.

De plus, l'on pouvait

considérer ce billet comme un don manuel, parce que le titre y représente la chose et a une valeur propre réalisable par le détenteur régulier.

Il a, en conséquence, maintenu l'action.

La Cour du Banc du Roi, au contraire, annula le billet comme constituant une donation faite pendant la maladie réputée mortelle de la donatrice et, par conséquent, nulle comme réputée à cause de mort.

C'est de ce jugement qu'il y a appel; et les questions que nous avons à considérer sont donc de savoir

1° si, dans les circonstances, nous sommes en présence d'une donation à cause de mort;

2° si, au contraire, il s'agit d'une donation entre vifs qui n'aurait pas été faite dans la forme exigée par le code civil;

3° s'il s'agit de l'acquittement volontaire d'une obligation naturelle que la succession de Madame Pesant est tenue de reconnaître.

Il y a certainement beaucoup à dire en faveur de la décision rendue par la Cour Supérieure qu'il s'agit ici d'un acte, pour employer les expressions de Aubry et Rau (vol. 4, p. 322) "rentrant par le fond comme par la forme dans la classe des actes à titre onéreux", surtout si on l'envisage à la lumière de la doctrine des commentateurs contemporains du Code Napoléon et de bon nombre d'arrêts de la Cour de Cassation. Cette décision peut aussi se réclamer

de plusieurs jugements prononcés dans la province de Québec et par des juges de la plus haute autorité. Sans vouloir diminuer l'importance des autres cas auxquels je pourrais référer, il suffit de citer sur ce point les opinions exprimées dans les causes de *Drouin* v. *Provencher* (1), de *Stephen* v. *Perrault*, Cour de Revision (2), et de *In re Ross, Hutchison* v. *Royal Institution for the Advancement of Learning* (3). La difficulté est de fixer la ligne de démarcation entre l'obligation naturelle et le simple devoir moral, ou devoir de conscience. Pour y parvenir, la doctrine nous offre les théories les plus diverses. Comme on l'a fait remarquer: chaque auteur a son système. La Cour de Cassation la considère comme une question de fait qu'elle laisse à la décision souveraine du juge du fond, suivant les circonstances de chaque espèce déterminée. Dalloz, Recueil Périodique, 1903, 2.13.

Madame Pesant avait l'obligation légale de pourvoir aux besoins de sa fille et des enfants de cette dernière dans la mesure de ses moyens de fortune. Cependant cette obligation légale cessait évidemment avec sa mort; et c'est ce qu'a fait remarquer la Cour du Banc du Roi. Mais Madame Pesant savait que sa fille était sans ressources, qu'elle ne lui avait pas laissé dans son testament le montant qu'elle léguait à la plupart de ses autres enfants, que le partage de la succession, à supposer que le résidu serait appréciable après l'acquittement des legs particuliers, serait retardé pendant quelques années et qu'elle risquait donc de rester sans moyens de subsistance. Il est naturel qu'elle ait regardé comme impérieux le devoir "d'assurer l'avenir" de sa fille et des enfants de cette dernière. En vue des legs qu'elle faisait aux autres enfants, le montant de $10,000 qu'elle a fixé était tout indiqué, et il n'est pas exagéré en proportion de la fortune qu'elle possédait. Certains auteurs contemporains voient là comme un prolongement de l'obligation civile de fournir des aliments; et il n'est pas surprenant que, dans toutes les circonstances que nous connaissons maintenant, Madame Pesant ait considéré son acte comme un devoir de conscience ou une obligation morale auquel elle n'était pas libre de se soustraire. Le seul fait que la somme remise ou stipulée prévoit les besoins alimen-

(1) (1883) 9 Q.L.R. 179. (2) (1918) Q.R. 565 C. 54.
(3) (1931) Q.R. 40 K.B. 107.

1934
PESANT.
v.
PESANT
Rinfret J.

taires futurs, ou, suivant l'expression contenue en la preuve, pourvoit à "assurer (la) vie" de la bénéficiaire pour l'avenir, n'est pas suffisant en soi pour qu'on la traite comme une pure libéralité. On en trouve un exemple dans Dalloz (Rép. Prat. vo. Donations entre vifs, p. 519, nº 9). Un beau-frère avait consenti une constitution de rente viagère au profit de la sœur utérine de sa femme, qui était dans l'indigence. Il n'y avait donc aucune obligation civile. L'acte était sous seing privé. La Cour de Douai décida que cet acte ne constituait pas une donation parce qu'il avait pour cause une obligation morale et, en conséquence, qu'il était valable. Sur pourvoi, la Cour de Cassation refusa d'intervenir en jugeant qu'en interprétant l'acte de cette façon, d'après les faits, "l'arrêt attaqué a pu le déclarer valable sans violer aucune loi" (20 Journal du Palais, p. 830).

On ne peut donc écarter *a priori* la décision du juge de première instance qui a jugé que, d'après les faits, dans cette cause-ci, il ne s'agissait pas d'une donation. Le code civil (art. 1140) reconnaît le lien créé par les obligations naturelles. Mais il ne définit pas ce genre d'obligations. Il n'est pas toujours facile de les distinguer du "simple désir de satisfaire à un sentiment d'équité, de conscience, de délicatesse ou d'honneur". La question est pleine de difficultés. Comme je ne crois pas nécessaire de la trancher pour décider la présente cause, je préfère ne pas me prononcer sur ce point. J'ai cru devoir m'en expliquer pour indiquer qu'en appuyant mes conclusions sur des motifs différents, je n'entends pas laisser croire que je désapprouve le point de vue auquel se placent mes collègues.

A mon avis, la Cour Supérieure a eu raison de juger que l'on pouvait du moins considérer la délivrance du billet promissoire de Madame Pesant comme un don manuel; et je confirmerais son jugement pour cette raison.

Même si on l'envisage comme une pure libéralité, je ne puis me rendre au raisonnement de la Cour du Banc du Roi qu'il y a eu, dans ce cas, donation à cause de mort.

Historiquement, la donation à cause de mort était celle qui ne devenait définitive que par la mort du donateur avant celle du donataire. Elle était, de sa nature, révocable au gré du donateur. Elle disposait des biens à venir, ou d'un bien présent dont le donataire n'acquérait la pro-

priété qu'à compter de la mort du donateur (10 Aubry et Rau, 5e éd., p. 439; 4 Mignault, p. 2). Quand Pothier (8 Bugnet, 3e éd., p. 350) parle d'un

donateur, qui se voit toucher à sa fin, (et qui) préfère le donataire non pas à soi, mais à ses héritiers ou à tout autre,

il entend expliquer par là "la raison des dispositions" qui annulent les donations "faites par personnes gisant au lit malades de la maladie dont elles décèdent", mais il ne prétend pas donner les caractéristiques de la donation à cause de mort. Les raisons de Pothier ont d'ailleurs singulièrement perdu de leur force depuis que la réserve et la légitime en faveur des héritiers sont disparues du droit de Québec. Les codificateurs eux-mêmes font allusion à cette transformation dans les remarques introductives de leur rapport sur les "donations entre vifs et testamentaires" (5e Rapp., Liv. 3e; seconde partie). L'article qu'ils ont proposé et qui est devenu loi se lit comme suit:

758. Toute donation faite pour n'avoir effet qu'à cause de mort qui n'est pas valide comme testament ou comme permise en un contrat de mariage, est nulle.

En somme, cet article contient une définition. La donation qui est déclarée nulle est celle "qui est faite *pour "n'avoir effet* qu'à cause de mort". Et si l'on analyse cette définition en regard de la notion historique de la *donatio mortis causa,* l'on doit reconnaître que la donation qui est prohibée par l'article est précisément celle dont l'effet est subordonné à la mort du donateur, qui jusqu'à cette mort n'a aucun effet, et en vertu de laquelle le donataire n'acquiert pas de droit avant cette mort. Le rapprochement avec le testament, qui est fait dans l'article, rend encore plus claire la pensée du législateur.

Or, la délivrance à l'appelante du billet promissoire de Madame Pesant n'a aucun des caractères que nous venons de mentionner. Madame Pesant a entendu donner $10,000 immédiatement et irrévocablement. Elle s'est dessaisie actuellement, en ce sens que sa promesse de payer l'a rendue débitrice de l'appelante. Par là, son acte rencontrait toutes les exigences du dernier paragraphe de l'article 777 C.C., et l'acceptation de l'appelante rendait l'acte irrévocable (art. 755 C.C.). L'acte a pris effet immédiatement et son efficacité n'a été en aucune façon subordonnée à la mort de la donatrice.

1934

PESANT v. PESANT.

Rinfret J.

Et il ne s'agit pas d'un chèque "donné sur une banque où le donateur n'avait pas de fonds", comme dans le cas supposé par M. le juge Carroll dans la cause de *Legris* v. *Beaulne & Chené* (1) ou comme le chèque dont il est question dans *Rochon* v. *Rochon* (2). Madame Pesant valait à peu près $150,000, d'après la déclaration faite au gouvernement après sa mort. La créance qu'elle constituait contre elle-même était donc absolument sérieuse et solide.

Sans doute, la donation fut faite pendant la maladie réputée mortelle de la donatrice, et l'article 762 C.C. édicte qu'en pareil cas "les donations conçues entre vifs sont nulles comme réputées à cause de mort". Mais l'article ajoute: "si aucunes circonstances n'aident à les valider". Cet article n'établit donc qu'une présomption qui peut être repoussée par une preuve contraire (art. 1239 C.C.; *Valade* v. *Lalonde* (3). Le législateur n'a pas introduit dans le code le texte rigide de la Coutume de Paris, ni la doctrine rigoureuse de Pothier, de Ricard, ou de Bourjon. Les mots: "si aucunes circonstances n'aident à les valider" n'étaient pas dans l'article de la Coutume. Ils ne signifient pas évidemment que les circonstances peuvent valider une donation réellement faite à cause de mort. Celle-ci est toujours nulle, excepté dans un testament ou dans un contrat de mariage, en vertu de l'art. 758 C.C. Ces mots veulent dire: si les circonstances ne réfutent pas la présomption qui résulte de ce que la donation a été faite pendant la maladie réputée mortelle. Ou, en d'autres termes: si les circonstances ne démontrent pas qu'il n'y a pas eu donation à cause de mort. Et la présomption est complètement réfutée lorsqu'il est établi que la donation, comme en l'espèce, a les caractéristiques de la donation entre vifs.

Une circonstance qui a paru avoir quelque poids auprès de la Cour du Banc du Roi, bien qu'elle n'ait eu apparemment aucune influence sur le jugement de la Cour Supérieure, est celle-ci:

A sa face, la créance ou le billet était payable à demande, Mais Mme Pesant a exprimé le désir que sa fille ne lui en réclame pas le paiement avant l'expiration de quatre mois

(1) (1914) Q.R. 23 K.B. 571.
(2) (1928) Q.R. 45 K.B. 170, at 174.
(3) (1897) 27 Can. S.C.R. 551, at 554.

de sa signature. Nous reconnaissons qu'il y a là un élément qui pourrait peut-être, dans certains cas, aider à déterminer s'il s'agit d'une donation à cause de mort. Il ne saurait jamais être décisif dans tous les cas; et il ne l'est pas ici. Il faut tenir compte de l'état d'esprit de la donatrice. "Nous ne considérons pas tant à ce sujet, disait Ricard (Donations, t. 1er, p. 22, nº 89), si (le malade) était actuellement proche de la mort, que s'il avait la pensée d'y être." Madame Pesant était malade depuis deux ans. Elle savait qu'elle mourrait de la tuberculose qui la minait—"tôt ou tard", suivant l'expression du juge de première instance. Mais rien, dans la preuve, ne démontre qu'elle s'attendait à mourir bientôt ou, pour employer le mot de Pothier, que sa "maladie eut un trait prochain à la mort". L'on se rappelle que cet auteur donne précisément comme exemple d'un cas où le malade s'illusionne, celui de la "pulmonie". Il n'est pas possible d'affirmer ici que Mme Pesant ne conservait pas l'espoir de vivre bien au delà des quatre mois de grâce qu'elle a demandés à sa fille, surtout lorsque le juge du procès n'a pas accepté cette suggestion de la défense.

En plus, il faut se garder de confondre le terme d'échéance de la créance avec le droit du bénéficiaire qui a pris naissance dès son acceptation (art. 755 et 777 C.C., 1er et dernier parags.). En l'espèce, la donation s'est réalisée au moyen de la remise du billet souscrit par la donatrice à la donataire, qui l'a acceptée. Elle était dès lors complète et définitive. Son effet fut immédiat. L'acte de Madame Pesant ne peut pas être caractérisé comme une "donation pour n'avoir effet qu'à cause de mort", suivant les termes de la prohibition de l'article 758 C.C. Et, comme nous le verrons, ce raisonnement s'applique *a fortiori* au don manuel.

Si donc la donation dont il s'agit n'est pas une donation à cause de mort, mais une donation entre vifs, la question qui reste à décider ne s'adresse plus qu'à la forme de la donation.

Il ne nous fait guère de doute qu'en France, à l'heure actuelle, une donation ainsi faite sous la forme d'un billet à ordre régulièrement rédigé et souscrit serait traitée comme donation déguisée et reconnue valable (D.P. 78.1.481). L'on peut dire qu'il y est de jurisprudence constante que les donations faites sous forme de contrats à titre onéreux

1934
PESANT
v.
PESANT.
Rinfret J.

par des personnes capables, sans fraude et sans préjudice du droit des tiers, sont valables nonobstant l'inaccomplissement des formalités prescrites pour les donations entre vifs. (Voir Dalloz—Code civil annoté—sous-art. 931—nos 172, 186, 239, 240, 243, 302, etc.) On trouve également des traces de cette théorie dans la jurisprudence de la province de Québec (*Cardinal* v. *Landes* (1); *Leblanc* v. *Porlier* (2). Mais je mentionne la question simplement pour indiquer qu'elle ne nous a pas échappé, car comme elle n'a pas été discutée devant nous par les avocats des parties, il n'y a pas lieu d'en parler davantage dans cette cause-ci. Et d'ailleurs, cela n'est pas nécessaire à la solution que nous cherchons, puisque, ainsi que je l'ai déjà dit, je suis d'avis que l'acte de Mme Pesant est valable à titre de don manuel.

Nous avons ici un billet promissoire ayant une cause intéressée ou une considération juridiquement suffisante, dont la donation, "accompagnée de délivrance", a été faite par Madame Pesant et acceptée par l'appelante. C'est là tout ce qu'il faut pour rencontrer les exigences du deuxième paragraphe de l'article 776 du code civil. Il y a eu donation: nous n'avons pas à revenir sur la discussion de ce point. Il y a eu délivrance: c'est là un fait établi. Il y a eu acceptation: cela ne fait pas de doute. La seule hésitation peut porter sur la question de savoir si le billet promissoire entre dans la catégorie des "choses mobilières" qui peuvent faire l'objet d'une donation en la forme autorisée par ce paragraphe. Par définition traditionnelle, il s'agit ici d'un objet dont la "délivrance" peut s'opérer par transmission de la main à la main. De là, l'appellation de "don manuel". Mais la loi parle de donation. Il faut donc, de la part du donateur, l'intention de se dépouiller à titre gratuit, actuellement et irrévocablement, de la propriété de la chose et, de la part du donataire, il faut l'intention d'accepter dans le même esprit. Il est suffisant que les deux intentions se manifestent "par convention verbale"; ce qui est essentiel, c'est que la tradition qui s'opère soit faite de telle façon qu'elle ait pour effet, par elle-même et sans plus, de transférer la propriété de la chose d'une façon complète et définitive. Ainsi comprises, les "choses mobilières" qui peuvent faire l'objet d'un don manuel sont celles dont la

(1) (1923) Q.R. 61 S.C. 521, at 523.

(2) (1927) 35 R.L.n.s. 187, at 211.

"délivrance" *est susceptible de transmettre effectivement la propriété.* Ce sont tout d'abord les choses corporelles, parce que leur "possession vaut titre" (art. 2268 C.C.); mais ce sont également, et entre autres choses, les titres de créance dont la remise est effectuée de manière à conférer à celui qui les reçoit le droit de propriété dans le titre et dans la créance qu'il représente. Dans ce cas, "la créance fait corps avec le titre et sa nature incorporelle, ainsi matérialisée, cesse de créer un obstacle à une livraison de main à main" (Fuzier-Herman, vo. Don Manuel, n° 101). Alors, comme le font remarquer Baudry-Lacantinerie et Colin (vol. 10, p. 539, n° 1188), "la possession de l'effet implique vraiment "la qualité de bénéficiaire". (Voir 32 Laurent, n^{os} 568 et 569.)

Et nous ne comprenons pas autrement le passage, auquel il a été si souvent référé, du jugement de Lord Buckmaster, parlant au nom du Conseil privé, dans la cause de *O'Meara* v. *Bennett* (1). Il ne faut pas perdre de vue la question que discutait Lord Buckmaster. ("A case is an authority only for what it actually decides", disait Lord Halsbury dans *Quinn* v. *Leathem* (2).) Dans *O'Meara* v. *Bennett* (1), Mrs. Thomas voulait, semble-t-il, donner à Mrs. O'Meara des actions d'une compagnie industrielle. Mrs. Thomas détenait les certificats de ces actions. Dans le but de mettre son projet à exécution, elle fit ce qui suit (je laisse parler Lord Buckmaster lui-même):

In order to carry out this intention, Mrs. Thomas communicated through her husband with the company, informing them of her desire that the shares should be regarded as held by her in trust for the appellant, but that the dividends should be forwarded to her as usual, and in accordance with their directions the certificates were sent to the company with an indorsed transfer on the back in these words: "For value received I hereby sell, assign and transfer unto Mary M. Thomas in trust for Gertrude Mary O'Meara shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint attorney to transfer the said stock on the books of the within-named Company with full powers of substitution in the premises"; and this was duly signed by Mrs. Thomas and also by her husband. The original certificates were cancelled and in their place two new certificates were issued, dated January 15, 1913. The one as to the ordinary shares was in this form: "This certifies that Mrs. Mary M. Thomas, in trust for Mrs. Gertrude M. O'Meara, is the registered holder of 33 common shares"; and the one for the preference shares was in similar terms. These certificates again contained transfers in blank upon their back, *but neither of these transfers was ever executed.* The certifi-

(1) [1932] 1 A.C. 80, at 83, 84. (2) (1901) 70 L.J.P.C. 76, at 81.

1934

PESANT v. PESANT.

Rinfret J.

cates were handed to Mrs. O'Meara some time afterwards and have remained in her custody ever since, but the dividends were received by Mrs. Thomas during her life. The question is whether in these circumstances a valid gift of the shares was made in favour of the appellant.

Lord Buckmaster se demande donc si une pareille "délivrance" constitue un don valable des actions de la compagnie et il arrive à la conclusion que le procédé adopté par Mrs. Thomas ne vaut ni comme constitution de trust en vertu de l'article 981a du code civil, ni comme don manuel en vertu de l'article 776 C.C. La question du trust ne nous intéresse pas en ce moment, mais il importe de suivre son raisonnement en ce qui concerne celle du don manuel. Il cite le deuxième paragraphe de l'art. 776 C.C. Puis il dit:

> Apart from the question as to the effect of the trust, the gift in this case can only be established if it were made by delivery. *Now the share certificates were not negotiable documents.*

En effet, les formules de transfert au dos des certificats d'actions n'avaient pas été remplies ni signées par Mrs. Thomas; et Mrs. O'Meara détenait seulement des certificats non endossés. Lord Buckmaster fait donc remarquer qu'une simple remise de ce genre n'a pas eu pour effet de transférer la propriété des parts: "In fact, in this case, there was no transfer of ownership." Et c'est là la *ratio decidendi* de son jugement dont il a clairement posé le principe dans une phrase antérieure:

> Gifts of moveable property accompanied by delivery in art. 776 C.C. must, in their Lordship's opinion, be read as relating solely to gifts of such moveable *property as is capable of passing by delivery,* for delivery has no value, apart from being evidence, *unless it can* effect a change of ownership, etc.

Et ce jugement laisse bien voir que si les certificats d'actions eussent été endossés par Mrs. Thomas "so as to effect a change of ownership", la situation eût été différente. Le sens de la décision est qu'il ne faut pas mettre sur le même pied un titre négociable et un titre qui ne l'est pas. (Voir, au bas de la page 84, la remarque sur l'opinion dissidente de M. le juge Cross, en Cour du Banc du Roi.) Sans doute, Lord Buckmaster approuve la distinction faite par M. le juge Pelletier entre l'expression "choses mobilières" et le mot "biens"; mais on voit par son jugement comment il l'interprète et de quelle façon il l'applique.

La livraison d'un titre au porteur transfère la propriété. Il en est de même d'un titre à ordre qui a été régulièrement endossé. Mais la simple remise de certificats d'actions, sans la signature des formules de transfert, ne peut être

considérée comme une délivrance des actions. C'est ce que dit Lord Buckmaster et c'est exactement ce qu'avait dit, dans la même cause, M. le juge Lamothe, en Cour Supérieure. (Voir *Corby Distillery Company* v. *Dame O'Meara and The Royal Trust* (1).)

En l'espèce, la "délivrance" du billet de Madame Pesant à l'appelante a eu pour effet d'en transférer la propriété à cette dernière. Madame Pesant a donc fait un don manuel valable.

Cette solution ne se heurte en rien à la doctrine ou à la jurisprudence, en France ou dans la province de Québec. Le don manuel de billets au porteur était valable dans l'ancien droit (Bressolles, p. 58). Le don manuel des effets au porteur ou des effets endossés en blanc est parfaitement reconnu à l'heure actuelle en France. Le principe est que la tradition en soit effectuée de manière à conférer la propriété. Il ne fut pas écarté par le Conseil Privé dans la cause de *Richer* v. *Voyer* (2) où il s'agissait d'un certificat de dépôt d'une somme d'argent remis par la donatrice au donataire, certificat négociable par endossement. Mais la preuve de la donation elle-même fut trouvée équivoque et il fut jugé qu'elle indiquait plutôt un mandat. Le principe a été appliqué dans *Darling* v. *Blakely* (C. de Rév.) (3) où cependant le billet du donateur avait été remis au donataire "with an expression of his wish that the note should not be presented for payment until after his death, and the donee complied"), dans *Brûlé* v. *Brûlé* (4), dans *Chêné* v. *Chêné* (5) confirmé en appel sous le nom de *Legris* v. *Beaulne & Chêné* (6); dans *Cardinal* v. *Landes* (7); dans *Harvey* v. *Harvey* (8). Le principe a été admis encore dans *Brochu* v. *Brochu* (9); dans *Rochon* v. *Rochon* (10) et dans *Malartre* v. *Décary* (11), quoique, dans ces trois dernières causes, le don ait été mis de côté pour d'autres considérations. Dans la cause de *O'Meara* v. *Bennett* (12), la majorité des juges de la Cour du Banc du Roi s'est prononcée favorablement à ce principe, et l'opinion personnelle différente de M. le juge Pelletier (à laquelle, soit dit en passant,

(1) (1918) Q.R. 55 S.C. 34, at 38.
(2) (1874) L.R. 5 P.C. 461.
(3) (1895) Q.R. 9 S.C. 517.
(4) (1904) Q.R. 26 S.C. 77.
(5) (1914) 20 R. de J. 322.
(6) (1914) Q.R. 23 K.B. 571.
(7) (1923) Q.R. 61 S.C. 521
(8) (1928) 35 R.L.N.S. 171
(9) (1922) Q.R. 61 S.C. 283.
(10) (1928) Q.R. 45 K.B. 170.
(11) (1926) Q.R. 70 S.C. 74.
(12) (1918) Q.R. 28 K.B. 332.

1934
PESANT
v.
PESANT.
Rinfret J.

le rapporteur a fait fortune) se termine quand même par cette conclusion: "La question reste donc ouverte." Ce qui a fait décider la cause contre Mrs. O'Meara, en Cour du Banc du Roi, fut le défaut de l'acceptation du don, l'absence de possession publique et la réserve de l'usufruit (voir le bas de la page 348 et le haut de la page 349)— toutes questions qui ne se posent pas dans la présente cause.

Par ailleurs, nous ne voyons pas qu'il y ait de distinction à faire, sous ce rapport, entre le don du billet d'un tiers et le don du billet du donateur. Du point de vue d'où se placent la doctrine et la jurisprudence, il n'y a pas de différence juridique entre les deux opérations. Dans le premier cas, le titre de créance (le billet du tiers) est déjà en circulation; dans le second cas, le donateur crée d'abord le titre, puis le met en circulation. On admet que le don manuel d'un chèque est valable. Le billet promissoire du donateur est sur le même plan légal. Dans la plupart des causes que nous avons citées, l'effet de commerce émanait du donateur lui-même, et l'on n'a pas songé à écarter le don pour cette raison.

Il ne reste plus qu'à ajouter que si, comme je le pense, il s'agit ici d'un véritable don manuel, à plus forte raison, comme nous l'avons déjà souligné, doit-on écarter l'imputation de donation à cause de mort, car, dit Troplong (Donations, vol. II, p. 423, n° 1053):

> La tradition qui fait le don manuel est absolue, irrévocable, pleine et entière; au lieu que la tradition de la donation à cause de mort est précaire et révocable.

A quoi l'on peut ajouter, pour terminer, la remarque de Bressolles (p. 167):

> Par la façon dont il se réalise et les effets qu'il produit (le don manuel) forme la plus énergique des libéralités au point de vue du dépouillement du donateur.

Je ferais donc droit à l'appel et je maintiendrais l'action contre l'exécuteur testamentaire, ès-qualité, pour le plein montant de la réclamation, et subsidiairement contre tous les légataires universels en cause conjointement; mais, dans les circonstances, les frais du procès dans toutes les cours devraient être supportés par la succession et par l'exécuteur testamentaire ès-qualité.

1934

PESANT v. PESANT.

CANNON, J.—A Montréal, le 5 décembre 1930, Dame Emma Martineau, veuve de Zéphirin Pesant, a consenti et signé un billet promissoire à demande, pour valeur reçue, par lequel elle promettait payer au bureau de la Banque Canadienne du Commerce, rue Masson, à Montréal, à la demanderesse, sa fille, ou à son ordre, la somme de $10,000 avec intérêt au taux de 7 p. 100 l'an après échéance. Ce billet fut livré le même jour à la demanderesse. Le 25 décembre 1930, la signataire de ce billet mourut après avoir fait un testament, en date du 11 février 1930, ainsi que deux codicilles, instituant Zéphirin Pesant son exécuteur testamentaire et les autres défendeurs, ses enfants, légataires résiduaires universels avec la demanderesse. La succession ayant refusé de payer le billet, la demanderesse a poursuivi l'exécuteur testamentaire et les légataires universels, tant personnellement qu'ès-qualité.

Les héritiers s'en sont rapportés à justice, et l'exécuteur testamentaire a contesté, prétendant que le billet en question n'est pas dû, ne représentant aucune considération valable ou légale, a été donné pendant la maladie réputée mortelle de la signataire, constituant une donation à cause de mort, avait été obtenu sous de faux prétextes; que d'ailleurs cette donation, n'étant pas dans la forme notariée et n'ayant pas été acceptée dans la même forme et n'ayant pas été enregistrée, n'a aucune valeur, d'autant plus qu'elle n'était faite que pour n'avoir effet qu'à cause de mort; qu'en outre, lors de la signature du billet, Dame Emma Martineau était physiquement et intellectuellement incapable de consentir valablement à une donation semblable et ne pouvait résister aux suggestions indues, à la captation et aux fausses représentations de la demanderesse; qu'à tout événement, si elle consentit ce billet à demande, ce ne fut que sur la représentation et entente que ce montant de $10,000 serait à prendre sur le total de sa succession lors du partage général, et qu'en conséquence l'action est prématurée.

En réponse, la demanderesse a allégué que le billet a été consenti par sa mère pour bonne et valable considération; que cette dernière, depuis plusieurs années, lui payait une pension alimentaire pour l'aider comme veuve chargée de quatre enfants; il est vrai que la demanderesse a été instituée une des légataires universels résiduaires de la succes-

1934

PESANT v. PESANT.

Cannon J.

sion de sa mère, mais que le partage ne doit se faire que dans environ six ans, savoir à la majorité du plus jeune des enfants; que sa mère, quelque temps avant la date du billet, après la mort du fiancé de la demanderesse, constata que cette dernière n'avait rien et serait dans le besoin, si sa mère ne pourvoyait pas à lui payer un montant raisonnable pour sa subsistance et celle de ses enfants, surtout durant l'intervalle qui devait s'écouler avant le partage des biens de ladite succession. Ce billet a été consenti volontairement, en parfaite connaissance de cause, pour acquitter une obligation morale et naturelle envers la demanderesse de la part de sa mère qui savait parfaitement qu'elle s'engageait à payer la somme de $10,000, puisqu'elle a demandé à sa fille de ne pas réclamer le billet avant l'expiration de quatre mois de la signature du billet.

Le juge de première instance a décidé que:

1° dans les circonstances, il ne s'agit ni d'une donation entre vifs, ni d'une donation à cause de mort;

2° la mère devait une pension alimentaire à sa fille sans moyens, et en reconnaissant cette obligation légale, elle signa le billet en question; il y avait donc valable considération;

3° l'on peut considérer ce billet comme un don manuel parce que le titre y représente la chose et offre une valeur propre réalisable par le détenteur régulier;

4° il est vrai que Dame Martineau était malade depuis longtemps, d'une maladie très grave dont, tôt ou tard, elle devait mourir; mais son intelligence était restée intacte.

La Cour du Banc du Roi a unanimement cassé ce jugement pour les considérations suivantes:

Considérant que la preuve révèle que le 5 décembre 1930, lors de la signature du billet qui fait la base de l'action, Madame Zéphirin Pesant était gravement malade depuis plusieurs mois, qu'elle gardait le lit depuis longtemps, que la maladie dont elle était atteinte était considérée comme mortelle, et que, de fait, elle est décédée le 25 décembre 1930;

Considérant que la demanderesse admet que sa mère était consciente de la gravité de sa maladie et qu'elle savait qu'elle en mourrait;

Considérant que, bien que le billet fût fait payable à demande, la signataire avait exigé que le paiement n'en fut demandé que quatre mois après sa signature, et que la demanderesse avait accepté cette condition;

Considérant que, de fait, la demanderesse n'a fait connaître l'existence de ce billet à ses frères et sœurs que quatre mois après la date du 5 décembre 1930; et bien qu'elle ait assisté à l'inventaire de la succession fait par le notaire Isidore Coupal, elle n'a fait aucune mention de ce billet;

Considérant qu'il résulte du témoignage de la demanderesse elle-même, que sa mère lui a donné ce billet *pour assurer sa vie, après qu'elle serait partie elle-même,* et que sa mère aurait consenti ce billet, parce que "elle avait des regrets de ne pas lui avoir donné des biens comme les autres", et qu'elle aurait ajouté: "Si tu veux accepter mon billet, je ne puis pas te donner autre chose pour le présent."

Considérant que la défunte, Madame Pesant, ne devait rien à sa fille à ce moment-là, si ce n'est l'obligation naturelle et légale qu'elle pouvait avoir de lui aider dans ses besoins;

Considérant que Madame Pesant, en signant ce billet de $10,000, n'a pas voulu s'engager elle-même à en faire le paiement, mais a entendu le mettre à la charge de sa succession;

Considérant que l'on reconnaît bien, dans les circonstances qui ont accompagné et précédé la signature du billet, dans les déclarations faites par la défunte, les traits caractéristiques d'une donation à cause de mort; la donatrice manifestant clairement qu'elle continuait de se préférer à la donataire, puisqu'elle n'entendait pas payer elle-même le montant du billet, mais qu'elle préférait la donataire à ses héritiers, vu qu'elle mettait le paiement de ce billet à leur charge;

Considérant que le 5 décembre 1930, Madame Pesant, sachant qu'elle était atteinte d'une maladie mortelle, ne pouvait pas faire une telle donation, et qu'en conséquence, le billet sur lequel la demanderesse fonde son action, n'a aucune valeur légale, est nul et doit être déclaré tel par cette Cour;

Considérant que, par les conclusions de la défense, il est demandé que le billet soit annulé, et déclaré nul et de nul effet; qu'il y a lieu de faire droit à ces conclusions;

Considérant, de plus, qu'aux termes du testament de ladite feu Dame Pesant, ses biens ne doivent pas être partagés avant l'âge de majorité du plus jeune de ses enfants, et que jusque-là, c'est l'exécuteur-testamentaire, seul, qui en a la saisine;

Considérant qu'en regard des termes de ce testament, les actions qu'un créancier peut avoir contre la succession, ne peuvent être instituées que contre l'exécuteur-testamentaire, ès-qualité, en mettant en cause les autres légataires;

Considérant que les conclusions de l'action telles que formulées contre les défendeurs conjointement et tant personnellement qu'ès-qualité, ne sauraient être accueillies;

Sur la question de la capacité mentale de la défunte, les deux cours sont d'accord pour repousser les prétentions des intimés. La Cour du Banc du Roi considère qu'en signant ce billet Madame Pesant savait parfaitement ce qu'elle faisait, puisqu'elle n'aurait pas voulu s'engager elle-même à en faire le paiement, mais aurait entendu le mettre à la charge de sa succession et aurait manifesté clairement cette volonté. Il n'y a pas lieu pour nous d'intervenir, et nous devons considérer ce moyen de défense comme non établi.

Il n'y a aucune preuve de captation; et la seule question qui reste à résoudre est celle-ci:

Sommes-nous en présence d'une donation, de sa nature, essentiellement gratuite, ou la défunte a-t-elle lié ses héri-

1934

PESANT v. PESANT.

Cannon J.

tiers par une obligation civile ordinaire constatée par billet promissoire qui en fait preuve?

Jusqu'à sa mort, Madame Pesant pouvait s'endetter et, en ce faisant, elle est censée avoir stipulé pour elle-même et ses héritiers ou représentants légaux, à moins que le contraire ne soit exprimé ou ne résulte de la nature du contrat (art. 1030 C.C.). Sa promesse de payer est-elle une dette recouvrable en vertu de la loi du Québec, où cette promesse a été faite, devait être remplie, et, au besoin, poursuivie. Voir: *Hutchison* v. *Royal Institute for the Advancement of Learning* (1).

D'après l'article 982 C.C.,

il est de l'essence d'une obligation qu'il y ait une cause d'où elle naisse, des personnes entre qui elle existe, et qu'elle ait un objet.

Et cette cause, nous dit l'article 984 C.C., doit être licite. Nous avons vu plus haut qu'il nous faut considérer que les parties au contrat intervenu étaient capables et que leur consentement a été donné légalement.

Quelle est la cause ou considération, ce qui, dans l'esprit de la défunte, contre-balançait le fardeau qu'elle assumait? Est-ce une pure libéralité? Est-ce le désir de s'acquitter d'un devoir?

En vertu des articles 186 et 58 de la *Loi des Lettres de change,* toute partie dont la signature apparaît sur le billet est *prima facie* censée devenue partie contre valeur. Les intimés ont voulu prouver que l'émission en était entachée d'illégalité. La fraude, la captation et l'incapacité étant écartées, les intimés ont-ils prouvé que la cause était illégale ou illicite en vertu de notre code civil? C'est le problème à résoudre.

Dans la cause de *Larraway* v. *Horsey* (2), les honorables juges Jetté, Ouimet et Pagnuelo, siégeant en revision, ont décidé sous l'ancien article 2285 C.C.:

In the case of cheques and other negotiable instruments the presumption of law is that they are given for value received, though it be not so expressed in the instrument, and the burden of rebutting such presumption is on the party who denies that value was given. The evidence adduced to rebut the presumption of value must be clear and convincing: mere improbability of the existence of a debt is not sufficient.

Les savants juges citent à l'appui de leur décision le Septième Rapport des Codificateurs, comme suit:

To these authorities let us add that of the codifiers of our civil code, who, following the English rule, intended clearly, from their report, that

(1) [1932] S.C.R. 57. (2) (1898) Q.R. 14 S.C. 97.

value should be implied in every negotiable instrument, acceptance and endorsement, although the words *"value received"* were not inserted in it. Here is what they say in their 7th report on *Commercial law*; speaking of art. 7 of their draft on *bills of exchange* (art. 2285 C.C.), they say: "The only question which can arise under the article, when no value is expressed, is whether the *onus* of proving value should rest upon the holder of the bill or upon the party from whom payement is demanded. The prevailing opinion is that as a general rule, the value will be presumed, subject of course, to be disproved by the party having an interest in doing so. This is the rule of the English law, which is derived as a consequence from the other rule, that value need not be expressed.'"

The wording of art. 2285 C.C. does not, however, convey properly this intention, and was interpreted differently; the report, however, correctly gave the English law, which is summed up by *Kent*, Comm. vol. 3, p. 77, in these words: "It is usual to insert the words *value received* in a bill or note, but they are unnecessary, and *value is implied in every negotiable bill, note, acceptance or endorsement*; the burden of proof rests upon the other party, to rebut the presumptions of validity and value, which the law raises for the protection and support of negotiable paper."

L'article 58 de l'*Acte des Lettres de change* est au même effet. Les intimés, d'ailleurs, l'ont compris de la sorte en assumant le fardeau de la preuve de leur plaidoyer.

Pouvons-nous dire qu'ils ont repoussé d'une manière claire et convaincante la présomption militant en faveur de l'appelante? S'il s'agit d'un billet commercial, et non primitivement d'une obligation civile ordinaire, devons-nous appliquer les règles du droit anglais ou celles de notre code civil dans la matière, en tenant compte de l'article 2340 C.C. qui se lit comme suit:

Dans tout matière relative aux lettres de change pour laquelle il ne se trouve pas de disposition dans ce code ou dans les lois fédérales, on doit avoir recours aux lois d'Angleterre qui étaient en force le trente mai mil huit cent quarante-neuf.

Cette question a été discutée par la Cour de Revision, composée des honorables juges Loranger, Davidson et Tellier, dans la cause de *Guy* v. *Paré et al* (1). L'honorable juge Davidson, dans un jugement très élaboré, se sépara de ses collègues et refusa d'accepter les "Considérants" suivants, que nous trouvons à la page 454 du rapport:

Considérant que les obligations civiles qui résultent du contrat intervenu sous forme de billet promissoire sont régies par le droit civil en force dans la province de Québec; que c'est une erreur de dire que notre code civil ne contient aucune disposition sur la matière qui fait l'objet du litige; qu'il n'y a pas lieu à l'application de la règle posée par l'article 2340 du code civil, ainsi que l'a jugé la cour en première instance;

Considérant que l'article 2340 du code civil tire sa source de la 12e Victoria, c. 22, et du c. 64, section 30 des Statuts Refondus du Bas-

(1) (1892) Q.R. 1 S.C. 443.

1934

PESANT
v.
PESANT.

Cannon J.

Canada, qui ne concernent que la forme, la négociabilité et la preuve des lettres de change et des billets promissoires; que la base de notre droit, en ce qui concerne ces effets de commerce, est, ainsi que le déclarent les codificateurs dans leur septième rapport, l'ancien droit français, dont les dispositions n'ont pas été changées quant au fond et à la substance du contrat, par nos lois statutaires ni par le code civil;

Considérant que le billet promissoire est un contrat dont les effets civils sont soumis aux principes et aux règles générales énoncés dans le titre des obligations, et n'est pas, comme le soutiennent les défenderesses, régi par des lois d'exception quant à sa substance;

Cette décision qui se rapportait à une cause régie par les dispositions du code civil qui ont été ensuite abrogées par la *Loi des Lettres de Change* (1890) a été suivie par les honorables juges Lafontaine, Weir et Panneton dans *Stephen* v. *Perrault* (1), confirmant en revision l'honorable juge Coderre. Dans cette cause, l'honorable juge (maintenant l'ex-juge-en-chef) Lafontaine disait ceci, décidant qu'une dette morale peut être la considération d'un billet à ordre:

L'affirmative, dans l'opinion des membres de ce tribunal, semble certaine, d'après les autorités qui sont concluantes.

"La cause, en effet, nous dit Bigot-Préamenu, Exposé des motifs, nº 27, résumant la doctrine de Domat qui a été adoptée par les codificateurs, est dans l'intérêt réciproque des parties, ou * * * ." On sait que cet intérêt n'a pas besoin d'être pécuniaire ou matériellement appréciable, et que, suivant des auteurs, et de Larombière, vol. 1, nº 11, entre autres, on peut trouver la cause des conventions "dans l'intention de faire quelques sacrifices à sa tranquillité, à sa *considération*, à la *paix de sa conscience*".

C'est aussi le langage d'Aubry et Rau, vol. 4, p. 322: "On doit, disent ces auteurs si recommandables, même reconnaître que le simple désir de satisfaire à un sentiment d'équité, de conscience, de délicatesse, ou d'honneur, constitue dans les cas prévus au par. 297 une cause suffisante d'engagement rentrant, par le fond comme par la forme, dans la classe des actes à titre onéreux."

* * *

A plusieurs reprises, les tribunaux de cette province ont fait l'application de cette doctrine. Ainsi dans la cause de *Kérouac* v. *Maltais* (2), M. le juge Casault, en prononçant le jugement de la Cour de Révision, après avoir déclaré que la remise faite à un failli par ses créanciers, dans un concordat, est complète comme dans toute autre remise, et ne laisse subsister aucune obligation naturelle, fait cependant ses réserves quant au point qui nous occupe, et admet avec les auteurs que la promesse de paiement faite en obéissance à un simple sentiment d'équité, de conscience, de délicatesse ou d'honneur, est valide comme ayant une cause suffisante.

Telle est la délicatesse du droit français qui est le nôtre.

* * *

Il ne fait pas de doute, que, bien que la loi des lettres de change et billets soit une loi fédérale tirée en grande partie de la loi anglaise, c'est

(1) (1918) Q.R. 56 S.C. 54. (2) (1900) Q.R. 18 S.C. 158.

tout de même notre droit français qui s'applique en la matière, en vertu d'une disposition expresse de cette loi, la clause 53 qui dit que toute cause suffisante pour donner validité à un simple contrat est une cause suffisante d'une lettre de change. Aussi les autorités du droit anglais qui nous ont été citées sur ce point n'ont pas d'application.

Et Falconbridge (1929), *Banking and Bills of Exchange,* commentant la section 10 de la *Loi des Lettres de change,* qui se lit comme suit:

The rules of the common law of England including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to bills of exchange, promissory notes and cheques.

continuait

Thus it appears that notwithstanding the provisions of the Bills of Exchange Act which purports to make the common law of England applicable to bills, notes and cheques, in cases not expressly provided for by the Act itself, effect is given to this provision in Canada only within the limits of what may be called the law of bills and notes in a strict sense, including of course the form, issue, negotiations and discharge of bills or notes, but not including all the consequences of, or all the rights or liabilities resulting from, the contracts entered into by parties to bills or notes. Beyond these limits there is a large field of law in which the rights and liabilities of parties to a bill or note transaction are governed by the law of a particular province in accordance with the ordinary rules of conflict of laws.

Il se réfère à la cause de *Guy* v. *Paré* (1), citée plus haut, et à celle de *Cook* v. *Dodds* (2)

Il ne faut pas oublier d'ailleurs qu'en tête du livre IV du code civil, contenant les lois commerciales, l'une des dispositions générales du code civil, l'article 2278, dit que les principales règles applicables aux affaires commerciales qui ne sont pas contenues dans le présent livre, sont énoncées dans les livres qui précèdent et nommément dans les titres du troisième livre, entre autres, celui *Des Obligations.*

Dans *Rawlings* v. *Galibert* (3), cette cour semble avoir appliqué sans hésitation les règles du code civil pour fixer l'étendue de l'engagement pris par le signataire d'un billet; et, de nouveau, dans la récente cause citée plus haut de *Hutchison* v. *Royal Institute for the Advancement of Learning* (4).

Le juge de première instance a considéré qu'au moment de la signature du billet la mère devait et payait des aliments à sa fille. Avait-elle aussi le sentiment d'une obligation naturelle de subvenir à ses besoins et à ceux de ses petits-enfants, après que cette obligation légale cesse-

(1) (1892) Q.R. S.C. 443.
(2) (1903) 6 O.L.R. 608, at 613.
(3) 1919) 59 Can. S.C.R. 611.
(4) [1932] S.C.R. 57.

1934

PESANT v. PESANT.

Cannon J.

rait? La demanderesse l'a affirmé sans être contredite, et son témoignage a été accepté par le premier juge. D'ailleurs, la jurisprudence et la doctrine reconnaissent l'existence de cette obligation naturelle entre personnes liées par l'obligation alimentaire *dans la mesure où la prestation fournie excède par sa nature ou par son importance ce que le droit civil permet d'exiger.* 7 Planiol & Ripert, p. 295.

Il faut, en outre, tenir compte de l'intention de celui qui agit sous l'impulsion de sa conscience; car, en fait, la question de savoir s'il y a obligation naturelle ne se pose qu'après l'exécution volontaire ou la reconnaissance volontaire par le débiteur; c'est parce qu'il a la pensée d'obéir à un devoir que l'acte juridique qu'il accomplit est rattaché à une idée d'obligation et non de libéralité. La croyance au devoir moral dans la pensée de celui qui agit est donc aussi importante à considérer que sa réalité même. Idem, p. 290.

On pourrait donc dire, pour exprimer le système de la jurisprudence moderne, restée fidèle aux idées du XVIIIe siècle, que l'obligation naturelle comprend *tout ce qui n'est ni une obligation civile munie d'action, ni une pure libéralité*; toutes les fois que ce qui est promis ou donné en dehors de toute obligation civile ne peut pas être considéré comme une donation inspirée par une pure idée de bienfaisance ou de gratification, la jurisprudence admet une obligation naturelle.

Les mêmes auteurs nous disent, à la page 294, que ce n'est que dans les cas où le devoir d'assistance prend une rigueur et une précision particulières, qu'il se traduit en obligations naturelles. C'est ce qui se rencontre notamment dans les rapports de parenté où l'obligation naturelle apparaît le plus souvent dans le prolongement de l'obligation civile; et ils concluent en disant:

Le moyen le plus décisif de reconnaître l'existence de l'obligation naturelle est de rechercher si l'individu s'est senti, au regard de sa propre conscience, ou devait se sentir, au regard d'une conscience normale, déterminé à agir comme il l'a fait par le sentiment d'un devoir, et non pas entièrement libre à son gré d'agir ou de ne pas agir.

En appliquant ce critère aux circonstances de la présente cause, je crois que la mère a senti cette nécessité d'agir et a voulu remplir ce qu'elle considérait une obligation de conscience envers sa fille et ses petits-enfants. Elle ne pouvait lui payer le montant immédiatement. Si ce paiement avait été fait, les héritiers ne pourraient certainement pas en exiger le remboursement; car, d'après l'article 1140 du code civil:

La répétition n'est pas admise à l'égard des obligations naturelles qui ont été volontairement acquittées.

L'exécution d'une obligation naturelle peut faire l'objet, non seulement d'un accomplissement régulier par le paiement, mais aussi d'une *promesse* valable et efficace. La promesse de payer engage civilement le débiteur, de telle sorte qu'à l'engagement dénué de contrainte qui existait jusqu'alors elle substitue un engagement qui présente tous les caractères

de l'obligation civile. C'est ce qu'exprime la jurisprudence en disant que les obligations naturelles peuvent servir de cause valable à des obligations civiles. 7 Planiol & Ripert, page 301.

En dehors de toute obligation naturelle, on ne peut nier l'efficacité et la validité d'une promesse que fait une personne à une autre. L'existence de l'obligation naturelle caractérise la nature de la prestation promise. C'est à un paiement, et non à une libéralité que s'engage le promettant. La promesse peut donc être faite sous une forme quelconque, généralement par un acte sous seing privé. Planiol & Ripert, vol. 7, page 303.

La Cour du Banc du Roi a basé son jugement sur l'article 762 du code civil:

Les donations conçues entre vifs sont nulles comme réputées à cause de mort, lorsqu'elles sont faites pendant la maladie réputée mortelle du donateur suivie ou non de son décès, si aucunes circonstances n'aident à les valider.

Et l'article 755 C.C. définit la donation entre vifs:

La donation entre vifs est un acte par lequel le donateur se dépouille à titre gratuit de la propriété d'une chose, en faveur du donataire dont l'acceptation est requise et rend le contrat parfait.

Dans l'espèce, l'élément essentiel de la donation, savoir la gratuité, n'a pas été prouvé. Gratuité suppose l'absence d'obligation d'agir et l'idée que le donateur ne recevra rien en retour. Or,

un acte de disposition ne constitue pas une donation quand il a pour objet d'acquitter une dette, soit civile, soit naturelle.

Aux actes contenant reconnaissance d'une obligation naturelle, il faut assimiler les actes ayant pour objet l'accomplissement d'une *obligation morale*. C'est ainsi, par exemple, que la constitution de rente viagère consentie par un beau-frère, au profit de la sœur utérine de sa femme, qui était dans l'indigence, ayant pour cause une obligation fondée sur les lois morales de la délicatesse et de l'honneur, ne constitue pas une donation entre vifs; aussi a-t-elle pu être déclarée valable, quoique faite par acte sous seing privé (Douai, 6 mai 1825, et sur pourvoi, Req. 22, août 1826, R, 1311). Dalloz, Répertoire, Vo. *Donations entre vifs*, p. 519, nos 8 et 9.

La Cour du Banc du Roi, dans la cause de *Legris* v. *Beaulne* (1), a établi les principes suivants:

1. L'obligation naturelle et la simple obligation morale suffisent pour faire de la donation un contrat à titre onéreux;

2. Les engagements ainsi contractés en vue de satisfaire à une obligation naturelle ou morale sont valables sans l'accomplissement des formes spéciales que la loi exige pour les donations;

3. Le père qui promet de payer le prix d'un terrain que son fils désire acheter, et aussi de payer le coût de la construction de la maison que ce

(1) (1914) Q.R. 23 K.B. 571.

1934

PESANT v. PESANT.

Cannon J.

même fils désire y construire, contracte un engagement suffisant pour engendrer une obligation civile, et le contrat qui se forme à ce sujet est un contrat à titre onéreux;

* * *

5. L'acte d'un père qui, deux jours avant sa mort, donne à son fils, deux chèques qui sont présentés à la banque et que cette dernière refuse de payer, faute de fonds, ne constitue pas un don manuel.

Et l'honorable juge Carroll disait:

Une telle reconnaissance constituerait, suivant nous, non pas une donation entre vifs, qu'il faudrait soumettre aux formes solennelles et aux autres conditions que la loi a exigées pour cette espèce d'acte, mais seulement une obligation civile ordinaire, qui devrait être, de tous points, régie par le droit comme des obligations. Il ne s'agit pas ici d'une gratuité, d'un don, mais d'un contrat à titre onéreux.

Dans la cause de *Drouin* v. *Provencher* (1), le savant juge-en-chef Casault disait:

L'obligation naturelle et la simple obligation morale suffisent pour faire de la donation un contrat onéreux et lui ôter le caractère de gratuité qui en fait une libéralité et un don, soumis pour sa validité, aux formes spéciales que la loi exige pour les donations.

Du moment que les circonstances de la cause écartent l'idée de donation gratuite, le jugement de la Cour du Banc du Roi manque de base. Je crois que Madame Pesant a voulu remplir vis-à-vis de sa fille:

1° son obligation alimentaire, qui la liait légalement de son vivant;

2° un devoir de justice en pourvoyant à ses besoins avant le partage de sa succession, qu'elle avait retardé par son testament jusqu'à la majorité du plus jeune de ses enfants, ce qui d'après la preuve, constitue un délai de six ans.

Pour remplir ce devoir de justice, liée à son obligation légale alimentaire, elle s'est engagée, sous la forme d'un billet promissoire qui, à sa face même, la liait de son vivant. Cette obligation passe à ses héritiers.

Le fait allégué par la demanderesse que sa mère lui aurait demandé de ne pas exiger paiement avant quatre mois ne change pas la nature de l'obligation. Même si l'appelante a consenti à ne pas exercer son droit de se faire payer de ce billet promissoire avant quatre mois de sa signature, ceci n'a pas changé le caractère de l'obligation contractée par le billet payable à demande.

C'est ce que cette cour a décidé *re Lacaille* v. *Corporation de Lacaille* (2); et, tout récemment, dans la cause de *Westcott* v. *Luther* (3), mon collègue, l'honorable juge Lamont,

(1) (1883) 9 Q.L.R. 182. (2) [1931] S.C.R. 619.
(3) [1933] S.C.R. 251.

s'exprimait comme suit, au nom de la cour, au sujet de la prétention que le billet promissoire signé par le défunt, payable à un an de date, était vicié et annulé par une promesse,—révélée par le bénéficiaire du billet,—que ce dernier ne devait être présenté qu'après la mort du promettant:

It will be observed that nowhere did the deceased suggest that the note was not to be a present obligation in favour of the respondent. All he does is to request the respondent not to enforce his rights until after he himself has passed away. The acceptance by the respondent of these requirements amounts, as the Court of Appeal held, to no more than a collateral engagement on his part not to enforce his rights until the request had been complied with. That does not make the document any the less an unconditional promise in writing by the deceased to pay at a fixed time a certain sum of money to the respondent. There is no embiguity in the note itself. Its terms import a present and unqualified obligation and there is nothing in the evidence to justify the conclusion that the delivery of the note by the deceased was made conditional upon the fulfilment of his requests.

Les circonstances de cette cause ressemblent beaucoup à notre espèce, sauf que, ici, il ne s'agit pas d'une promesse de présenter le billet après la mort de la défunte, mais simplement d'attendre quatre mois après la signature du billet.

Les intimés nous disent que Madame Pesant savait, lors de la signature du billet qu'elle mourrait avant l'expiration de ce délai. C'est une affirmation gratuite. Lors de la signature du billet, la défunte était mieux de la crise dont elle avait souffert au mois de novembre et pouvait parfaitement avoir l'espoir, comme bien des tuberculeux, de prolonger sa vie indéfiniment. En tout cas, il est sûr que rien au dossier ne prouve que la défunte a stipulé que le billet ne serait payé qu'après sa mort, et ce contrairement aux faits révélés dans la cause de *Rochon* v. *Rochon* (1), où le bénéficiaire du chèque avait admis qu'il ne devait le présenter pour paiement qu'après la mort du défunt. En cette affaire, aucune condition ne subordonnait le droit de l'appelante à la mort du *de cujus* et, en conséquence, l'on ne peut pas dire que Madame Pesant a préféré l'appelante à ses héritiers mais non pas à elle-même, car elle s'est engagée personnellement et aurait pu, si elle avait vécu, être tenue de payer.

Pour ces raisons, je crois que l'appel devrait être maintenu avec dépens et le défendeur ès-qualité condamné à payer suivant les conclusions de l'action. Les frais de la

(1) (1928) Q.R. 45 K.B. 170.

1934
PESANT
v.
PESANT.
Cannon J.

Cour Supérieure et de la Cour du Banc du Roi devront être payés par la succession. Il n'y aura pas de frais contre les autres défendeurs qui s'en sont rapportés à justice et qui auraient pu simplement être mis en cause pour voir dire et déclarer que l'exécuteur testamentaire doit payer cette dette conformément à l'article 919 du code civil.

Appeal allowed, cost of all parties out of the estate.

Solicitors for the appellant: *Lamothe & Charbonneau.*

Solicitors for the respondents: *Dorais & Dorais.*

1933
*Oct. 6, 10.
1934
*Feb. 6.

THE EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO AND OTHER STATES (DEFENDANT)..... APPELLANT;

AND

THE CITY OF EDMONTON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Taxation—Municipal law—Exemptions—Lands used in connection with and for purposes of a college—Assessment together of exempt and non-exempt land—Taxing Statute—Construction of—The Edmonton Charter, 1913, c. 23, s. 320 (5).

In 1924 the appellant corporation, the "Synod", purchased for the purposes of a college certain blocks of land in the city of Edmonton, containing a little over eight acres, and erected college buildings on a portion thereof, and these have since been used by the Synod for the purposes of the college. In 1930 the Synod acquired six other lots, now in question, which were not contiguous to the lands on which the college buildings were situated, and erected thereon four residences, or dwelling-houses, for the use of the professors of the college. No rent was charged or collected from the professors occupying these residences by the Synod, but the professors were entitled to occupy these residences only while engaged as professors of the college in the service of the Synod, and a condition of their engagement was that residence accommodation would be furnished them rent free. The professors had some duties to perform in the college at night, such, for instance, as superintendence and assistance to the students in their studies, and inspection of dormitories, and meetings of the faculty of the college. The six lots in question had an area of ·572 acres and with 3·428 acres comprising the sites of the college and buildings, formed just 4 acres. Section 320 of the Edmonton Charter provides that "All lands in the city shall be liable to

*PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Hughes JJ.

assessments and taxation for both municipal and school purposes, subject to the following exceptions: * * *

(5) The land not exceeding four acres of and attached to or otherwise *bona fide* used in connection with and for the purposes of any * * * college, * * * so long as such land is actually used and occupied by such institutions, but not if otherwise occupied."

Held, Cannon and Crocket JJ. dissenting, that the appellant was not exempted from taxation as to the lots upon which the residence of its professors were situated.

Per Duff C.J. and Lamont and Hughes JJ.—Assuming in the appellant's favour that the professor's residences were "*bona fide* used in connection with and for the purpose of" the college, it has not been established from the facts as disclosed in the special stated case, (and the onus was on the appellant to bring itself strictly within the provision of the statute granting immunity) that these residences were "actually used and occupied by" the appellant institution, and "not otherwise occupied".

Per Duff C.J. and Lamont and Hughes JJ.—Section 320 does not give to an institution to which an exemption is granted the right to select the various pieces of property up to four acres to which the exemption would apply; under the Act, in the absence of any statutory provision indicating that the selection of the exemptions under the section may be made by the donee thereof and for giving notice of the same to the assessor, it is the assessor's duty to select the exemptions.

The other portion of the appellant's land, i.e., the site of the college buildings and the land immediately surrounding them, was assessed as a block described as 8·107 acres with the added words "4·107 taxable, 4 acres exempt".

Per Duff C.J. and Lamont and Hughes JJ.—Such an assessment is invalid as it is impossible to ascertain from that description which particular piece of land is assessed and which is exempt.

Per Cannon J. dissenting.—According to the facts disclosed in the special stated case, the land and the professors' residences erected thereon were exempted from taxation under section 320 of the Edmonton charter. These facts and the plans fyled in the case established that the residence of the principal of the institution was a building used and occupied by him in connection and for the purposes of the college; and there is no difference in the present case, between the nature of the occupation of the principal's residence and that of the professors'. Their presence was required and their residence in close proximity was necessary for the due carrying out of the purposes for which the appellant institution has been established.

Per Crocket J. dissenting (concurring with Cannon J.).—Whatever may be the meaning of the words "attached to," the alternative words "or otherwise *bona fide* used in connection with and for the purposes of" point to other lots and buildings than those which may be contiguous or, to use the words of the enactment, "attached to" one another, and whether the lots and buildings are contiguous or not, the alternative words above quoted extend the statutory exemption to them if they are in fact *bona fide* used in connection with and for the purposes of any of the institutions designated.

Judgment of the Appellate Division ([1933] 2 W.W.R. 310) aff.

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &c. v. THE CITY OF EDMONTON.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Ford J. (2), which was in favour of the appellant.

The material facts of the case and the questions at issue are stated in the head-note, in the statement below and in the judgments now reported.

The case was a special case stated by leave of the trial judge, of which the principal paragraphs are as follows:

3. Section 320 of the charter of the plaintiff provides in part as follows:

320. All lands in the city shall be liable to assessment and taxation for both municipal and school purposes, subject to the following exemptions:

* * *

(5) The land not exceeding four acres of and attached to or otherwise *bona fide* used in connection with and for the purposes of any university, college, high school, public or separate school, seminary of learning or hospital owned by a corporation, whether vested in a trustee or otherwise, and of the association known as "The Young Men's Christian Association" and "The Young Women's Christian Association" so long as such land is actually used and occupied by such institution but not if otherwise occupied;

(6) The land exempted under the two preceding clauses shall nevertheless be liable to be assessed for local improvements.

15. In the year 1930 the said Synod caused to be erected four residences or dwelling houses for the use of the professors of the said college on the lots enclosed in red upon the said plan being lots 14, 15 and 16, in block 13, and lots 9, 10 and 11, in block 18, Bellevue subdivision aforesaid.

16. The defendant acquired said lots enclosed in red and erected said residences under the belief that such lots and sufficient land upon which the college buildings were erected to the extent in all of four acres were exempt from taxation except local improvement taxes.

17. The four buildings mentioned in paragraph 15 are residences or dwelling houses and are used solely and exclusively as residences or dwelling houses for the professors of the said college in the service of the said Synod; no rent is charged to or collected from the said professors occupying the said residences or dwelling houses by the said Synod and the said professors are entitled to occupy said residences or dwelling houses only while engaged as professors of the said college in the service of the said Synod as aforesaid and a condition of the engagement of the said professors is that residence accommodation be furnished to them rent free.

17a. That the professors who reside in the said residences have duties to perform in the said college at night, such for instance as supervision and assistance of students during study periods in the evening, the supervision of student activities, the inspection of the dormitories at retiring time and the inspection of the college buildings, meetings of the faculty of the college and such other duties as may be assigned to such professors.

25. The question submitted for the opinion of this Court is: is the said Synod by reason of the provisions of said Section 320 of the Edmonton charter entitled to the exemption from taxation except for local improvements, of the said lots 14, 15 and 16, block 13, and said lots 9, 10 and 11, block 18, and 3·428 acres containing the site of the said college buildings and immediately surrounding said college buildings, or is the said City of

(1) [1933] 2 W.W.R. 310. (2)]1932[3 W.W.R. 275.

Edmonton entitled to assess the said Synod in the manner in which it is assessed on the Assessment Roll of 1931 and 1932?

S. Bruce Smith for the appellant.

Geo. B. O'Connor K.C. for the respondent.

The judgment of the majority of the Court (Duff C.J., Lamont and Hughes JJ.) was delivered by

LAMONT J.—In my opinion this appeal should be dismissed. The question which we are called upon to answer is set out in the special case in these words:

25. The question submitted for the opinion of this Court is: is the Synod by reason of the provisions of said section 320 of the Edmonton charter entitled to the exemption from taxation except for local improvements, of the said lots 14, 15 and 16, block 13, and said lots 9, 10 and 11, block 18, and 3·248 acres containing the site of the said college buildings, or is the said city of Edmonton entitled to assess the said Synod in the manner in which it is assessed in the assessment Roll of 1931 and 1932?

The material facts are briefly as follows:

In 1924 the appellant corporation (hereinafter called the "Synod") purchased for the purposes of the college block X, and block 33, as shewn on plan 2677-Q, of the city of Edmonton, containing a little over eight acres, and erected college buildings on a portion thereof, and these have since been used by the Synod for the purposes of the college.

In 1930 the Synod acquired the six lots now in question which are not contiguous to the lands on which the college buildings are situated, and erected thereon four residences, or dwelling-houses for the use of the professors of the college. No rent is charged or collected from the professors occupying the said residences by the Synod, but the professors are entitled to occupy these residences only while engaged as professors of the college in the service of the Synod, and a condition of their engagement is that residence accommodation shall be furnished them rent free.

The professors have some duties to perform in the college at night, such, for instance, as superintendence and assistance to the students in their studies, and inspection of dormitories, and meetings of the faculty of the college.

The six lots in question have an area of ·572 acres and with 3·428 acres comprising the sites of the college and buildings, form just 4 acres.

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &C. v. THE CITY OF EDMONTON.

Lamont J.

Whether the six lots in question are exempt from taxation depends upon the provisions of the exempting statute, which is section 320, subsection (5), of the Edmonton charter, the material portion of which reads as follows:

320. All lands in the city shall be liable to assessments and taxation for both municipal and school purposes, subject to the following exceptions:

(5) The land not exceeding four acres of and attached to or otherwise *bona fide* used in connection with and for the purposes of any * * college, * * * so long as such land is actually used and occupied by such institutions, but not if otherwise occupied.

Under this statutory provision, before the Synod is entitled to have its lands to the extent of four acres exempt from taxation, it must be shewn that

1. the land is *bona fide* used in connection with and for the purposes of the college; and

2. the land is actually used and occupied by the institution. Without deciding the point I will assume in the Synod's favour that the professors' residences are *bona fide* used in connection with and for the purposes of the college. That, however, is not the only condition of the exemption: to be entitled to the exemption they must be "actually used" and "occupied" by the institution, and not otherwise occupied. On the facts as disclosed in the special case is it possible to conclude that the college actually used and occupied these residences? That is the condition imposed by the legislature, and the onus is on the Synod to shew that the condition has been complied with. The Act grants immunity from a burden which most other inhabitants are called upon to bear, and those who claim the benefit of that immunity must bring themselves strictly within the purview of the statute granting it, and shew that the facts, as set out in the case, construing the words in their ordinary sense, do justify the conclusion that the institution did occupy the residences within the meaning of what is ordinarily understood as "occupying" a residence.

It was a term of a professor's engagement that "residence accommodation be furnished" him "rent free." It is, therefore, to be inferred that his occupation was in accordance with the terms of his engagement. The facts disclosed in the special case leave no room for an inference that a professor in his occupation is not to enjoy all the independence and all the control of the residence which he occupies that a tenant of his class would be entitled to enjoy if he

rented the premises. Although he does not pay any rent it cannot be supposed that the furnishing of a free dwelling-house did not constitute a part of the remuneration which the Synod, when it engaged him, agreed to allow him for his services. Had the Synod not agreed to furnish residence free, the remuneration which it would have had to pay its professors would have been increased by the value of the occupation of their dwelling-houses. So that while it may be that the Synod did not collect rent for these residences *qua rent* it reached the same result by agreeing to furnish residence with a smaller monetary remuneration.

There is nothing in the statement of fact to justify even a suggestion that the professors occupied their residences as servants of the Synod. Yet, if they were not the servants of the Synod, how can it be said that the dwellings were occupied by the "institution," and not "otherwise occupied"? In my opinion the dwellings were occupied by the professors, who exercised all the rights and all the independence of an ordinary householder. It is not shewn that the Synod had any right to interfere in any way with a professor's occupation of his house so long as he occupied the position of professor in the college. The Synod was, therefore, not entitled to exemption in respect of the six lots.

It was also argued on behalf of the Synod that the effect of section 320 was to give to the institution to which an exemption was granted the right to select the various pieces of property up to 4 acres to which the exemption would apply. Along with the members of the court below I am unable to see any authority for the proposition that the party claiming the exemption has the right of selection. The right to make the selection, in my opinion, is governed by the same principle as the claim for exemption itself. It is a benefit which is allowed to only a few of His Majesty's subjects and, in order to be entitled to it, the onus rests on the claimant to shew clearly that it was the intention of the legislature that such right of selection should exist. I find absolutely nothing in the legislation from which an inference can reasonably be drawn that such was the legislative intention. In fact if that had been the intention it is surprising that no provision is to be found in the statute by which the Synod would be able to

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &C. v. THE CITY OF EDMONTON.

Lamont J.

give notice to the assessor that the selection had been made. The assessment roll should shew definitely what property is exempt, and what property has been assessed. To set these out is the duty of the assessor. In the absence of any statutory provision indicating that the selection of the exemptions under the section may be made by the donee thereof and for giving notice of the same to the assessor, I am of opinion that it is the assessor's duty to select the exemptions.

As to the assessment of the property of the Synod other than the six lots, I agree with the court below that it is invalid. The land is assessed as a block which is described as containing "8·107 acres" with the additional words "4·107 acres taxable 4 acres exempt". It is impossible to ascertain from this description which particular piece of land is assessed and which is exempt.

CANNON J. (dissenting).—The dwellings built for the professors are occupied by them not as ordinary tenants, but are placed at their disposal, rent free, while they are in service for the purposes set forth in the stated case which require their residence in close proximity in order to perform some of their duties at night. The education of the students requires from the teachers close supervision, assistance and inspection at night and this has as much importance as the bare teaching given during the day. The exemption is granted to lands (*a*) owned and attached to, or (*b*) owned by and otherwise used in connection with and for the purposes of any seminary of learning.

These are the important words—which are not, to my mind, nullified by the redundance found at the end of the exemption clause. As long as the land is actually used and occupied *bona fide* in connection with and for the purposes of the school, it should be exempt, if within the four acres selected. The selection was made, with the knowledge and consent of the city authorities, and we are not called upon to decide, in the abstract, who, under the statute, is entitled to segregate for exemption the four acres of land—including the buildings erected thereon—by and for the purposes of the school. The only question is: the selection having been made, is the site of these four residences entitled to exemption under the statute?

A college cannot exist without professors in close touch with the students and the principal. It is common ground that under the statute the residence of the principal is used and occupied for the purposes of the college and therefore exempt. The blue print shewing the situation of the properties involved in the case includes, enclosed in green, the residence of the principal to which reference is made as follows in the special case.

21. The portions of block "X" and block 33 enclosed in green are *bona fide* used in connection with and for the purposes of the said college and such land is actually used and occupied by the said college.

24. The building marked "A" upon the said plan has been demolished and the orange coloured figure upon block "X" represents the residence of the principal of the said college which is used and occupied by him upon the same terms and conditions as the other residences are used and occupied by the professors of the said college.

Therefore, for the decision of the case, this building is used and occupied by the principal in connection and for the purposes of the college and such land (including buildings) is actually used and occupied by the said college.

I cannot differentiate, in the present case, between the nature of the occupation of the principal's residence and that of the professor. Their presence is required, their residence in close proximity is necessary, according to the facts agreed upon, for the due carrying out of the purposes for which the appellant has been established. I do not say that there is any finding on that point in the judgment of the Appellate Division, but I base my reasoning on the facts agreed upon by the parties which, to my mind, have been ignored by the court *a quo*.

I agree with the reasoning of Mr. Justice Ford and would allow the appeal with costs before this Court only, as there seems to be an understanding between the parties that no costs were to be given in the lower courts.

CROCKET J. (dissenting).—This appeal arises out of a stated case and raises the question as to what portion of the defendant corporation's land in the city of Edmonton, if any, is entitled to exemption from taxation under s. 320, ss. 5 of the city of Edmonton charter. That subsection provides for the exemption from all municipal and school taxes, except taxes for local improvement, of

The land not exceeding four acres of and attached to or otherwise *bona fide* used in connection with and for the purposes of any university, college, high school, public or separate school, seminary of learning or hospital owned by a corporation, whether vested in a trustee or other-

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &c. v. THE CITY OF EDMONTON.

Crocket J.

wise, and of the association known as "The Young Men's Christian Association" and "The Young Women's Christian Association" so long as such land is actually used and occupied by such institution but not if otherwise occupied.

It is agreed in the stated case that the defendant in the years 1931 and 1932, with the assessments for which this action was concerned, was and still is the owner of several parcels of land in the city of Edmonton containing a combined area of more than eight acres. Two of these parcels of land are contiguous, and when acquired by the defendant in the year 1924 constituted the whole of what were then designated in the town plan of Edmonton as blocks X and 33. Block X extended northerly from Jasper St. past what was then the end of 111th Ave. to 112th Ave. Block 33, abutting it on the east, extended only from Jasper St. to 111th Ave. and was bounded on the east by the westerly line of 71st St. The defendant erected its college buildings partly in the centre of block 33, and partly in the southern portion of block X, the principal's residence being placed near the southwesterly corner of block X, 150 ft. or more from the college buildings proper.

In the year 1930 the defendant conveyed to the city a strip off the northerly portion of block X measuring approximately on 112th Ave. 375 ft. by 125 ft., which was afterwards subdivided into building lots, in exchange for several building lots conveyed to it by the city in the southern half of blocks 18 and 13, lying between Jasper St. and 111th Ave. The defendant had previously proposed in 1929 to erect four houses for the use of its professors on that portion of block X, which it subsequently conveyed to the city, but as the result of the exchange of the lots referred to, it erected in the year 1930 two residences for the purpose indicated on lots 9, 10 and 11 of block 18, and two others on lots 16, 15 and 14 of block 13. The lots 9, 10 and 11 in block 18 occupy the southwesterly part of that block and are separated from block 33 and block X, upon which the college buildings are situated, by five apparently vacant building lots, and by 71st St., running north and south, while lots 16, 15 and 14 in block 13 occupy the southwesterly portion of the latter block, and are separated from blocks 33 and X by 70th St., the whole southerly half of block 18 and 71st St. The six lots upon which the professors' residences were built contain a combined area of

·572 acres, while block 33 and the southerly portion of block X lying between the southerly line of 111th Ave. and its prolongation westerly across the width of block X, upon which the college buildings proper and the principal's residence are situated, it is admitted, does not exceed three acres in area.

In the years 1931 and 1932 the city assessors assessed the six lots on which the professors' buildings were erected and all that portion of block X remaining in the possession and ownership of the defendant after the exchange with the city, and the whole of block 33—a total in the last two blocks of 8·107 acres—of which the assessment roll marked "4·107 acres taxable" and "4 acres exempt," without indicating in any way what portion or portions of blocks X and 33 were included in the exemption otherwise than by setting against them $6,080 as the value of the land, and $3,000 as the land exemption, and $81,000 as the value of the buildings and $81,000 as the buildings exemption, leaving $3,080 as the net taxable value of the two blocks.

The defendant claimed that it was entitled to include within the exempted area of four acres the six lots on which the professors' houses were constructed, together with that portion of blocks X and 33 upon which the college buildings proper and the principal's residence are situated, and sufficient land around these buildings to make up the complement of the four-acre exemption, contending that the lots upon which the professors' houses were situated was its land *bona fide* used in connection with and for the purposes of the college, within the meaning of s. 320, ss. 5, and that it was entitled to select the four acres to which the exemption should apply.

The question submitted on the stated case to Mr. Justice Ford of the Supreme Court of Alberta was, therefore, as follows:

> Is the Synod by reason of the provisions of said section 320 of the Edmonton charter, entitled to the exemption from taxation except for local improvements, of the said lots 14, 15 and 16, block 13, and said lots 9, 10 and 11, block 18, and 3·428 acres, containing the site of the said college buildings and immediately surrounding the said college buildings?

He answered this question in the affirmative, but on appeal to the Appeal Division of the Supreme Court of Alberta, his decision was unanimously reversed.

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &C. v. THE CITY OF EDMONTON.

Crocket J.

The decision of the majority of the Appellate Division, Harvey, C.J.A., Mitchell, Lunney and McGillivray, JJ.A., was based upon the ground that the land upon which the professors' residences are located is used and occupied by men who are in the employ of the institution, and that this does not constitute occupation by the institution, within the meaning of the section, and consequently that it does not come within the exemption. Clarke J. A., held that the defendant was not entitled to any exemption so long as its land used and occupied by it for the purposes of the college exceeds four acres in area, and that the city was entitled to assess the whole property without exemption.

Two paragraphs from the special case regarding the occupation of the residences by the professors and the latter's duties in connection with the college appear to be necessary to a full consideration of the question involved. These are paragraphs 17 and 17A, which read as follows:

17. The four buildings mentioned in paragraph 15 are residences or dwelling houses and are used solely and exclusively as residences or dwelling houses for the professors of the said college in the service of the said Synod; no rent is charged to or collected from the said professors occupying the said residences or dwelling houses by the said Synod and the said professors are entitled to occupy said residences or dwelling houses only while engaged as professors of the said college in the service of the said Synod as aforesaid and a condition of the engagement of the said professors is that residence accommodation be furnished to them rent free.

17a. That the professors who reside in the said residences have duties to perform in the said college at night, such for instance as supervision and assistance of students during study periods in the evening, the supervision of student activities, the inspection of the dormitories at retiring time and the inspection of the college buildings, meetings of the faculty of the college and such other duties as may be assigned to such professors.

The respondent in its factum relies upon the following four grounds:

1. The professors' houses are separated from the main college site and the right of selection of exemption up to four acres if in the appellant is confined to the main college site.

2. The professors' houses being used solely and exclusively as residences are not "*bona fide* used in connection with and for the purposes of the college" within the meaning of subsection (5).

3. The lots and residences are not "actually used and occupied by the institution" within the meaning of said subsection (5).

4. In any event the exemption is confined to land and the houses are not exempt.

The fourth point is the one which naturally first arises, and it will, therefore, be convenient to consider this first, although neither the trial judge nor the Appellate Division

appear to have considered it in their reasons. It is not questioned that it is open to the respondent.

This contention is based upon the fact that the Edmonton charter, as amended by c. 23, statutes of Alberta, 1913, did not contemplate the taxation of buildings, except in the case of special franchises, as clearly appears by s. 3 of part I and the whole statute. It is argued that the meaning of the words "the land not exceeding four acres," etc., of s. 320, ss. 5, as it then stood in the charter, was not affected by the amendment which was made to the charter in the year 1918, c. 52, statutes of Alberta, s. 44, which provided for the assessment of buildings.

It appears, however, that in 1917 an amendment was enacted to the charter by c. 46, statutes of Alberta, providing for a plebiscite on the question of assessing buildings and business incomes. By this Act, s. 321 of the charter, which then provided that

land shall be assessed at its fair actual value exclusive of the value of buildings and improvements thereon,

was amended by inserting immediately after these words the words

unless the buildings and improvements shall become assessable as hereinafter provided,

and by adding two subsections to the same section, ss. 2 providing for the plebiscite on the question of the assessment of buildings, and ss. 3 providing for a plebiscite on the question of the assessment of business incomes. The words, "unless the buildings and improvements shall become assessable as hereinafter provided," clearly referred to the event of the adoption as a result of the plebiscite of the proposal to assess buildings, and are still retained in s. 321 of the charter as it stands to-day, making the first sentence thereof read as follows:

Land shall be assessed at its fair actual value exclusive of the value of buildings and improvements thereon unless the buildings and improvements shall become assessable as hereinafter provided;

thus clearly contemplating that whenever buildings and improvements become assessable, they become so as part of the land.

The provision for the assessment of buildings in 1918 was made by the addition to s. 321 of a new section—321A, reading as follows:

In the year 1918 and in each subsequent year all buildings and improvements on the land within the city shall be assessed at sixty per

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &c. v. THE CITY OF EDMONTON.

Crocket J.

centum of their actual value, *which shall be the amount by which the value of the land is thereby increased;*

This added section, as it appears in the printed consolidated charter of 1931, filed in this case, contains, in addition to the main section just quoted, three subsections, nos. 2, 3 and 4, ss. 4 reading in part as follows:

In assessing land having any buildings thereon, the assessment value of the land and buildings as hereinbefore defined shall be ascertained separately and shall be set down separately in the assessment roll either in the same or separate columns, *and the assessment shall be the sum of such values.*

The underlined words of the main section—321A—and of ss. 4 thereof, quite as plainly indicate, I think, as those of the amended sec. 321, that, although the value of the land and buildings is to be ascertained separately and that they shall be set down separately in the assessment roll, the assessment shall be treated as an assessment of the land, inclusive of the buildings. The effect of these amendments, therefore, must be to render entirely inoperative the words "but in no other cases," in clause (*d*) of s. 12, following the words "in case of special franchises," and thus to give the word "land" the meaning which but for these words it would, undoubtedly, bear, including buildings and improvements. The city itself, by its assessors, seems to have consistently acted upon that interpretation in its assessment of the college from the beginning. I find it, therefore, impossible, to accede to the proposition that the words "land not exceeding four acres," as it now reads in s. 320, ss. 5, do not apply to land, whose value has been increased by the erection upon it as part of the freehold of buildings and permanent improvements.

I am, therefore, of opinion that the word "land" in the exemption subsection includes all buildings affixed thereto.

Although the four points relied upon by the respondent in its factum do not seem to include the ground taken by Clarke J.A., in his reasons for judgment, the respondent's counsel explicitly took it upon this appeal, viz: that because the college lands exceed in area the four acres to which the exemption is limited, they are not entitled to exemption at all.

It is true that the Act does not indicate how or by whom the area of exemption is to be selected, but this in my opinion is not a sufficient reason for limiting the exemption to cases where the college or other institution owns and

occupies no more than four acres of land and thus construing the ownership and use of no more than four acres as a condition without which the exemption is not to apply at all. If that were the true construction, no college or seminary of learning or hospital could extend its land holding beyond four acres without entirely forfeiting its right to the exemption which the legislature, in my opinion, clearly intended to give it. I think the more reasonable view is that the words "land not exceeding four acres," etc., mean land to the extent of four acres.

In the *Mayor, etc., of Whanganui* v. *Whanganui College Board* (1), the Court of Appeal of New Zealand considered a clause in the New Zealand *Rating Act,* which excepted from the payment of rates "land and buildings used for a school * * * *but so that* within any borough or town district not more than four acres be used and occupied by or for the purpose of any such school." The Court unanimously held that the effect of these words—which appear on their face to point much more directly to a condition than the enactment now under consideration—was, if more than four acres were so held, to exempt up to four acres and not to destroy the exemption entirely. Any other construction, it was pointed out by two of the three judges taking part, would lead to such a manifest absurdity and repugnance as to justify the Court in ignoring the strict grammatical meaning of the language of the enactment.

In the present case the interpretation of the words "not exceeding four acres" in the sense indicated does no violence to the grammatical construction of any language used in the enactment.

Once the selection of the four acres to which the exemption is to apply is made, either by the city assessors or by the owner, as it must be, the difficulties suggested by Clarke, J.A., as to the description and identification of the excess in case of a sale for non-payment of taxes, disappears. Counsel for the respondent conceded that if the view taken by Clarke, J.A., were erroneous, the defendant had the right to select the exempted area. This, I think, is true, for the reason that the exemption is intended for the benefit of the college.

(1) (1906) N.Z.L.R. 1167.

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &C. v. THE CITY OF EDMONTON.

Crocket J.

The other points relied upon by the respondent all concern the construction of the words "of and attached to or otherwise *bona fide* used in connection with and for the purposes of any university, college," etc., and the concluding words of the subsection, "so long as such land is actually used and occupied by such institution but not if otherwise occupied."

The subsection is certainly not a model of good phrasing, as will be seen when one tries to link the words "the land * * * of and attached to" with the various institutions named, whether as a group or separately or as buildings or bodies corporate. Whatever may be the meaning of the words "attached to" it is manifest that the alternative words "or otherwise *bona fide* used in connection with and for the purposes of" point to other lots and buildings than those which may be contiguous or, to use the words of the enactment, "attached to" one another, and that, whether the lots and buildings are contiguous or not, the alternative words above quoted extend the statutory exemption to them if they are in fact *bona fide* used in connection with and for the purposes of any of the institutions designated. These words must be construed severally with reference to these various institutions. In the case of a university or a college which is a corporate institution, as the defendant's college is, they must be read as meaning lots and buildings, which are *bona fide* used in connection with and for the purposes of a university or college as such an institution and in the ordinary and popular sense of the language the legislature has employed. There is nothing in the context to indicate otherwise. What then is the ordinary and popular meaning of the words "*bona fide* used in connection with and for the purposes of" a university or a college as a corporate institution? Obviously they cannot refer to a physical connection of lots or buildings. They must, therefore, mean a use in connection with and for the purposes of the corporate institution in the wider sense. Whether the words "in connection with" qualify the words "the purposes of" or the words "any university, college," etc., the result is the same. Subject to the four-acre limitation and to the concluding words of the section they embrace any use of lots and buildings made for legitimate university or college purposes, and would, in my opinion, include a resi-

dence building provided by the college for its principal as they would a residence provided by and managed and controlled by the college for its students, whether physically attached to the college building proper or not, as they would also include, in the case of a hospital, a nurses' home for the use of its nurses. I can see no distinction between the case of a principal's residence and the case of professors' residences. The only suggested distinction is that the professors' residences are separated from the particular lots on which the college buildings are situated, and this fact, as I have already pointed out, does not exclude them from the exemption provision. As a matter of fact, the professors' houses, which were erected, are nearer to and more conveniently situated with reference to the college buildings proper than if they had been erected on the site first intended at the extreme northerly end of block X.

There remains the question as to the effect of the concluding words of the subsection, viz: "so long as such land is *actually used and occupied by such institution, but not if otherwise occupied.*" Are these words intended to alter the scope of the exemption as indicated by the preceding words "*bona fide* used in connection with and for the purposes of" the university, college, etc.? It is contended that they limit the exemption to land which is actually used and occupied by the institution. That the concluding words must be interpreted in the light of the preceding words can hardly be denied. The preceding words indicate the character and scope of the use which must be made of the land of the college to entitle it to exemption, viz: that it be *bona fide* used in connection with and for the purposes of the college. Do the words "actually used and occupied by the institution," etc., mean anything more than the words "*bona fide* used and occupied in connection with and for the purposes of" the institution? In my opinion they do no more than define the duration of the exemption already created, and the residences cannot fairly, in the circumstances stated, be said not to be actually used and occupied in connection with and for the purposes of the college. They are used for the purposes of housing, rent free, professors of the college only while engaged in the service of the college as such professors—professors who, in addition to their daytime duties, have duties to perform in the college at night, such as assist-

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &C. v. THE CITY OF EDMONTON.

Crocket J.

ing the students during study periods and inspecting the dormitories at retiring time, as the stated case sets forth, and who are subject at all times to the orders of the principal. Although in a sense the residences may be said to be used and occupied by the professors, they are none the less *bona fide* used, as the learned trial judge has found, by the institution in connection with and for the purposes of the college, and are, in my opinion, actually used and occupied by it within the contemplation of the subsection, their use having a direct reference to the aims and objects of the college as a corporate institution.

A number of English, Canadian and American cases were cited on the argument dealing with exemption claims under various rating statutes. In none of them is the language of the exemption provision involved identical with that of s. 320 of the Edmonton charter, or the facts the same as in the present case. These cases, therefore, are of little assistance in construing the provision here in question. For instance the respondent's counsel relied strongly on the decision of this Court in *Ruthenian Catholic Mission* v. *Mundare* (1), where the Court divided evenly on an appeal from the decision of the Appellate Division of the Supreme Court of Alberta holding that a building used by the appellant as a seminary was not a building used for church purposes within the meaning of s. 24 (*d*) of the Alberta *School Assessment Act*. It will at once be seen that there is no analogy between the words "any building used for church purposes" and the words "land *bona fide* used in connection with and for the purposes of" any university or college as a corporate institution. In the Nova Scotia case, *Catholic Corporation of Antigonish* v. *Municipality of Richmond* (2), the exemption words were "Every church and place of worship and the land used in connection therewith and every churchyard and burial ground." There were no such words as "*bona fide* used in connection with and for the purposes of" a church in the sense of a corporate institution or a religious denomination. The word "church" clearly meant a building used as a church or place of worship.

The case, which seems to me most nearly to approach the present case, is *The Trustees of Phillips Academy* v.

(1) [1924] S.C.R. 620. (2) [1911] N.S.R. 320.

Andover (1), in which the Supreme Court of Massachusetts considered the question as to whether the occupation of residences belonging to the Academy by the president and professors and the officers of the institution and their families was necessarily inconsistent with the intent of the provision of a taxing Act exempting the real estate of educational and charitable institutions, "occupied by them or their officers for the purposes for which they were incorporated." All of the judges agreed that the exemption contemplated an occupancy which "must have or be supposed to have direct reference to the purposes for which the institution was incorporated and must tend directly to promote them," and further, that "the occupancy does not lose what may be termed its institutional character and purpose because as incidental to it, the president and professors and other officers and their families are provided with homes, for the possession and enjoyment of which by them compensation is allowed or taken into account in some manner." It was contended that the inclusion of the words "or their officers" in the Massachusetts exemption provision, distinguished the *Phillips Academy* (1) case from the present. These words, I think, make no real difference inasmuch as a corporate institution cannot occupy land otherwise than by its officers or servants. It is a question in every case, having regard to all the facts and circumstances, and the intentions and purposes of those in charge of the institution, whether the dominant, controlling consideration of the use or occupancy of the buildings is really the enhancement of the educational advantages of the institution, or the private benefit and convenience of the professors and their families. The words "*bona fide* used" in the exemption clause in the present case point unmistakably to such a consideration as the determining factor.

I should perhaps also refer to a passage used by Lord Davey in delivering the judgment of the Judicial Committee of the Privy Council in *Commissioners of Taxation* v. *Trustee of St. Mark's Glebe* (2). His Lordship, discussing the effect of the words "for and in connection with," said:

> The words "for or in connection with" (say) a hospital or a church are probably intended to include, not only the actual site of the hospital or church, but also other buildings or land occupied in connection with

(1) (1900) 55 N.E.R. 841. (2) [1902] A.C. 416.

1934

EVANGELICAL LUTHERAN SYNOD OF MISSOURI, &c. v. THE CITY OF EDMONTON.

Crocket J.

the principal building, as, for example, land used for a residence for the head or Minister, or a room for church meetings or other similar purposes. This is doubtless a mere dictum, as contended by the respondent's counsel, but it is a dictum of very high authority, and one which, so far as I have been able to discover, has never been authoritatively challenged in a case where identical words were considered.

I would allow the appeal and restore the decision of the learned trial judge with costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Parlee, Freeman, Smith & Massie.*

Solicitors for the respondent: *Thomas E. Garside.*

1933

*Nov. 8.

1934

*Feb. 6.

HIS MAJESTY THE KING (PLAINTIFF) APPELLANT;

AND

CONSOLIDATED LITHOGRAPHING MANUFACTURING COMPANY, LIMITED (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Sales tax—Playing cards—Excise tax—Whether included in sale price—Special War Revenue Act, R.S.C., 1927, c. 179, s.s. 82, 85 (a) (b), 86 (i).

The respondent, a licensed manufacturer under Part XIII of the *Special War Revenue Act* (R.S.C., 1927, c. 179), manufactured and sold playing cards. It paid the sales tax on all cards sold, said tax being computed on the sale price of the cards exclusive of the excise tax imposed by section 82 of the Act. The Crown contended that the sales tax should have been computed on the sale price including the excise tax.

Held, Crocket J. dissenting, reversing the judgment of the Exchequer Court of Canada ([1933] Ex. C.R. 204), that the excise tax should have been included in the sale price of such cards for the purpose of calculating the sales tax. The definition of "sale price" in the Act (s. 85, ss. (*a*)) is very comprehensive: "sale price" is inclusive of every item entering into the price just before the consumption or sales tax is added and must therefore include the excise tax.

Per Crocket J. (dissenting).—A taxing statute is always to be construed strictly against the taxing authorities and a tax upon a tax ought not to be held to be imposed in the absence of language which leaves no doubt whatever as to the intention to impose it. The omission from

PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes, JJ.

1934

THE KING v. CONSOLIDATED LITHOGRAPHING MFG. CO. LTD.

the definition which the statute gives of the term "sale price" of any mention of excise taxes, together with its inclusion of excise duties when goods are sold in bond and its express provision making the excise tax part of the duty paid value and of the sale price in the case of imported playing cards leaves the intention of Parliament in such doubt that the trial judge was fully warranted in resolving the question against the taxing authorities.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), dismissing an action brought by the Attorney General of Canada to recover the sum of $2,611.58, which it was claimed was owing by the respondent as sales tax in respect of the sale of playing cards made from December 1st, 1931 to July 31, 1932.

The material facts of the case and the question at issue are stated in the above head note and in the judgments now reported.

F. P. Varcoe K.C. for the appellant.

L. A. Forsyth K.C. and *J. de M. Marler* for the respondent.

The judgment of the majority of the court (Duff C.J. and Rinfret, Cannon and Hughes JJ.) was delivered by

HUGHES J.—This is an appeal from a judgment of Mr. Justice Angers of the Exchequer Court of Canada dismissing an action brought by the Attorney-General of Canada to recover the sum of $2,611.58, which it was claimed was owing by the respondent in respect of sales of playing cards made from December, 1931, to July 31, 1932.

During the period in question each pack of cards manufactured was subject to an excise tax imposed by Part XII of the *Special War Revenue Act*, R.S.C., 1927, chapter 179, section 82, of which reads as follows:—

S. 82. There shall be imposed, levied and collected, an excise tax on playing cards for every fifty-four cards or fraction of fifty-four in each package, of ten cents per pack

2. The excise taxes imposed by the preceding subsection shall be payable at the time

(*a*) of importation or removal from warehouse for consumption in addition to the duties of customs; or

(*b*) of sale by the Canadian manufacturer.

(1) [1933] Ex. C.R. 204.

1934

THE KING v. CONSOLIDATED LITHOGRAPHING MFG. CO. LTD.

Hughes J

Regulations 1 and 2 pertaining to Part XII are as follows:—

1. The tax of ten cents per pack shall be payable by means of excise tax stamps issued by the department of National Revenue.

2. Excise tax stamps on playing cards manufactured in Canada shall be affixed to the individual packs and be cancelled, before the playing cards are removed from the premises of the manufacturer.

By section 86 (1) of the Act the respondent was liable to pay a consumption or sales tax of four per cent on the sale price of all goods (*a*) produced or manufactured in Canada payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof. On April 7th, 1932, a new subsection was substituted whereby the tax became six per cent.

It is conceded that the respondent paid sales tax during the period in question on its sales exclusive of the excise taxes imposed by virtue of section 82 of the Act. The appellant contends that the sales tax should have been computed on the sale price including the excise taxes. Two copies of invoices of the defendant were produced. Invoice exhibit 1 mentioned the excise tax separately from the remainder of the price, and the sales tax was computed on the total. Invoice exhibit 2 indicated the price, including the excise tax, in a lump sum. The respondent had charged its customers sales taxes on the prices including excise taxes, but explained that this was only as a protection in case the contention of the Crown were correct.

It is agreed that the amount in question is $2,611.58.

Section 85 subsection (*a*) of the *Special War Revenue Act* defines the expression "sale price" as follows:—

(*a*) "sale price", for the purpose of calculating the amount of the consumption or sales tax, shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto, and shall include the amount of other excise duties when the goods are sold in bond; in the case of imported goods the sale price shall be deemed to be the duty paid value thereof.

Subsection (*b*) of section 85 defines the words "duty paid value" as follows:

(*b*) "duty paid value" shall mean the value of the article as it would be determined for the purpose of calculating an ad valorem duty upon the importation of such article into Canada under the laws relating to the customs and the customs tariff, whether such article be in fact subject to ad valorem or other duty or not, and in addition the amount of the custom duties, if any, payable thereon: Provided that in computing the "duty paid value" of tea purchased in bond in Great Britain the amount of the customs duty payable on tea for consumption in Great Britain shall not be included in the value of such tea for purposes of

this Part; and that in the case of matches or playing cards, the excise taxes imposed by Parts X and XII of this Act shall be included in the duty paid value.

The respondent urged strongly that since excise taxes were expressly mentioned in the definition of "duty paid value" and not mentioned in the definition of "sale price" except that the latter should include the amount of other excise duties when the goods were sold in bond, there was no intention on the part of the legislature that the sales tax should be imposed upon the sale price including excise tax. It must be kept in mind, however, that "duty paid value" has reference only to imported goods where there may not be a price at all, as for example, where there are being brought into Canada goods such as an automobile or painting purchased abroad. In the case of goods sold in bond, there may again be special circumstances requiring specific mention in the statute that "sale price" shall include the amount of other excise duties. For example, a distiller sells a consignment of spirits to a purchaser such as a provincial liquor board, which purchaser has a bonded warehouse. The goods in such a case are sold in bond and the excise duty is not payable by the distiller at the time of sale, but is payable only when the purchaser removes them. The mention of excise duties by way of definition in respect of these special cases should not in the absence of plain language be held to cut down the wide definition of "sale price" as given. The earlier part of section 85, subsection (*a*) provides that for the purpose of calculating the amount of the consumption or sales tax, "sales price" shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto. Now, as already indicated, regulation 2 pertaining to Part XII provides that the excise tax stamps on playing cards manufactured in Canada shall be affixed to the individual packs and be cancelled before the playing cards are removed from the premises of the manufacturer. Therefore the amount of the excise tax must truly be a part of the price of every package of cards leaving the premises of the manufacturer. The definition of "sale price" in the statute is very comprehensive. "Sale price" is inclusive of every item entering into the price just before the consumption or sales tax is added and must therefore include the excise tax.

1934

THE KING v. CONSOLIDATED LITHOGRAPHING MFG. CO. LTD.

Hughes J.

In *Partington* v. *Attorney General* (1), Lord Cairns said, page 122:

> I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

I am of opinion, therefore, that the appeal should be allowed and that judgment should be entered for the appellant for $2,611.58 and costs throughout.

CROCKET J. (dissenting).—This is an appeal from the judgment of Mr. Justice Angers of the Exchequer Court dismissing an information brought by the Attorney-General of Canada to recover the sum of $2,611.58, which it was claimed the defendant became liable to pay to His Majesty as sales tax in respect of the sale of playing cards from December 1st, 1931, to June 30th, 1932.

The defendant is a Canadian licensed manufacturer of playing cards, and, as such, paid sales tax on playing cards manufactured and sold by it during the period mentioned to the amount of $6,808.56. This amount represented 4 per cent on its sales down to the time of the coming into force of the amendment which was made in 1932 to the *Special War Revenue Act*, R.S.C. 1927, c. 179, increasing the sales tax rate to 6 per cent, and 6 per cent on all sales subsequent to that date, but the sales prices on which the tax was paid did not include the special tax of ten cents per pack, imposed by s. 82 of the Act, though the invoice prices at which the playing cards were billed to its customers did include it.

The Crown contends that the defendant was not entitled to deduct the excise tax of ten cents per pack from the invoice price at which it billed its playing cards to its customers, and the $2,611.58 claimed in the information represents the additional amount the defendant would be required to pay on its sales during the period mentioned if the excise tax forms part of the sale price for the purpose of computing the sales tax.

(1) (1869) L.R. 4 H.L. 100.

This is the whole question involved in the case, whether the excise tax is to be included in or excluded from the sale price for the purpose of computing the sales tax.

The excise tax is imposed, as already stated, by s. 82 of the Act. Ss. 2 of this section is as follows:

> The excise taxes imposed by the preceding subsection shall be payable at the time
>
> (*a*) of importation or removal from warehouse for consumption in addition to the duties of customs; or
>
> (*b*) of sale by the Canadian manufacturer.

Section 86 is the section which imposes the sales tax. Prior to the amendment of 1932, it read, in so far as is here material:—

> In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four per cent on the sale price of all goods.
>
> (*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the times of the delivery of such goods to the purchaser thereof.

The amendment of 1932 substituted for these words the following:

> There shall be imposed, levied and collected a consumption or sales tax of six per cent on the sale price of all goods,
>
> (*a*) produced or manufactured, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

It will be observed that the only change which the amendment effected beyond the substitution of the six per cent for the four per cent rate was the omission of the opening words, "in addition to any duty or tax that may be payable under this Act or any other statute or law". Whatever the significance of these words and their omission from the substituted section may be, I agree with the learned trial judge that the solution of the question with which he was concerned is to be found in the definitions which the Act itself gives of the words "sale price", and "duty paid value" in s. 85. "'Sale price'," says this section,

> for the purpose of calculating the amount of the consumption or sales tax shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto, and shall include the amount of other excise duties when the goods are sold in bond; in the case of imported goods the sale price shall be deemed to be the duty paid value thereof.
>
> "Duty paid value" shall mean the value of the article as it would be determined for the purpose of calculating an *ad valorem* duty upon the importation of such article into Canada * * * Provided * * * that in the case of matches and playing cards the excise taxes imposed by Parts X and XII of this Act shall be included in the duty paid value.

1934

THE KING v. CONSOLIDATED LITHOGRAPHING MFG. CO. LTD.

Crocket J.

The definition of "sale price", as pointed out by the learned judge, excludes the sales tax and includes the amount of other excise duties when the goods are sold in bond, but makes no mention of excise tax, while in the case of imported goods it is provided that the sale price is to be deemed the duty paid value thereof, and in the case of matches and playing cards expressly enacts that the duty paid value shall include in addition to any customs duties payable thereon the excise tax imposed by s. 82.

Had the statute itself not defined the term "sale price", it might well be argued that the sale price was what the purchaser paid to the vendor as consideration for the object of the sale and that since the purchaser had to pay the excise tax to the vendor, such excise tax should be treated as part of the purchase price. Since the statute, however, itself states not only what the term "sale price" means, but what it includes and does not include, I am of opinion that the tax which Parliament has imposed as a sales tax upon the sale price of goods produced or manufactured in Canada ought not to be held to be imposed upon another special tax as part of such sale price, as in the case of the excise tax on playing cards, unless that special tax is clearly indicated in the statutory definition as part of the sale price upon which the sales tax is imposed. A taxing statute is always to be construed strictly against the taxing authorities, and, in my opinion, a tax upon a tax ought not to be held to be imposed in the absence of language which leaves no doubt whatever as to the intention to impose it. The omission from the statutory definition of any mention of excise taxes, together with its inclusion of excise duties when goods are sold in bond and its express provision making the excise tax part of the duty paid value and of the sale price in the case of imported playing cards, leaves the question in such doubt that I think the learned trial judge was fully warranted in resolving the question against the taxing authorities.

The appeal should, therefore, be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondent: *L. A. Forsyth.*

CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

AND

CANADIAN NATIONAL RAILWAY COMPANY ..... RESPONDENT.

1933
*Nov. 15.
1934
*Mar. 6.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Agreement between Canadian Pacific Ry. Co. and Canadian National Ry. Co. of January 29, 1929 (schedule "C" to Northern Alberta Railways Act, c. 48 of Statutes of Canada, 1929)—Construction—Comparison of freight traffic for purpose of equal division between the parties to said agreement—Grain shipped from stations on Northern Alberta Railways for export—"Outbound freight traffic destined to competitive points on or beyond the lines of the parties" (article 7 of agreement).

Upon the agreement made between the Canadian Pacific Ry. Co. and the Canadian National Ry. Co. dated January 29, 1929, being schedule "C" to the *Northern Alberta Railways Act,* Statutes of Canada, 1929, c. 48, and upon the facts and circumstances existing with regard to traffic, rates and carriage, grain shipped from stations on the Northern Alberta Railways to Prince Rupert (reached by the Canadian National alone) or to Victoria (reached by the Canadian National by transporting loaded cars of grain on barges, but not so reached by the Canadian Pacific) for export, and exported from either of those ports (to, say, the United Kingdom), is "outbound freight traffic destined to competitive points on or beyond the lines of the parties" within the meaning of article 7 of said agreement, and is not to be excluded from the comparison of freight traffic for the purpose of the equal division to be made under said article 7. In the light of the objects of the agreement as ascertained from it as a whole, and the conditions the parties must necessarily have had in view, the words "competitive points on or beyond the lines of the parties" should not be construed as limited to points on the lines of the parties or their connecting rail carriers to which the parties are prepared to handle traffic offered at equal rates.

Judgment of the Board of Railway Commissioners for Canada, 41 Can. Ry. Cas. 214, reversed.

Crocket J. dissented.

APPEAL by the Canadian Pacific Railway Company (by leave of the Board of Railway Commissioners for Canada) from the judgment (Order No. 50139) of the Board of Railway Commissioners for Canada (1) declaring that Prince Rupert is not a competitive point within the mean-

(1) (1933) 41 Can. Ry. Cas. 214.

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

ing of clause 7 of the agreement dated January 29, 1929, between the Canadian Pacific Railway Company and the Canadian National Railway Company (which agreement is schedule "C" to the *Northern Alberta Railways Act*, ch. 48 of the Statutes of Canada, 1929), and that, until such time as the Canadian Pacific Railway Company files a through tariff for export wheat to Victoria, the latter point is not competitive within the meaning of the said agreement.

The question of law upon which the Board granted leave to appeal, and to which the Board's judgment was, in effect, an answer in the affirmative, was as follows:

Whether upon the agreement made between the Canadian National Railway Company and the Canadian Pacific Railway Company on the 29th day of January, 1929, and the facts and circumstances hereinafter set forth, grain shipped from stations on the Northern Alberta Railways to Prince Rupert or to Victoria for export, and exported from either of those ports to, say, the United Kingdom, is to be excluded from the comparison of freight traffic for the purpose of the equal division to be made under article 7 of the agreement as not being "outbound freight traffic destined to competitive points on or beyond the lines of the parties" as the expression is used in said article.

The agreement is schedule "C" to ch. 48 of the Statutes of Canada, 1929. Clauses 2, 6, 7 and 11 (as being especially important) of the agreement are set out in the judgment of Duff C.J. now reported.

The facts and circumstances are set out in the order of the Board granting leave to appeal as follows:

1. The Northern Alberta Railways comprise lines of railway situated in the northern part of the Province of Alberta, connecting with the Canadian Pacific Railway at Edmonton and with the Canadian National Railway at Edmonton and Morinville.

2. They are the property of the Northern Alberta Railways Company, the capital stock of which is held by the Canadian National Railway Company and the Canadian Pacific Railway Company, jointly acquired by them under the authority of and pursuant to chapter 48 of the Dominion Statutes of 1929, and the agreements which form schedules "A" and "C" to that Act * * *

3. The chief industry of northern Alberta is agriculture, and the principal traffic on the Northern Alberta Railways consists of grain shipped for export from Canada, which each of the railways, the Canadian National and the Canadian Pacific, has at all times been desirous of securing for transport over its lines from the Northern Alberta Railways to the seaboard.

4. The Pacific coast seaports from which grain is exported from Canada were and are Vancouver, New Westminster, Victoria and Prince Rupert, in the Province of British Columbia. Of these, Vancouver and New Westminster are reached by both the Canadian Pacific Railway and the Canadian National Railway, and Prince Rupert by the Canadian National alone.

Victoria is reached by transporting the loaded cars of grain on barges from Port Mann on the Canadian National Railway near Vancouver, the distance thereto being 78 miles. The Canadian Pacific does not undertake the carriage of grain to Victoria by such a service. The bulk of the grain carried by each railway to these ports for export is taken to and exported from Vancouver.

5. The Canadian National's line to Prince Rupert was originally part of the Grand Trunk Pacific Railway, and its line to Vancouver was originally part of the Canadian Northern Railway System. On September 2, 1925, coincidentally with the construction of the Government elevator at Prince Rupert, the Canadian National Railways issued a tariff of export grain rates from stations on its railway to Prince Rupert and these rates were the same as the export grain rates from the same stations to Vancouver (tariff No. W. 135-C, C.R.C. No. W. 357, Supplement No. 15). Under the same date export grain rates from points on the Alberta and Great Waterways Railway to Prince Rupert via the Canadian National Railways were also put into effect on a parity with similar rates via Canadian National Railways to Vancouver (A.G.W. No. 123, C.R.C. No. 105, Supplement No. 7). Upon the termination of the Alberta Government Agreement in 1926 the Canadian National published to Prince Rupert from points on the Edmonton, Dunvegan and British Columbia, Alberta and Great Waterways and Central Canada Railways, export rates on the Vancouver basis. (C.N. tariff No. W. 135-D, C.R.C. No. W. 432, Supplement No. 8). On October 12th, 1927, the Canadian National Railways published similar rates from points on the Pembina Valley Railway to both Vancouver and Prince Rupert, as shown in Supplement 1 to C.N. Rys. tariff W. 135-F, C.R.C. W. 546.

6. At the time of their acquisition in 1929 the Northern Alberta Railways were owned or controlled by the Government of Alberta; part of them, known as the Pembina Valley Railway, having been constructed by the Government, and the remainder, consisting of the railways of The Edmonton, Dunvegan and British Columbia Railway Company, the Central Canada Railway Company and the Alberta and Great Waterways Railway Company, having come into its hands through the insolvency of those companies.

7. From 1920 to 1926, as the result of the agreement set out in chapter 56 of the Statutes of Alberta, 1921, joint rates on grain shipped for export from stations on the Edmonton, Dunvegan and British Columbia and Central Canada Railways were established and maintained exclusively in connection with the Canadian Pacific Railway, and joint rates from stations on the Alberta and Great Waterways Railway Company in connection with both the Canadian Pacific and Canadian National companies. In 1926 the Government terminated the agreement and all joint tariffs in connection with the Canadian Pacific were cancelled, and from that time until the acquisition of the lines by the Northern Alberta Railways Company in 1929, under agreement dated November 11, 1926, * * * joint rates were maintained in connection with the Canadian National Railway Company exclusively.

8. Since 1929 joint rates on grain have been published by the Northern Alberta Railways Company and the Canadian Pacific Railway Company from stations of the former to Vancouver and New Westminster for export, and by the Northern Alberta Railways Company and the Canadian National Railway Company to Vancouver, New Westminster, Victoria and Prince Rupert for export (present C.N.R. Tariff No. W. 135-F, C.R.C.

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

No. W-546 and supplements 36 and 42 thereto, and C.P.R. Tariff No. W-5769, C.R.C. No. W-2847 and supplements 37, 41 and 43 thereto). The rates in the foregoing tariffs from Canadian National and Canadian Pacific points to Vancouver were made under Order of the Board of Railway Commissioners No. 448 of August 26, 1927. The mileage from Edmonton to Vancouver via the Canadian National Railways is 765 miles, and via the Canadian Pacific is 836 miles. The mileage from Edmonton to Prince Rupert is 957 miles. In the calculation of the rates to Vancouver, the Canadian National mileage from Edmonton to Vancouver is taken by the Canadian Pacific as its mileage from Calgary to Vancouver. By reason of competition, the Canadian Pacific accepts for carriage via its line from Edmonton to Vancouver the same rate as the Canadian National receives for carriage via its shorter mileage. In order to place Prince Rupert on an equality with Vancouver, the Canadian National published the same rates to Prince Rupert as were effective over its own line to Vancouver, thus extending lower rates to Prince Rupert than required by General Order No. 448.

9. These rates, and the terms and conditions of rail carriage, are the same from any Northern Alberta Railways station to all these seaports whether routed via Canadian National Railway or Canadian Pacific Railway.

10. Export rates are lower than the domestic rates.

For example: The rates on grain and grain products, in carloads, from Grande Prairie on the Northern Alberta Railways to New Westminster and Vancouver via either the Canadian Pacific or the Canadian National, and to Victoria and Prince Rupert via the Canadian National, for export is 28 cents per one hundred pounds, while the domestic rate via either the Canadian Pacific or Canadian National is 52½ cents per one hundred pounds to New Westminster and Vancouver, 55½ cents per one hundred pounds to Victoria, and via the Canadian National to Prince Rupert 58 cents per one hundred pounds.

11. Ocean rates on grain are not uniform, but by force of competition tend to equality.

12. Grain shipped to any of the above mentioned ports for export is discharged by the railway into elevators at the said ports and there stored with grain of the same grade, and is no longer earmarked as grain of that shipment. When the shipper desires to export his grain an equivalent amount of grain of the same grade is subject to his order. The same practice is followed in all cases where grain is milled or stored in transit.

13. The port of Churchill on the Canadian National Railways is a port of export on the Atlantic coast to which grain from points on the Northern Alberta Railways may be carried under C.N. tariff No. W-485A, C.R.C. No. W. 757. Outbound freight traffic to Churchill for export is dealt with by the Northern Alberta Railways Company for the purposes of article 7 of the agreement as being in the same category as similar traffic to Prince Rupert and Victoria.

14. The question of law above stated came before the Board for determination upon the application of the Canadian National Railway Company. * * *

W. N. Tilley K.C. for the appellant.

I. C. Rand K.C. for the respondent.

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

The judgment of Duff C.J. and Smith and Hughes JJ. was delivered by

DUFF C.J.—The appellants, the Canadian Pacific Railway Company, obtained leave to appeal from the Board of Railway Commissioners on the following question of law:

Whether upon the agreement made between the Canadian National Railway Company and the Canadian Pacific Railway Company on the 29th day of January, 1929, and the facts and circumstances hereinafter set forth, grain shipped from stations on the Northern Alberta Railways to Prince Rupert or to Victoria for export, and exported from either of those ports to say the United Kingdom, is to be excluded from the comparison of freight traffic for the purpose of the equal division to be made under article 7 of the agreement as not being "outbound freight traffic destined to competitive points on or beyond the lines of the parties" as the expression is used in said article.

The articles of the agreement requiring strict examination are those numbered 2, 6, 7 and 11. We quote them literally:

2. Each of the parties hereto shall assume the payment of and be liable for one-half of the purchase price payable (with interest), and one-half of the obligations to be assumed by the purchasers under the said agreement, and shall be entitled to one-half of the benefits to be derived therefrom, it being the intention of the parties that the said agreement shall be for their equal benefit and advantage.

6. Neither party shall directly or indirectly solicit the routing of outbound competitive traffic over their respective lines.

7. The new company shall be required to route outbound freight traffic (including grain milled or stored in transit) originating on the lines of the new company and destined via Edmonton or Morinville to competitive points on or beyond the lines of the parties, in such a way that each of the parties shall receive on a revenue basis one-half the outbound freight traffic orgiinating and destined as aforesaid, including such freight traffic routed by the shipper as well as such freight traffic unrouted by the shipper. Comparisons on a revenue basis of the traffic so received by each of the parties shall be made monthly, and any inequality of division in any month shall be rectified in succeeding months. The foregoing provisions in respect to Freight Traffic shall apply also to outbound Express Traffic and Telegraph Traffic respectively, originating on the lines of the new company and destined to competitive points on or beyond the lines of the parties. For the purpose of the division of traffic in this paragraph provided for, Freight Traffic, Express Traffic and Telegraph Traffic shall be divided and dealt with separately.

11. The parties agree to co-operate with fairness and candour toward each other, and to give effect to this agreement in the most liberal and reasonable manner to the intent that each of them shall receive its full and equal share of the benefits of the joint undertaking, subject to the provisions of clause 4 hereof.

The question for decision is by no means free from difficulty, although the relevant considerations lie in a rather limited field. The Board answered the question in the

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Duff C.J.

negative. We think the pith of the reasons delivered by the learned Chief Commissioner is in the extracts now quoted:

The rates and conditions of carriage of grain shipped for export from points on the Northern Company to all three of the ports above referred to are identical. The question is, what did the parties mean by the use of the words "competitive points on or beyond the lines of the parties"? I have always understood "competitive points" in railway parlance to mean points in respect to which two or more lines compete for traffic. In other words, a point at which two or more railways have facilities and are prepared to handle traffic offered at equal rates. Reading the words in the ordinary way, I think there can be no doubt that "competitive points on or beyond the lines of the parties" means points on the lines of the parties or their connecting carriers, and have no reference to any point other than one on a railway.

* * *

The word "competitive" as used in the agreement must have reference to competition between railways. The parties were only interested in securing the carriage of grain to a port. What becomes of it afterwards did not in the least interest them. If the parties intended what Mr. Tilley now contends they did, they should have said so, and this is particularly true when one considers the meaning which both parties had, long prior to the agreement, given to the words "competitive traffic".

In the Board's General Order No. 252, *re* interswitching, it is set out that "nothing herein contained shall prevent the line carrier from absorbing the entire toll, or tolls, charged for interswitching competitive traffic, provided that the traffic and movements so treated are clearly defined in its tariffs." Turning to the tariffs of the Canadian Pacific and Canadian National as in effect in both Eastern and Western Canada, covering rules and regulations governing interswitching charges, they are found to all contain the following definition of competitive traffic:—

"DEFINITION OF COMPETITIVE TRAFFIC

At point of Origin.—When the railway performing the switching service can handle the shipment in road-haul movement from the origin station at equal rate.

At Destination.—When the railway performing the switching service could have handled the shipment in road-haul movement into the destination station at equal rate."

Another definition found in the tariff of the Canadian Pacific, Western Lines, having to do with absorption of cartage charges rather than the question of interswitching, concerning competitive carload traffic, reads:—

"Competitive traffic is defined as having both its origin and destination at points reached by other railroads, which may also be reached by the lines of this company or its connections."

* * *

It will be seen then that the Canadian National prior to the making of the agreement had certain exclusive rights with regard to the carriage of traffic routed to Victoria or to Prince Rupert. If the contention of the Canadian Pacific is right the Canadian National deliberately abandoned these exclusive rights. I can find nothing in the agreement to justify such a position.

* * *

I would give the words in the agreement the meaning which those words are ordinarily understood to convey among railway men, and hold that Prince Rupert is not a competitive point within the meaning of the agreement. I hold further that until such time as the Canadian Pacific files a through tariff for export wheat to Victoria, the latter point is not competitive within the meaning of the agreement.

The statement of facts and circumstances referred to in the question as stated by the Board and quoted above contains the following paragraph:

12. Grain shipped to any of the above mentioned ports for export is discharged by the railway into elevators at the said ports and there stored with grain of the same grade, and is no longer earmarked as grain of that shipment. When the shipper desires to export his grain an equivalent amount of grain of the same grade is subject to his order. The same practice is followed in all cases where grain is milled or stored in transit.

On behalf of the appellants it is contended that the Board has erred in ascribing too much weight to their meaning in "railway parlance," to use the phrase of the learned Chief Commissioner, in interpreting certain phrases in the agreement. We have quoted rather fully from the reasons of the learned Chief Commissioner because we think it appears pretty clearly from these reasons that, in construing what he regards as the critical expressions of article 7, he considers himself governed by the common usage in speech and writing among "railway men" concerning matters of railway operation, such, for example, as interswitching arrangements and the incidence of cartage charges.

The learned Chief Commissioner says:

The word "competitive" as used in the agreement must have reference to competition between railways. The parties were only interested in securing the carriage of grain to a port. What becomes of it afterwards did not in the least interest them.

There can be no doubt that the traffic the parties had in view consisted almost entirely of grain and products of grain for export. The ultimate destination of the articles shipped was not the Pacific sea-board but places in Asia, Europe and America beyond the Pacific sea-board. The real question is whether or not the returns from the whole of this traffic, originating on the Northern Alberta Railway Company's lines, carried by rail to the seaboard for export, were to be subjected to articles 6 and 7 of the agreement, or whether these articles were to be limited in their application to traffic destined to points which are competitive in the sense ascribed to the word by the learned Chief Commissioner.

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Duff C.J.

The parties had joined in a common enterprise with a view to sharing equally in its benefits and they declare their intention in very explicit words in article 11 to

> give effect to this agreement in the most liberal and reasonable manner to the intent that each of them shall receive its full and equal share of the benefits of the joint undertaking * * *

We think article 11 lays down a principle which does not contemplate that the construction of the cardinal stipulations of the contract are to be controlled by the meaning attached by the usage of "railway men," in "railway parlance," to particular expressions when those expressions are employed exclusively with reference to the operation of railways. The words of the agreement are, of course, to be given their ordinary scope, but we think this article is intended as a direction that the objects of the agreement as ascertained from the instrument as a whole, together with the conditions the parties must necessarily have had in view, are to be factors of exceptional weight and importance in its interpretation. From this point of view, we find ourselves unable to concur with the view of the learned Chief Commissioner that the phrase "competitive points" in article 7 is to be read as limited to points "at which two or more railways have facilities and are prepared to handle traffic offered at equal rates."

The learned Chief Commissioner observes:

> The parties were only interested in securing the carriage of grain to a port. What becomes of it afterwards did not in the least interest them.

We do not agree that the ultimate destination of grain shipped to the seaboard did not "in the least interest" the railway companies. It is not disputed, as already observed, that in great part, such grain is export grain, and that this was the condition of things contemplated by the parties to the agreement. Nor is it disputed that, in point of practice, tariffs of export rates, on grain and grain products, from stations on the Northern Alberta Railways for export to Africa, Asia, Australia, Central America and Europe are published by the Canadian Pacific Railway Company (to Vancouver, North Vancouver and New Westminster) and by the Canadian National Railway Company (to Vancouver, North Vancouver, Victoria and Prince Rupert) for export to the same countries. The ultimate destination of the grain is to points reached by both railways, either directly, or through rail or inland or

ocean water connections. Giving the words of the agreement their natural sense, it would seem to make no difference whether such ultimate destination is reached by land or water.

Nor do we think that the language of article 6 should be overlooked. "Competitive traffic" is, perhaps, not a very precise phrase; but it seems, clearly enough, to mean here traffic in respect of which the railways would be competing. In its natural meaning it would apply to the traffic in export grain. It is quite true, of course, that article 6 is not to be read as dominating the agreement. It must be read with article 7, but it does point to the conclusion that what the parties had in mind is competitive traffic in export grain. It is not seriously disputed that, but for the agreement, there would be competition between the railway companies in respect of all this traffic.

The appeal should be allowed with costs and the question submitted answered in the negative.

LAMONT J.—This is an appeal from the decision of the Board of Railway Commissioners declaring that Victoria and Prince Rupert in British Columbia are not competitive points within the meaning of section 7 of an agreement, dated January 29th, 1929, between the Canadian Pacific Railway Company (hereinafter called the "Pacific") and the Canadian National Railway Company (hereinafter called the "National").

The question submitted to us by the Board and the relevant provisions of the agreement have been set out in the judgment of the Chief Justice and need not be repeated here.

Before attempting to interpret the language of section 7, which is the crucial section, it may not be inadvisable to see what were the relations which, prior to the agreement, existed between these two railway companies and the four railway companies which, as a result of the agreement, were merged into one company—the Northern Alberta Railway. These railways were the Edmonton, Dunvegan and British Columbia Railway, the Alberta and Great Waterways Railway, the Central Canada Railway and the Pembina Valley Railway, all of which were local railways running northerly from Edmonton to points in Northern Alberta. At the date of the agreement the Pembina was

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Lamont J.

owned by the Alberta Government, and the other three had come under its control through insolvency of their respective companies. At Edmonton these railways connected with both the Pacific and the National which carried their traffic from Edmonton to the Pacific Coast. The principal traffic from these local railways was grain—chiefly wheat—which they brought down to Edmonton to be shipped to ocean ports for export from Canada. The National had three ports at which delivery of overseas traffic could be made to ocean-going vessels: Vancouver (including New Westminster), Prince Rupert and Victoria (the cars to this latter place being carried by barge from Port Mann), while the Pacific could make delivery only at Vancouver.

Both the Pacific and the National had been desirous of securing a monopoly of the carrying of this grain from Edmonton to tide water and, at different periods, prior to the date of the agreement, a monopoly of the traffic had been enjoyed by one or other of these railways to the exclusion of the other. As the carriage of grain from Edmonton to the Coast was profitable, each railway was desirous that the exclusive control should not fall into the hands of the other, so they agreed to combine and purchase the four local railways and form them into a single system to be called the Northern Alberta Railway. This they carried out by the agreement in question in which it was provided that a new company should be formed to take over and operate the four railways forming the Northern Alberta system (hereinafter referred to as the "Northern Alberta"). Each party was to provide one half of the purchase price and become responsible for one half the liabilities; and each party was entitled to appoint one half of the directors. The object of each of the parties in entering into this agreement was not the revenue which they hoped to derive from the operations of the Northern Alberta, for it is admitted in the respondent's factum that "the operation of the lines had been carried on in deficit." The consideration which appealed to both the Pacific and the National was the collateral benefit which their individual lines of railway would receive from carrying the grain gathered by the Northern Alberta and turned over to them for carriage to ocean ports. Therefore in the agreement the parties set out not only the terms and conditions on which they

became partners in the Northern Alberta but also the principle in accordance with which they were to share in this collateral benefit. That principle was one of equality of benefit, it being declared that the intention was that the agreement should be "for their equal benefit and advantage" (s. 2). This equality of benefit and advantage was emphasized in section 11, which reads as follows:

> 11. The parties agree to co-operate with fairness and candour toward each other, and to give effect to this agreement in the most liberal and reasonable manner to the intent that each of them shall receive its full and equal share of the benefits of the joint undertaking, subject to the provisions of clause 4 hereof.

In addition the agreement provided that all officers and employees of the new company should be impartial between the Pacific and the National and that neither party should, directly or indirectly, solicit the routing of outbound competitive traffic over their respective lines. By section 7 the new company is required

> to route outbound freight traffic (including grain milled or stored in transit) originating on [its] lines and destined via Edmonton or Morinville to competitive points on or beyond the lines of the parties, in such a way that each of the parties shall receive on a revenue basis one-half [of such traffic].

The question for determination is, what did the parties mean by "competitive points on or beyond the lines" of the railways?

The contention of the Pacific is that the word "destined" in section 7 means "intended for delivery not to the actual point to which the traffic is billed over the Pacific or National lines as it comes from the Northern Alberta, but to the ultimate destination which may be intended or contemplated by the person controlling its movements"; and that the words "competitive points" include points beyond the lines of the Pacific or the National and their rail connections, such as all foreign points which are accessible to shipping from ocean ports reached by either railway or their connecting rail carriers; for instance, grain having Liverpool as its ultimate destination could be carried by either the Pacific or the National to the Pacific Coast, and there forwarded by ocean-going vessels to Liverpool. Any of these ports to which it may have been brought by either railway and from which it is shipped to Liverpool, are, according to the interpretation placed upon the section by the Pacific, "competitive points on or beyond the line of the railway."

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Lamont J.

The contention of the National is that these words include and apply only to outbound traffic which, received from the Northern Alberta, is undertaken by the Pacific or the National to be carried to a point then named as its destination, and that such point must be one common to both lines or their connecting rail carriers to which rates from shipping points by either the Pacific or the National, with or without connecting carriers, are equal.

The Board of Railway Commissioners held that "competitive points," in railway parlance, meant "points in respect to which two or more lines compete for traffic."

In his judgment the Chief Commissioner said:—

> Reading the words in the ordinary way, I think there can be no doubt that "competitive points on or beyond the lines of the parties" means points on the lines of the parties or their connecting carriers, and have no reference to any point other than one on a railway.

This was his interpretation of the words used and he supported it by two other arguments.

The first was:

> It will be seen then that the Canadian National prior to the making of the agreement had certain exclusive rights with regard to the carriage of traffic routed to Victoria or to Prince Rupert. If the contention of the Canadian Pacific is right the Canadian National deliberately abandoned these exclusive rights. I can find nothing in the agreement to justify such a position.

The second was as follows:

> True, under the agreement the parties are to have equal benefits because they are taking equal shares in the new company, but equal benefits in what? Surely the benefits referred to are the benefits to be derived from the operation of the new company. * * *

Dealing with this latter argument first, I am of opinion that, if the language means, as I think it does, that the benefits which the Pacific was to receive were simply the dividends on its stock in the new company, the benefits were illusory, for, as I have already pointed out, the Northern Alberta was being operated at a loss. Further, if Prince Rupert and Victoria are held not to be competitive points within the meaning of section 7, the result will be that the Pacific and National, under the agreement, will share equally in the revenue derived from the carriage of outbound freight from Edmonton to Vancouver; but the National will have, in addition, the entire revenue from the grain carried to Prince Rupert and Victoria. This, in my opinion, is inconsistent with the equality of benefit in the joint undertaking provided for in section 11. It would also

mean that the representatives of the Pacific, as business men, agreed to pay one half the purchase price of the joint undertaking and assume one half of its financial obligations; hold one half the shares in the company and divide the collateral advantage—which was the chief inducement to enter into the agreement—on a basis which would allow the National the lion's share of the profit. That the representatives of the Pacific, or any other business corporation or person, would agree to that kind of arrangement seems to me highly improbable.

The Chief Commissioner stressed the argument that the National, prior to the making of the agreement, had certain exclusive rights with regard to the carriage of traffic routed to Prince Rupert and Victoria, and that they would be giving these up if the contention of the Pacific was right.

It was common knowledge at the date of the agreement that the railways that were taken over by the Northern Alberta—with the exception of the Pembina—were in an insolvent condition, and that the Pacific might purchase them.

If the Pacific had purchased them it would have had the exclusive control; and, undoubtedly, would have routed everything it possibly could over its own line to Vancouver. The same would have happened had these lines been purchased by the National. Therefore, so far as export traffic was concerned, neither railway would have had much to hope for if the railways comprising the Northern Alberta system became the property of the other. Furthermore, if the National did relinquish any exclusive right which it had with respect to grain routed to Prince Rupert and Victoria, might it not have considered that it was being compensated therefor, (1) by sharing on equal terms in the revenue from grain attracted to Vancouver over the Pacific by reason of its storage and shipping facilities, which it is well known are greatly superior to those of the National, and (2) by the Pacific's relinquishment of its right to solicit the routing of grain over its line which is now routed by the Northern Alberta over the National to Prince Rupert and Victoria? It was to avoid the possibility of one of the parties to the agreement getting exclusive control over the local railways that the Pacific and the National agreed to share equally in the obligations and advantages

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Lamont J.

which would accrue from taking over these lines. As equality of obligation and advantage is expressly declared in the agreement to be the intent of the parties, effect should be given to that intent in construing section 7, unless the adoption of that principle is inconsistent with the language there used.

The construction placed by the Board of Railway Commissioners on the words "competitive points on or beyond the lines of the parties," namely, "points on the lines of the parties or their connecting carriers," limits the application of the words "points beyond" to some point on a connecting railway. Now the only railways at the Pacific Coast which connect with either the Pacific or the National are railways running south to the United States. This was well known to the men who made and drafted the agreement. These men, however, also knew that the market for Alberta grain was not in the United States, but in Europe or the Orient; therefore, when they required the new company to route outbound freight destined to competitive points on or beyond the lines of the Pacific and the National, they must have had in contemplation the points to which the grain would be exported in order to find a market; and these certainly would not be points on a railway running to the United States. In my opinion no reasonable meaning can be given to the words "competitive points on or beyond the lines of the railway" which would give effect to what the parties had in contemplation as a business enterprise, other than the overseas points as contended by the Pacific. To give to the words the construction placed upon them by the Board of Railway Commissioners seems to me to nullify the very object which the parties intended to effect. Further, although that intention might have been put in language which would have obviated our present difficulty, yet I think the words used, taken in their ordinary sense, are not inconsistent with the intent of the parties, and are a sufficient expression of it. That construction of "competitive points" should, therefore, be adopted which gives effect to the intention of the parties, rather than the narrower meaning which has been adopted from the definitions of "competitive traffic" and "competitive rates" as given effect to in the decision of the Board.

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

CROCKET J. (dissenting).—The question of law submitted for decision on this appeal is whether upon the agreement, the material provisions of which are set forth in the judgment of the learned Chief Justice, and the facts and circumstances stated in the order of the Board of Railway Commissioners granting leave to appeal, grain shipped from stations on the Northern Alberta Railways to Prince Rupert or to Victoria for export and exported from either of those ports, say to the United Kingdom, is to be excluded from the comparison of freight traffic for the purpose of the equal division to be made under article 7 of the agreement as not being "outbound freight traffic destined to competitive points on or beyond the lines of the parties," as the expression is used in that article.

As grain so shipped to either of the two named ports is admittedly outbound traffic shipped "to points on (or beyond) the lines of the parties" it will be seen at once that the whole question with which we are concerned is as to whether it is grain "*destined to competitive* points," as that term is used in article 7 of the agreement, and that, if it is, the whole question is concluded. We have nothing to do in the latter event with its shipment to points "beyond the lines of the parties."

The Railway Commission held that both ports named were not competitive points within the meaning of article 7, for the reason that Prince Rupert is reached and served only by the C.N.R. and that only the C.N.R. undertakes the carriage of export grain to Victoria, although both railways have terminal facilities there. In so deciding it is clear from the written opinion of the learned chairman that the Board construed the term "competitive points" in the sense in which it is ordinarily used with reference to the operation of railways, or, as he expressed it, in the sense which it is ordinarily understood to convey among railway men, i.e., points at which, as he particularly explained, "two or more railways have facilities and are prepared to handle traffic offered at equal rates."

I have no doubt, and indeed it is not seriously disputed, that this is the ordinary signification of the term as it is used in connection with the operation of railways. The appellant, however, contends that this is not the sense, in which either the term "competitive points" or the words

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Crocket J.

"destined to" immediately preceding it, is used in article 7, and this is really the crux of the controversy between the parties as it comes before us.

For my part I can see no reason why such words as "outbound freight traffic destined to competitive points on or beyond the lines of the parties" should be interpreted in any other sense than the ordinary, usual sense which they bear in the conduct and operation of railways. The whole agreement is on its face essentially a railway agreement, concluded between two railway companies as such, and one which deals entirely with railway administration and operation, railway traffic and railway revenue.

The contention that the critical words "destined to competitive points" are not used in article 7 in their usual railway operating sense is primarily based on the inclusion in the limitation clause of the words "or beyond." It is argued that in the case of freight shipped to the seaboard for export these words must necessarily denote points beyond the seaboard, and that their inclusion in the phrase contemplates a through joint rail and ocean transit. This is, no doubt, a possible construction if we were dealing with the carriage of outbound freight billed for a through joint rail and ocean transit to a point in an overseas country, but this is not the question which the Railway Commission considered or the question which is now submitted to us for decision. The question we have to decide is, not whether freight so billed is to be excluded from the equalization comparison provided for, but whether upon this agreement "and the facts and circumstances set forth" in the order of the Board of Railway Commissioners granting leave to appeal,

> grain shipped from stations on the Northern Alberta Railways to Prince Rupert or to Victoria for export, and exported from either of these ports to say the United Kingdom, is to be excluded * * * as not being "outbound freight traffic destined to competitive points on or beyond the lines of the parties" as the expression is used in said article (article 7).

There is not the slighest suggestion in the Board's order that the grain is billed for a through joint rail and ocean transit to any particular point overseas or indeed to any country overseas. On the contrary the statement of facts shews that it is not. It states that

> grain shipped to any of the above mentioned ports (Vancouver, New Westminster, Victoria and Prince Rupert, the two first named being points to which both railways carry grain over their own lines to their own

terminals) for export is discharged by the railway into elevators at the said ports and there stored with grain of the same grade, and is no longer ear-marked as grain of that shipment. When the shipper desires to export his grain an equivalent amount of grain of the same grade is subject to his order. The same practice is followed in all cases where grain is milled or stored in transit.

It may be added that it is stated in the reply of the Northern Alberta Railways Co. that it is required to shew clearly on the waybills that the grain is for export and the name of the elevator in care of which the grain is shipped.

How grain thus shipped from stations on the Northern Alberta Railways to any of these ports, and discharged into the particular elevator in care of which it is shipped, and there stored to await an order of the owner when he desires to export it to the overseas market in which he has decided to sell it, for delivery into an ocean steamer for a separate ocean transit, with which the railway company as such has no concern, can be considered as not being "destined" to the particular port on the Pacific seaboard to which it is shipped, but "destined" to an unnamed point in an unnamed country, I confess I am completely at a loss to comprehend. The very suggestion of "a competitive point" beyond the seas in such an agreement demonstrates to me that the words "or beyond the lines of the parties" were never intended to cover an ocean transit with reference to which the railway undertakes no responsibility and with which it has as such nothing whatever to do.

Notwithstanding that the principal traffic of the Northern Alberta Railways consists of grain shipped to the seaboard for export, and this traffic must therefore have been the dominating consideration in the negotiation of the agreement, it is apparent that the parties had in contemplation outbound domestic freight traffic as well as export traffic and that article 7 was framed to embrace both. The limitation "destined to competitive points" must be held to apply to both classes in some sense. Is it to be supposed that it was intended to apply in one sense to one class and in an entirely different sense, or not to apply at all, to the other?

The only conceivable ground on which such a supposition can rest is that the word "on" refers exclusively to domestic shipments or shipments of freight not intended ultimately to be exported overseas, and the word "beyond" exclusively to shipments to the seaboard for export, and

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Crocket J.

that a clear distinction between the two descriptions of outbound freight traffic is thus indicated by the words "on or beyond." Such a construction obviously reads out the words "or beyond" in respect of all outbound freight traffic which is not intended for export, notwithstanding that there may be competitive, as distinguished from non-competitive, points, either "on" the lines of the parties themselves, or "beyond" the lines of the parties on the lines of other connecting railways in Canada or the United States, to which such outbound freight traffic may be shipped. It also casts aside the word "on" in respect of all shipments of export freight to the seaboard, notwithstanding that such freight may be destined to points "on" the lines of the parties and indeed must be held to be so destined in a railway carrying sense unless it is billed to some named point overseas for a through, continuous joint rail and ocean transit. Moreover, it renders the words "competitive points" themselves entirely meaningless with reference to all such shipments of freight to the seaboard for export, for assuredly, where no overseas destination point is in any way indicated, it becomes quite impossible to apply the quoted words to an overseas point at all.

Apart from these considerations, the collocation of the words "on or beyond" in relation both to "outbound freight traffic destined to competitive points" and to "the lines of the parties" itself appears to me to entirely preclude such a construction as is contended for and to make it clear that the whole limitation was intended to apply to all outbound traffic in the same sense. Reading all these words together in the order in which they are placed, the whole purpose of the clause on its very face is to prescribe destination to competitive, as distinguished from non-competitive, points, as a condition of the inclusion of any outbound freight traffic, export or otherwise, in the revenue apportionment provided for in the article. The truth is that it is only when one endeavours to read the language of the clause in any other than its ordinary railway sense, that any difficulty whatever arises upon the construction of the article itself.

One suggestion is that all freight shipped to the seaboard for export is "competitive traffic" in the sense that it is entitled to "competitive rates," and that what the parties

meant was not "competitive points," but "competitive traffic." To give effect to this suggestion one must not only substitute for the term the parties have chosen to use another term of an equally well recognized and entirely different import in railway usage, but to re-cast the entire clause, and thus completely disregard its application to export traffic.

Another suggestion is that all ports on the seaboard are competitive ports, and that what the parties meant was, not "competitive points" in a railway carrying sense, but "competitive ports." This suggestion pre-supposes that the limitation clause does not apply to export traffic at all, for manifestly all freight intended for export overseas must be shipped to ports on the seaboard, and if all ports are alike competitive, the limitation is entirely meaningless as regards shipments to the seaboard for export.

Indeed, the whole gist of the appellant's contention is that the limitation does not apply at all to outbound traffic shipped to the seaboard for export. Yet neither the word "export" nor "seaboard" is mentioned anywhere in the text of article 7. One would naturally think, if such had been the intention, the parties would have said so instead of hitting upon a clause which on its face comprises both export and non-export outbound freight traffic alike. In my opinion, this clause must be read in the context in which it appears in article 7 in the sense in which the Board of Railway Commissioners has construed it, and constitutes a definite and specific limitation upon the outbound freight traffic intended to be included in the fifty-fifty apportionment provided for by that article in respect of such outbound freight traffic.

The object of the agreement as a whole must, of course, be ascertained, and I have no doubt, having regard to the provisions of articles 2 and 11, that the underlying intention was that, as far as practicable, the parties should share fully and equally in the benefits accruing from their joint acquisition and operation of the Northern Alberta Railways system, and that the joint undertaking should be conducted with fairness and candour between them. Once, however, it is seen that a definite and specific exception is made in clear and unambiguous language as regards a particular branch of traffic in an article obviously inserted for

1934

CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO.

Crocket J.

the purpose of dealing exclusively with that particular branch of traffic, the special article must be held to be the governing article in relation to the particular branch of traffic which it has thus singled out from all other branches. No other conclusion, it seems to me, is possible without entirely ignoring the special article, which surely must be considered in order to determine the object and intent of the agreement as a whole. That intent, I think, is clearly shown, viz: that both parties are to share equally in the benefits accruing from the joint undertaking in the manner above stated subject to the condition expressly provided in article 7 with regard to outbound freight traffic, that only the revenues accruing from such outbound traffic as is destined to competitive points on or beyond their own lines, is to be included in the equalizing revenue comparison. Articles 2 and 11 may both be read in perfect consistency with such an intent. They cannot over-ride or negative the plain, unequivocal words of article 7.

For these reasons I would affirm the decision of the Board of Railway Commissioners and dismiss the appeal with costs.

Appeal allowed with costs, and question submitted answered in the negative.

Solicitor for the appellant: *W. H. Curle.*

Solicitor for the respondent: *I. C. Rand.*

1933

* Nov. 28, 29

1934

* Mar. 6.

IN THE MATTER OF THE ESTATE OF KATHERINE HAMILTON BROWNE, DECEASED.

AND IN THE MATTER OF THE CONSTRUCTION OF THE WILL OF THE SAID DECEASED.

ON APPEAL FROM THE HIGH COURT OF JUSTICE FOR ONTARIO

Will—Construction—Vesting

By clause 5 of her will the testatrix directed that a fund invested in a certain way for her by W. should continue to be so invested by W. during the lifetime of the testatrix' son and the income therefrom be paid to the son during his lifetime, and, in the event of W.'s death during the son's lifetime, the fund be invested by the testatrix' executors and the income therefrom paid to the son during his lifetime; and "on the death of my said son", that the fund "is to be

* PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Hughes JJ.

divided as follows": one half to her grand-daughter, E. (daughter of the son), and the remainder "to be divided equally between" three named daughters of the testatrix. By clause 6 the residue of the estate was given equally amongst E. and the said three daughters. Clause 7 read: "In the event of [E.] or any of my said daughters predeceasing me or predeceasing my said son, leaving issue, I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived." All said beneficiaries survived the testatrix.

Held: The legacies directed under clause 5 to be paid to E. and said three daughters upon the death of the son, did not become vested upon the testatrix' death. The fair and literal meaning of the words used in clause 5 in giving the capital of the fund is that the testatrix gives when she divides—that the operation of the gift is postponed until the period of distribution; and this meaning found support in the form and nature of the prior directions in clause 5, in contrasting the wording of the gift in question with that of other gifts in the will where immediate vesting was indicated, and in the wording of clause 7 ("would have been entitled had she survived" indicating that the "mother"—i.e., any one of E. and said three daughters—should take no title to the interest conferred in clause 5 unless she survived both the testatrix and her son).

The fundamental principle to guide in interpreting wills is that effect must be given to the testator's intention ascertainable from the expressed language of the will. So far as possible the will itself must speak. If, after careful consideration of the language used, in the particular passage in question and consistently with the context of the document, the intention remains doubtful, then resort may be had to certain rules which have been generally adopted, upon the strength of which courts are enabled to draw a certain conclusion as "more nearly corresponding" with the testator's intention. (*Busch* v. *Eastern Trust Co.*, [1928] Can. S.C.R. 479, explained. That case should not be "cited as deciding more than was actually determined"; there was no intention of laying down a rule of general application, far less of "effecting a radical change in the law and creating some new principle governing the question of vesting.").

APPEAL, directly to the Supreme Court of Canada (by leave granted by the Court of Appeal for Ontario), from the judgment of Rose C.J.H.C. (1), against that part only of the judgment which declared that the legacies directed by the testatrix, Katherine Hamilton Browne, deceased, under paragraph 5 of her will, to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith, named therein, upon the death of the life tenant, William George Hamilton Browne, did not, nor did any of such legacies, become vested upon the death of the said testatrix.

(1) [1933] Ont. W.N. 5.

1934

In re BROWNE.

The said judgment was rendered on questions submitted, on an originating notice of motion, for the adjudication of the court, with respect to the construction of the will of the said testatrix.

A special case was settled for the purpose of the present appeal to this Court. The material facts of the case, the material provisions of the will in question, and the questions submitted on the present appeal, are sufficiently stated in the judgment now reported. The appeal was dismissed.

A. J. Russell Snow K.C. and *N. B. Gash K.C.* for the appellants (Florence Yoda Moody, Constance Emma Kinnear and Helen Smith) and for Enid Browne (who since the date of the originating motion had attained the full age of 21 years).

McGregor Young K.C., Official Guardian, for the infant children of Florence Yoda Moody and Constance Emma Kinnear, and any unborn children of the said Florence Yoda Moody and Constance Emma Kinnear, as well as of Helen Smith and of Enid Browne.

G. A. Urquhart K.C. for the executors of the estate of the deceased.

The judgment of the court was delivered by

RINFRET J.—This is an appeal *per saltum* from part of the judgment rendered in Weekly Court, at Toronto, on an originating notice of motion submitting for determination certain questions (among others not relevant to the present appeal) arising out of the interpretation of the will of Katherine Hamilton Browne bearing date the 16th day of December, 1929.

The will begins, as usual, by revoking all former testamentary dispositions and by directing the executors to pay all debts, funeral and testamentary expenses.

Specific bequests are made unto the son, William George Hamilton Browne; and then follow the main provisions which form the subject of the submission:

5. Whereas I have now the sum of $100,000 invested in the name of E. H. Watt, of the said firm of Watt & Watt, in trust in the form of a call loan, I HEREBY DIRECT that the said fund is to be continued to be invested in call loans by the said E. H. Watt during the lifetime of my said son, William George Hamilton Browne, and the income arising therefrom is to be paid to my said son during his lifetime. In the event

1934

In re BROWNE.

Rinfret J.

of the death of the said E. H. Watt during the lifetime of my said son, I DIRECT that the fund now invested by him in the form of a call loan shall be invested by my executors in such securities as are authorized by the laws of the Province of Ontario as trustee investments, and the income therefrom is to be paid to my said son during his lifetime. On the death of my said son, William George Hamilton Browne, I DIRECT that the said fund of $100,000 is to be divided as follows:

One-half of the said fund to my grand-daughter Enid Browne, daughter of my son, William George Hamilton Browne, and the remainder of the said fund to be divided equally between my daughters, Florence Yoda Moody, wife of Robert E. Moody, now of Los Angeles, California; Constance Emma Kinnear, wife of Harold Kinnear, of the City of Detroit, in the State of Michigan, and Helen Smith, wife of Herbert P. Smith. of Jamaica. Long Island, New York, share and share alike.

6. All the rest and residue of my estate, both real and personal, of whatsoever kind and wheresoever situate, I GIVE, DEVISE and BEQUEATH unto my grand-daughter, Enid Browne and my daughters, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith, to be divided amongst them equally, share and share alike.

7. In the event of my grand-daughter, Enid Browne or any of my said daughters predeceasing me or predeceasing my said son, leaving issue, I DIRECT that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived.

The final provisions of the will deal with the powers of the executors and appoint as such the son, William George Hamilton Browne, and Thomas Cameron Urquhart, barrister-at-law, of Toronto.

For the purpose of the appeal, a Special Case was settled by a judge of the Court appealed from, and the questions to be determined are stated thus:

(*a*) Whether or not the legacies directed by the said testatrix, Katherine Hamilton Browne, deceased, under paragraph 5 of her said Will, to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith (the Appellants herein), upon the death of the life tenant, William George Hamilton Browne, became vested upon the death of the said testatrix;

(*b*) And should this Honourable Court find that such legacies did become vested upon the death of the testatrix, then, whether or not the legacy of any of such Appellants is liable to be divested under or otherwise affected by paragraph 7 of the said Will.

The relevant facts are set out in the Special Case:

The testatrix died at Toronto on the 17th March, 1930.

Probate of her will was granted to the executors appointed therein.

All the beneficiaries indicated by name in the will survived the testatrix and are still living.

All of them are now adults. Enid Browne, who was an infant represented by the Official Guardian at the date of the application, has since attained the full age of

1934

In re BROWNE.

Rinfret J.

twenty-one years and is now represented by counsel for the appellants.

Florence Yoda Moody is the mother of three infant children, and Constance Emma Kinnear is the mother of one infant child, and these children are represented by the Official Guardian who also represents any unborn children of the said Florence Yoda Moody and Constance Emma Kinnear, and of the other two named beneficiaries, Enid Browne and Helen Smith.

Helen Smith is the mother of one child, Nedra Caroline Smith, an adult, whose interest under the will is the same as that of the said infants.

The judgment appealed from, and which was pronounced by the Honourable the Chief Justice of the High Court for Ontario, declared that the legacies directed under paragraph 5 of the will to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith "did not, nor did any of such legacies become vested upon the death of the said testatrix."

The beneficiaries just named appeal from that judgment.

In answering the questions submitted, our endeavour must be to give effect to the testator's intention. And the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will (*Auger* v. *Beaudry* (1)). If we approach from that viewpoint the will now under consideration, the first thing to be noted is that, throughout paragraph 5, there are to be found no words of present gift. The testatrix states that she has now a sum of $100,000 invested in the name of E. H. Watt, in trust, in the form of a call loan. Her direction is that "the said fund is to be continued to be invested in call loans". A feature perhaps not to be overlooked is that this direction is not given to the executors,—at least, it is not primarily so given. The direction is that the investments are to be made "by the said E. H. Watt", who is not appointed executor. So that the fund is really treated as separate and distinct from the estate disposed of in the will. And it is to be looked after in this way "during the life-time of my said son, William George Hamilton Browne", that is to say: during the whole period ex-

(1) [1920] A.C. 1010, at 1014.

tending up to the time fixed by the testatrix for the distribution to the appellants. Only indirectly, "in the event of the death of the said E. H. Watt *during the lifetime of my said son*", are the executors to be entrusted with the power of investing the fund. Moreover, there is nothing in paragraph 5 necessarily indicating that, except in the event mentioned, the executors are to have anything whatever to do with the fund. In terms, it is not given to them either in trust or otherwise. The testatrix merely says that she has that sum of $100,000 invested in a certain form in the name of E. H. Watt. The income arising therefrom is to be paid to the son. The principal itself is not given, but is to remain in the form in which it is, until the death of the "said son". Only then, when the testatrix comes to refer to her son's death, and for the first time in the clause, does she make use of expressions apt to dispose of the capital or in any way connecting the appellants with the fund itself. According to the words she uses, grammatically and literally, the testatrix gives when she divides, and there is no apparent intention that the gift should take effect at any date prior to the time she fixes for the division.

In contradistinction to the language of clause 5, must we point to the wording of every other clause of the will where the testatrix makes a bequest with the evident intention that it should become vested at once. Invariably and in each case without exception, the testatrix says: "I Give, Devise and Bequeath". That is the expression used in clause 6 (above set out) where she disposes of the rest and residue of her estate. Such is also the expression in clauses 3 and 4, which it is not necessary to quote in full, and which are the other clauses of the will containing the specific bequests.

The contrast between clause 5 and these other clauses is so striking as to lead to the logical—if not the almost inevitable—conclusion that, while all the other bequests were intended to vest immediately upon the death of the testatrix, the language in clause 5 was purposely chosen to indicate a contrary intention. It evidences a desire to postpone the operation of the gift to the appellants until the period of distribution.

1934

In re BROWNE.

Rinfret J.

That view is further confirmed by clause 7. The direction there is that in the event of the grand-daughter, Enid Browne, or any of the daughters predeceasing the testatrix or predeceasing her son, leaving issue, "the child or children of the person so dying shall take the interest to which their mother *would have been entitled had she survived*". The interest there referred to, and "to which the mother would have been entitled had she survived", is the interest conferred in clause 5. In the premises, the fair and literal meaning of those words is that the mother (i.e., any of the appellants) takes no title to that interest unless she survives both the testatrix and her son, and that is to say: till the time of distribution.

It follows that our view accords with the judgment pronounced by the learned Chief Justice of the High Court of Ontario.

We feel, however, that we should not part with this case without adding yet one more observation.

In support of his argument before this Court—and apparently also before the learned judge of first instance—counsel for the respondents as well as the Official Guardian strongly relied upon our judgment in *Busch* v. *Eastern Trust Co.* (1).

The *Busch* case (1) ought not to be "cited as deciding more than was actually determined" (*Re Gilmour* (2)). There was no intention in that case of laying down a rule of general application, far less of "effecting a radical change in the law and creating some new principle governing the question of vesting". (*Re Moore* (3)). It is unnecessary to repeat that the golden rule, the fundamental principle whereby the courts must be guided in the interpretation of testamentary documents, is that effect must be given to the testator's intention ascertainable from the expressed language of the instrument. So far as possible, the will itself must speak. If, after careful consideration of the language used, in the particular passage immediately under examination and consistently with the context of the document, the intention remains doubtful, then

(1) [1928] Can. S.C.R. 479.
(2) (1932) 41 Ont. W.N. 34. (The words quoted appear in the full judgment, but not in the report).
(3) [1931] O.R. 454.

resort may be had to certain rules which have been generally adopted. Upon the strength of those rules, the courts are enabled to draw a certain conclusion "on the ground that this must more nearly correspond with (the) intention" of the testator. It was one of those rules which this Court thought applicable to the particular language of the will under consideration in the *Busch* case (1). But Mr. Justice Newcombe, in delivering the reasons of the court, was careful in recalling at the outset the cardinal principle that "one must decide according to the intent appearing upon the will" (p. 483); and, in *Singer* v. *Singer* (2), speaking for the majority of the court, he had further occasion of pointing out the limited application of the rule acted upon in the *Busch* case (1). The rule itself, as stated in Williams (12th Ed., p. 795), is made subject to many qualifications.

Each will must be construed according to the apparent intention of the testator (Williams on Executors, 12th ed., p. 726). While the well known rules or the decided cases are no doubt helpful in ambiguous matters or in affording illustrations, "in every case it is the testator's intention, if it can be gathered from the will, which must govern". (*Singer* v. *Singer* (2)).

The appeal will be dismissed with costs.* The new questions submitted in the Special Case will be answered as follows:

Question (*a*): The legacies referred to did not become vested upon the death of the testatrix.

Question (*b*): In view of the answer to the first question, the point submitted here does not arise.

Appeal dismissed.

Solicitor for the appellants: *A. J. Russell Snow.*
Solicitor for certain infant children and any unborn children of certain persons: *The Official Guardian.*
Solicitors for the executors of the estate of Katherine Hamilton Browne: *Urquhart, Urquhart, Smith & Parrott.*
Solicitor for Nedra Caroline Smith: *J. E. Hare.*

(1) [1928] Can. S.C.R. 479. (2) [1932] Can. S.C.R. 44 at 49.

* Reporter's note: On a subsequent motion, the interested parties consenting, an order was made for payment of the costs of all parties in this Court out of the fund.

1934

* May 3, 4.
* May 8.

RURAL MUNICIPALITY OF SCOTT v. EDWARDS

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Waters and watercourses—Question as to existence of watercourse—Right of proprietor to prevent surface water from draining on to his land.

APPEAL by the defendant rural municipality (by special leave granted by the Court of Appeal for Saskatchewan) from the judgment of the Court of Appeal for Saskatchewan (1), which held that there was nothing in the nature of a watercourse upon the lands in question, but only a succession of sloughs or depressions where surface water collected and at times of excessive rains or melting snow diffused itself over considerable areas and on such occasions moved through narrows to sloughs or depressions in lower areas; that, under the law in force in Saskatchewan, such surface water, which had accumulated on neighbouring lands and on the defendant's road allowance, could be prevented by the plaintiff from draining on to his land, and that, under the circumstances, he was entitled to an injunction restraining the defendant from interfering with a dam which plaintiff had for that purpose erected on his land.

On the appeal to the Supreme Court of Canada, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs, and expressing reasons as follows: "We concur with the conclusions of the Court of Appeal and we see no reason to add anything to the reasons (1) given in support of those conclusions by Mr. Justice Martin which, in our view, are entirely satisfactory."

Appeal dismissed with costs.

P. M. Anderson K.C. for the appellant.

Charles Schull for the respondent.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) [1934] 1 W.W.R. 33.

MARY JANE LEWIS, ADMINISTRATRIX OF THE ESTATE OF JOHN LEWIS LEWIS, DECEASED (PLAINTIFF) ..... } APPELLANT;

1934
* March 8
* April 24.

AND

NISBET & AULD LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Workmen's Compensation Act, R.S.O. 1927, c. 179, ss. 119-121—Janitor cleaning outside part of windows in office building—Reaching from one window to clean another—Decayed condition of window-sill—Fall and injury—Whether injury "caused" by "defect" in condition of sill, within s. 119 (1)—Manner of use of sill—Jury's findings—Evidence—Excessive damages awarded by jury and new trial as to amount.

L., as part of his work as janitor and caretaker of respondent's office building, was cleaning two upper windows, which were separated by a pillar 12 inches wide. He had finished one window on the outside, sitting on its sill and facing towards the inside of the building. He then proceeded to clean the other window on the outside by reaching over from the sill of the finished window, and, in doing so, changing from his former posture, when the outside sill of the finished window, from which he was reaching, gave way and he fell and was injured. Respondent was sued for damages, and the claim was treated, in the questions put to the jury, as one under ss. 119-121 in Part II of the *Workmen's Compensation Act,* R.S.O. 1927, c. 179. The jury found that the accident was caused by defect in the window sill, being owing to its "decayed condition"; that at the time of the accident L. was acting within the scope of his employment; and that he was not guilty of contributory negligence; and judgment was entered for the damages found. The Court of Appeal for Ontario ([1933] O.R. 595) set aside the judgment and dismissed the action, on the ground that the case was not brought within the statute, L. being the author of his own injury by exposing himself to an unnecessary risk (*Lancashire & Yorkshire Ry. Co.* v. *Highley,* [1917] A.C. 352). On appeal to this Court:

Held: The judgment of the Court of Appeal should be set aside; and the jury's findings sustained (as being not unwarranted on the evidence) in all respects except as to the amount of damages awarded, which were excessive, and as to which there should be a new trial. On the facts in evidence and the jury's findings, the injury was "caused" by a "defect" in the sill's condition, within s. 119 (1) of the Act.

Per Duff C.J.: The exposition of "defect" (within such a statute) in *Walsh* v. *Whiteley,* 21 Q.B.D. 371, at 378, and *Nimmo* v. *Connell,* [1924] A.C. 595, at 606, is (subject to exclusion, under the Ontario Act, of negligence as an essential element of the cause of action) reasonably applicable to the present case. "It is the use to which a thing is intended to be put and is being put which must be considered when the question whether or not there is a defect in its condition has to be determined" (*Nimmo* v. *Connell, supra,* at 606). When the employer permits a particular use, that shews conclusively

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Hughes JJ.

1934

LEWIS v. NISBET & AULD LTD.

that such is the intended use of the thing to which "defect" is imputed within the meaning of this principle (*Jones* v. *Burford,* 1 T.L.R. 137). The jury's findings established that the sill was being used in a reasonable way for a purpose for which its use was permitted, when, owing to its condition, it gave way and so caused the fall. These facts brought the case within s. 119 (1) of the Act.

Per Lamont J.: As respondent permitted, and therefore intended, that the sill be used as a base of operations for window washing, it was, within the meaning of the Act, "intended for or used in the business of his employer". If it was, in its condition, unfitted for such use, or if its condition made it dangerous when reasonably so used, that condition constituted a "defect" within the Act; and the jury had, by their findings, said that L.'s manner of use was reasonable.

Per Cannon, Crocket and Hughes JJ.: Having regard to the object of s. 119 (1) (reading it with the enactments following it in the Act), as a special enactment to extend the employer's liability in the workman's favour, and one, therefore, not to be narrowly construed against the workman, it cannot be said, if the workman is in fact injured by reason of a defect in the condition or arrangement of any portion of the building (the building being "connected with, intended for or used in" the employer's business), that he is not to recover unless the defect be one which concerns the particular duties which his contract of service requires him to perform. That consideration may bear upon the question of the causation of the injury, but does not justify annexing to the ordinary meaning of "defect" in its context, as applicable to a building or any of its parts, a condition or meaning which the language of the enactment does not express or necessarily imply. No significance to the contrary can be safely taken (in construing the Ontario Act) from the words in *Walsh* v. *Whiteley,* 21 Q.B.D. 371, at 378 (and supported in the dictum in *Nimmo* v. *Connell,* [1924] A.C. 595, at 606), that "it must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used", as those words proceeded rather from the consideration of the negligence of the employer as a necessary element in the existence of the defect causing the injury. Under the enactment now in question, all that is necessary is that the workman is injured by any defect in the building in which he is employed.

Under s. 119 (1) (and reading ss. 120 and 121 in connection therewith) it is sufficient to entitle the workman to recover, if the injury be in part directly attributable to the defect (and though the defect has arisen without negligence of the employer or his servants or agents); the fact that some negligence of the workman may have operated with the existence of the defect to produce the injury makes no difference as to the employer's liability, except (s. 121) as to assessment of the quantum of damages. The jury's finding that the accident was caused by defect in the sill (its decayed condition) was conclusive as to respondent's liability .

The question as to whether L. voluntarily and unnecessarily assumed a new and added risk independently of that attaching to his employment as janitor and caretaker and different in kind therefrom or whether he was simply doing something within the sphere of his employment in an improper or negligent manner, does not arise upon

the special provisions of s. 119 (1). The principle, or test, affirmed in *Lancashire & Yorkshire Ry. Co.* v. *Highley*, [1917] A.C. 352, has no application to that enactment.

1934

LEWIS v. NISBET & AULD LTD.

APPEAL by the plaintiff, Mary Jane Lewis as administratrix of the estate of John Lewis Lewis, from the judgment of the Court of Appeal for Ontario (1) which set aside the judgment of Kerwin J. (given in favour of the plaintiff on the findings of a jury) and dismissed the action.

The action was for damages because of injuries suffered by the said John Lewis Lewis by his falling while cleaning windows in the office building of the defendant (respondent). The action was begun by the said John Lewis Lewis and his wife, Mary Jane Lewis, the latter claiming for loss of consortium and loss of support, which claim she abandoned at the trial. After the action was begun the plaintiff John Lewis Lewis died (from a cause not connected with the accident) and the action was revived and continued by his wife as administratrix of his estate, the present appellant.

The material facts of the case, the findings of the jury, and the questions in issue on this appeal, are sufficiently stated in the judgments now reported (in more particular detail in the judgment of Crocket J.) and are indicated in the above headnote.

J. Keiller Mackay K.C. for the appellant.

R. S. Robertson, K.C. for the respondent.

DUFF C.J.—I concur fully in the conclusions of my brother Crocket; and I think there is little, if any, real difference between us in relation to the actual grounds of the decision.

It is advisable, perhaps, to say something upon the meaning of the statutory phrase:

> Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, or intended for or used in the business of his employer.

It is, of course, a hazardous thing to attempt an exhaustive definition of the phrases used in a statute like this; and it must be understood that judicial expositions and paraphrases of the language of such a statute cannot properly

(1) [1933] O.R. 595; [1933] 3 D.L.R. 414.

1934

LEWIS v. NISBET & AULD LTD.

Duff C.J.

be regarded as of universal application. They must not be applied as substitutes for the words of the statute.

In the case before us, the man who was injured was cleaning windows, and, in doing so, was sitting upon the window sill, the greater part of his body being outside the window and his weight resting largely, if not mainly, upon the sill. He was using the sill in that way and for that purpose. The evidence shewed that the sill had "become rotted" and the jury in effect found that, by reason of this, part of it broke away under pressure of the workman's weight and that this was the cause of his fall. So far as presently relevant, the language of s. 119 (1) of the Ontario statute differs from that of s. 1 (1) of the *Employers' Liability Act*, 1880, in this that the words "arrangement", "buildings or premises" and "intended for" are not to be found in the English Act.

This is a case in which the workman was making use of part of the building, of which he was caretaker, as a support for himself while engaged in the course of his duty in cleaning windows. And, I think, that for the purposes of this case, subject to one qualification, the exposition of "defect" in *Walsh* v. *Whiteley* (1) by Lopes, L.J., and Lindley, L.J., correctly expressed the effect of the statute. Under the English Act the negligence of the employer is an essential element of the cause of action, and in *Walsh* v. *Whiteley* (1) that was held to be an essential term in the definition of "defect". In Ontario this condition has been abrogated and it, therefore, no longer enters into the concept of the statutory "defect". But, I think, in other respects, the definition holds, for cases to which it can be reasonably adapted.

This exposition in *Walsh* v. *Whiteley* (1) was expressly approved by the majority of the House of Lords in *Nimmo* v. *Connell* (2) per Lord Atkinson whose reasoning was adopted by Lord Shaw (at p. 607) and Lord Dunedin (at p. 623). Indeed, in *Connell's* case (3) there was an authoritative adoption of the judgment of Lopes and Lindley, L.JJ., in *Walsh* v. *Whiteley* (4). At p. 606, Lord Atkinson (with, as I have mentioned, the concurrence of Lord Shaw and Lord Dunedin) said:

(1) (1888) 21 Q.B.D. 371, at 378.
(2) [1924] A.C. 595, at 606.
(3) [1924] A.C. 595.
(4) (1888) 21 Q.B.D. 371.

In *Walsh* v. *Whiteley* (1), Lopes L.J. (delivering the judgment of himself and Lindley L.J.), in considering s. 1, sub-s. 1, and s. 2, sub-s. 1, together, said: "It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used." He previously had said: "The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation." And then he gives a definition of a defect to satisfy both of these sections, thus: "It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer." This judgment supports completely my contention that it is the use to which a thing is intended to be put and is being put which must be considered when the question whether or not there is a defect in its condition has to be determined.

It will be observed that this view of the meaning of "defect" was applied in *Connell's* case (2) where the "defect" in the "ways" and "works * * * connected with or used in the business" of the employer consisted in an accumulation of inflammable gas in a section of a mine which "was being worked and traversed by workmen".

There are two separate conditions, one of which is that there must be a "defect" in the condition of the thing, "having regard to the use to which it is to be applied or to the mode in which it is to be used." That is a distinct condition imposed by the use of the word "defect" which has nothing to do with the negligence of the employer, which is another distinct condition. Lord Atkinson's last sentence, the basis of the judgment of the House of Lords, ought to be emphasized,

> This judgment supports completely my contention that it is the use to which a thing is intended to be put and is being put which must be considered when the question whether or not there is a defect in its condition has to be determined.

It may be added that this view has been the generally accepted view of the profession in England, as is evidenced by Ruegg (8th Ed.) at pp. 118 *et seq.*, 20 Halsbury, 142.

It should, perhaps, be observed that when the employer or his deputy permits a particular use, that shews conclusively that such is the intended use of the thing to which "defect" is imputed within the meaning of this principle. (*Jones* v. *Burford*) (3).

(1) 21 Q.B.D. 371, at 378. (2) [1924] A.C. 595.
(3) (1884) 1 T.L.R. 137.

1934

LEWIS v. NISBET & AULD LTD.

Duff C.J.

I do not think I need delay upon a discussion of the applicability of this to the case of buildings. If an employee is properly in the vicinity of his employer's plant, works or buildings, and owing to some defect in condition something falls upon the workman and injures him, that would, of course, be a consequence of a defect in condition within Lord Atkinson's language, because plant, works or buildings are not intended to fall to pieces or to collapse.

The language of the judgments in *Connell's* case (1) and in *Walsh* v. *Whiteley* (2) seems reasonably applicable to the case before us. There is here no question of the arrangement of the "works, ways, etc."; the matter complained of is the condition of the window sill. Therefore, the plaintiff, if he was in truth using the sill upon which his body was resting for a purpose authorized by his employer, and the condition of the sill was such that it gave way and so caused him to fall, these facts bring the case within the purview of the enactment.

On the other hand, although he was engaged in cleaning windows, if, nevertheless, he was using the sill for a purpose not authorized, for example, for indulging in acrobatic feats, and it was this unauthorized and wrongful use of the sill which caused it to give way, then I should agree that his injury was not "caused" by the condition of the sill within the contemplation of the statute.

I do not think it necessary to proceed further in the discussion of the statute. The jury found that the appellant was engaged in executing the duties of his employment and they negatived contributory negligence.

Now, in form, these findings do not aptly comprehend the points I have discussed; but when you add the finding that the injury was, in substance, "caused" by the defect, they do so. They negative by necessary implication the suggestion that the cause of Lewis' fall was some prank unconnected with his duties; and they establish that the sill was being used in a reasonable way for a purpose for which its use was permitted.

I shall add an observation as to the word "caused". The sole question is whether the injury was "caused" within the intendment of the statute. The jury's finding that Lewis was acting reasonably, necessarily, if there was evidence to support it, disposes of the contention that

(1) [1924] A.C. 595. (2) (1888) 21 Q.B.D. 371.

what he did was *nova causa interveniens;* that is so, because his case is, on that assumption, precisely the kind of case envisaged by the statute.

If " cause " is to be paraphrased or qualified, I prefer the paraphrase adopted by Lord Esher, M.R., in *The Bernina* case (1):

(5) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant. (6) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against anyone;

and chiefly for the reasons mentioned in the following passage in Lord Sumner's judgment in *Weld-Blundell* v. *Stephens* (2):

Everything that happens, happens in the order of nature and is therefore "natural". Nothing that happens by the free choice of a thinking man is "necessary," except in the sense of predestination. To speak of "probable" consequence is to throw everything upon the jury. It is tautologous to speak of "effective" cause or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in *Burrows* v. *March Gas & Coke Co.* (3) and *Hill* v. *New River Co.* (4).

See *Long* v. *Toronto Ry. Co.* (5); *Canada & Gulf Terminal Ry. Co.* v. *Levesque* (6).

On the findings, since there was no *nova causa interveniens,* it is clear that the fall of Lewis was directly caused by the condition of the sill.

As to the evidence, I will not discuss it in detail. The questions were pre-eminently for a jury, and I think the evidence was sufficient.

What I have said will indicate with sufficient clearness why, with great respect, I am unable to agree with the judgment of the Court of Appeal. If Lewis's acts constituted a reasonable use of the sill, as the jury (as I think, on sufficient evidence) have found, then, as I have just

(1) (1887) 12 P.D. 58, at 61.
(2) [1920] A.C. 956, at 983-4.
(3) (1872) L.R. 7 Ex. 96.
(4) (1868) 9 B. & S. 303.
(5) (1914) 50 Can. S.C.R. 224, at 242-248
(6) [1928] Can. S.C.R. 340, at 347-351.

1934

LEWIS v. NISBET & AULD LTD.

said, I find it too difficult to hold that his fall was not "caused", within the intent of the statute, by the condition of the sill.

LAMONT, J.—I agree that this appeal should be allowed with costs and that there should be a new trial for the assessment of damages upon the basis of the findings referred to by my brother Crocket in his judgment.

The first question to be considered in this appeal is, were the injuries which Lewis received caused by a "defect" in the condition of the building or premises used in the business of his employer? The "defect" alleged was that the window-sill was rotten and not properly attached to the building, and that, as a consequence thereof, it gave way when Lewis, whose duty it was to wash the window, was in the act of performing that duty, and he was precipitated to the roof of a building two storeys below, and was severely injured. That the window-sill was intended to be used as a seat, upon which the window cleaner might sit while actually washing the window, is not denied. The usual manner of washing the windows was for the washer to sit on the sill with his head and body outside of the window, facing inside, his feet on the inside and the window pulled down to his lap. Lewis had for many months washed the windows in this manner, to the knowledge of Gibson Brothers, who looked after the building for the respondent. Thus the respondent, through its representative, permitted, and therefore intended, the window-sill to be used as a base of operations from which the washing of the window might be carried on. It was, therefore, "intended for or used in the business of his employer" within the meaning of the statute. If it was, in its condition, unfitted for such use, or if its condition made it dangerous to the workman when reasonably so using it, that condition constituted a "defect" within the contemplation of the statute. That the window-sill in question was being used at the time of the accident as a base of operations from which to clean the window is clear. Was the manner in which it was being used by Lewis a reasonable one? The jury have said that it was, because they found that, at the time of the accident, Lewis was acting within the scope of his employment and was not guilty of any negligence which contributed to the accident.

On the argument before us it was strongly contended that the evidence of Lewis taken on examination for discovery, and put in by counsel for the respondent, established that the accident was the result of the reckless conduct of Lewis himself in attempting to clean the window in a manner different from that usually adopted. It was pointed out that, in his examination, Lewis admitted that on this occasion he was not on the window-sill in a sitting posture, but had his right foot and left knee on the sill, and that this was not a reasonable position to take in washing windows and that, therefore, the accident must be attributed to his own recklessness.

Whether Lewis was sitting or kneeling on the sill at the time of the accident, the sill had to bear the entire weight of his body and it was a question for the jury whether, if the wood in the sill had been sound and it had been properly attached to the building, it would have supported his weight in either of these positions. Whether the position adopted by him was a proper one to take was also a question solely for the jury, and the jury by their verdict have, as I have said, found that it was. Lewis had not been instructed how he was to wash the windows, that was left entirely to his own judgment. He could, therefore, perform the operation in any manner he chose, provided that manner was a reasonable one. And, in determining its reasonableness, the jury might properly have regard to the fact that Lewis did not know of any "defect" in the condition of the sill.

In my opinion, there was evidence upon which the jury were entitled to find that the injuries of Lewis were "caused", within the meaning of the statute, by a "defect" in the condition of the window-sill.

The judgment of Cannon, Crocket and Hughes JJ. was delivered by

CROCKET J.—The respondent, a wholesale dealer in woollen and other goods, purchased an office building adjoining its business premises on Wellington Street West, Toronto, in 1929, the management of which it delegated to a real estate agency. In November of that year the husband of the appellant administratrix was employed by this agency as janitor and caretaker of the newly acquired building at a wage of $65 a month with living quarters provided in the building for himself and his family. His employment in-

1934

LEWIS v. NISBET & AULD LTD.

Crocket J.

cluded, among other things, attending the furnaces and the cleaning of the halls and windows.

On May 21st, 1930, he went to clean two windows in the hall on the fourth floor, which is the top floor of the building. These windows, it appears, are placed side by side in the sloping Mansard roof of the building but are separated from each other by a pillar 12 inches wide. The two windows are the same size, each measuring in width 2 feet 8 inches from one side of the window frame to the other, and containing an upper and lower sash which are moved up and down by pulley ropes and weights. Although the evidence throughout is most confusing with its references to the two windows as one window and to the sill of the window frame proper as the subsill, it appears from the explanations made during the argument that the sill of the window frame proper rested partly at least upon a piece of wood about 4 inches thick which was inserted in a recess in the top of the outside brick wall to which the sill of the window frame proper was nailed. The sill of the window frame proper extended about 4 inches beyond the outside of the lower window sash when closed. The finished inside sill from its inner edge to the window stop was $9\frac{1}{4}$ inches wide, so that, allowing for the width of the window stop and the thickness of the window sash, there was a width of $18\frac{1}{2}$ inches from the inner edge of the finished inside sill to the outer edge of the sill of the window frame proper. The inside sill was 20 inches above the hall floor.

Lewis, it seems, had cleaned the upper and lower sashes of one of these windows on the outside while sitting on the window sill facing towards the inside of the building, and was reaching over to clean the other window to his right, when the outside sill, upon which he had been sitting while cleaning the first window and from which he was then reaching, gave way and he fell to the roof of a shed two stories below, sustaining serious injuries to his back and spinal cord for which he was under treatment in an hospital for nearly eight months. Ten days after his discharge as a patient for these injuries he returned to the hospital for a mastoid operation and remained as a patient again for several weeks. This trouble, however, had no connection with the injuries suffered from the fall from the window.

This action was brought by himself and his wife on November 23rd, 1931, the latter claiming damages for loss of

consortium and loss of support. Lewis died of pneumonia on December 3rd, 1932, his death, according to the medical evidence, having no connection whatever with the fall. The action was revived in February, 1933, and tried soon afterwards before Mr. Justice Kerwin and a jury, Mrs. Lewis during the trial abandoning her claim.

Although the plaintiffs in their statement of claim alleged that the window sill broke away owing to the negligence of the defendant, its agents, workmen or servants " in that the said window sill was rotten and was not firmly attached to the said building and was neglected by the said defendant while in a dangerous condition which was known or ought to have been known by the defendant," and the whole action was apparently based upon negligence, no question was submitted to the jury by the learned trial judge touching any negligence upon the defendant's part, the plaintiff having apparently abandoned that branch of his case and relied entirely upon Part II of the *Workmen's Compensation Act,* R.S.O. 1927, ch. 179, ss. 119 and 120.

The questions put to the jury with their answers were as follows:

1. Q. Was the accident caused by any defect in the window sill? Answer fully, giving particulars.

A. Yes. Owing to decayed condition of window sill.

2. Q. At the time of the accident was Lewis acting within the scope of his employment?

A. Yes.

3. Q. Was Lewis guilty of negligence contributing to the accident? Answer fully, giving particulars.

A. No.

4. Q. If so, to what degree in per cent. was he so negligent?

(No answer.)

5. Q. What is entire amount of damages to which Lewis would have been entitled had there been no contributory negligence on his part?

A. $12,000.

The verdict was accordingly entered for the plaintiff administratrix for $12,000.

On appeal by the respondent the Appeal Court set this verdict aside and ordered that the action be dismissed with costs upon the ground, as appears by the written reasons of Middleton, J., that the case had not been brought within the statute, the deceased being the author of his own injury by exposing himself to an unnecessary risk on the principle of the case of *Lancashire & Yorkshire Ry. Co.* v. *Highley* (1).

(1) [1917] A.C. 352.

1934

LEWIS v. NISBET & AULD LTD.

Crocket J.

No one other than Lewis himself witnessed the accident and the only evidence as to what actually happened on the occasion in question which is to be found in the record are those portions of his discovery examination which the defendant's counsel offered on the trial. I have already sufficiently set forth the deceased's statement as to how he cleaned the two sashes of the first window and the position in which he was when he reached over to clean the second one. The only further questions and answers which appear in the record and which bear upon the precise position in which he was when the window sill collapsed are as follows:

Q. Were you still sitting on the window sill?
A. I was still partly sitting, like one knee.
Q. You were on one knee and one foot?
A. Yes, one foot and one knee, and holding on this first half and reaching with the right hand, and everything went down.
Q. Do I understand that you were wholly outside the window?
A. No, not wholly.
Q. The window was up a little from the bottom?
A. My left foot was inside and the knee and the right foot outside, and I was reaching for the right hand half.

Whether Lewis, when reaching with his right hand for the second window, was straddling the sill in a sitting position or kneeling with his right knee on the outside portion of the sill, his statement does not make clear, but it would seem to be quite evident that, whether he was sitting or kneeling, his principal weight would be on the outside part of the sill and that he was bending or leaning over from the sill of this window to the other when he went down with the giving way of the sill.

It is not disputed that the deceased's contract of service created the relationship of employer and workman between the defendant and the deceased and brought the latter within the class of workmen for whose benefit ss. 119-121 of Part II of the existing *Workmen's Compensation Act* were enacted. Neither is it disputed that s. 119 (1) imposes on the employer a liability to make good the damages sustained by the deceased in consequence of his injuries if such injuries were in fact caused by reason of any defect in the condition or arrangement of the window sill, whether the existence of such defect at the time the accident occurred was or was not due to any negligence on the part of the employer. The jury's answer to question 1 is, therefore,

decisive of the whole question of the respondent's liability if there is sufficient evidence to warrant it and no error in law in connection therewith.

Two objections are relied upon by the respondent as errors in law: 1st, that s. 119 (1) contemplates only a defect in respect of the purpose for which the thing is provided, whether it be a way, a machine or any part of a building, and that, the purpose of an outside window sill having no relation to the deceased's work as a janitor or caretaker, there was no defect within the meaning of the section; and, 2nd, that if the sill did constitute a defect within the meaning of the enactment, the deceased's injuries cannot rightly be attributed upon the evidence to such defect as their immediate or direct cause.

As the solution of the questions raised by these two objections depends entirely upon the construction of ss. 119 and 120, it is perhaps well that the material provisions should here be set out. In so far as the language of s. 119 (1) bears on these questions, it is as follows:—

> Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of his employer or by reason of the negligence of his employer or of any person in the service of his employer acting within the scope of his employment the workman * * * shall have an action against the employer, and * * * shall be entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury.

Then, as pointed out by Middleton, J., in the judgment appealed from, the common law defences of common employment, voluntary assumption of risk, negligence of fellow-servants and contributory negligence are done away with by the following subsections and by s. 120, as bars to the right of action and recovery which 119 (1) expressly gives to the workman, though s. 121 provides that contributory negligence is to be taken into account in assessing the damages.

It will be seen at once that the enactment is a special one which was clearly passed to extend the liability of the employer in favour of the workman. It is an enactment, therefore, which ought not to be narrowly construed against the workman. No court has any right to add to it any condition which its language does not clearly express or necessarily imply. Rather is it the duty of a court, as said by

1934

LEWIS v. NISBET & AULD LTD.

Crocket J.

Brett, M.R., in *Gibbs* v. *Great Western Ry. Co.* (1), in construing a section of the Imperial *Employers' Liability Act* (1880) to construe it "as largely as reason enables one to construe it in their [the workmen's] favour and for the furtherance of the object of the Act."

Approaching then the construction of s. 119 (1) from the standpoint of the object of the whole enactment, what is there in its language to suggest that the words "any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of his employer" necessarily implies a defect in respect of the purpose for which the way, machine, plant, or building was provided? Assuming that the building in which the deceased was employed as janitor and caretaker comes within the provisions of the statute as a building "connected with, intended for or used in the business of his employer," as the Appeal Court has held, and as the respondent's counsel has not here questioned, can it be said, if the workman is in fact injured by reason of a defect in the condition or arrangement of any portion of the building, that he is not to recover for his injuries, unless the defect be one which concerns the particular duties which the workman's contract of service required him to perform? I do not think so. That consideration may bear upon the question of the causation of the injury, but it has no sound basis as an argument for ignoring the ordinary meaning of the word "defect" in the context in which it is used, as applicable to a building or to any of its parts, and annexing to it a condition or a meaning which the language of the enactment itself in no manner expresses or necessarily implies.

The learned counsel for the respondent in support of this contention depended largely on dicta from the judgment of Lopes, L.J., concurred in by Lindley, L.J., in *Walsh* v. *Whiteley* (2), a case involving the construction of the words "defect in the condition of the machinery" as used in s. 1 (1) of the Imperial *Employers' Liability Act*. The first thing that judgment pointed out was that to determine the meaning of the words quoted it was necessary to look not only at s. 1 (1), but also at s. 2 (1). The latter expressly provided, as the Ontario statute, ch. 146, R.S.O., 1914, form-

(1) (1884) 12 Q.B.D. 208, at 211. (2) (1888) 21 Q.B.D. 371.

erly did also, that the workman should not be entitled to any right of compensation or remedy against the employer by reason of any such defect as mentioned in s. 1 (1) unless that defect arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person entrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, building or premises was proper. His Lordship then immediately proceeded:—

> Reading those sections and subsections together we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, *having regard to the use to which it is to be applied or to the mode in which it is to be used.* It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark, but it is essential that there should be evidence of negligence of the employer or some person in his service entrusted with the duty of seeing that the machine is in proper condition.

Their Lordships concluded that "the defect in the condition of the machinery must be such as to shew negligence on the part of the employer" and that "there was no evidence of negligence to go to the jury." The cases of *Heske* v. *Samuelson* (1), and *Cripps* v. *Judge* (2), and others were referred to in this judgment, and it was pointed out that they were all cases where there was evidence of a defect shewing negligence of the employer.

Mr. Robertson stressed the words I have underlined as applying to the meaning of the word "defect" as used in the English statute. The whole quotation and the whole judgment, however, make it perfectly clear, I think, that these words cannot safely be given the significance contended for but proceed rather from the consideration of the negligence of the employer as a necessary element in the existence of the defect causing the injury for which the statute gives the remedy to the workman. Indeed it is obvious, quite apart from the quoted context, that no court or jury could at all determine whether a defect in a machine was a defect arising from negligence of the employer without considering the use to which the machine is intended to be applied and the mode in which it is intended to be used. It can hardly be said that such an expression could in any view be similarly applied to an entire building or

(1) (1883) 12 Q.B.D. 30. (2) (1884) 13 Q.B.D. 583.

1934

LEWIS v. NISBET & AULD LTD.

Crocket J.

to a window frame or window sill or other piece of wood or metal placed in the foundation or wall or roof of a building as a permanent fixture. Once such a fixture is permanently placed, whether it be to strengthen the foundation or the walls or support the roof or to make an opening for light or ventilation, or to shed water off the walls, as was suggested was the purpose for which the window sill in question was provided, no question could possibly arise as to any use or mode of use of such a fixture by or for the occupying employer. Yet the fixture may none the less be a defective fixture and constitute a defect by reason of which personal injury is caused to a workman employed by the employer in or about the building. If a portion of a wall or of the roof fell in by reason of the unsoundness or defective condition of any of its parts and a workman should thereby be injured, is he to be excluded from the benefit of the statute because the defect existed in a portion of the building which his contract of service did not require him to use? To my mind it was the clear purpose of this part of the enactment to entitle the workman to recover damages from his employer for any personal injuries caused to him by reason of any defect in any part of the building in which he is employed. If the workman is injured by reason of any defect in the building in which he is employed, that is all that is necessary. No other condition is expressed or implied by the language of the section.

We were referred to *British Columbia Mills Co.* v. *Scott* (1), *Wood* v. *Can. Pac. Ry. Co.* (2), and other cases in this court and in Ontario in support of the proposition which it was contended was laid down in *Walsh* v. *Whiteley* (3), but all these cases will be found, in so far as they concern the question of injuries caused by defective plant or machinery, to have dealt with that question, as in *Walsh* v. *Whiteley* (3), from the standpoint of defects arising from the negligence of the employer, as provided by the former Ontario and other similar Acts containing the same provisions as the English *Employers' Liability Act,* and the decisions to have been based on the same grounds.

(1) (1895) 24 Can. S.C.R. 702. (2) (1899) 30 Can. S.C.R. 110.
(3) (1888) 21 Q.B.D. 371.

My attention has been called to a dictum of Lord Atkinson in *Nimmo* v. *Connell* (1), commenting on the decision in *Walsh* v. *Whiteley* (2), which emphasizes the importance of the use to which a thing is intended to be put and is being put in determining whether or not there is a defect in its condition. An examination of this case shews that the decision was based on considerations of the defect there relied on arising from negligence, precisely as in *Walsh* v. *Whiteley* (2), though in the earlier case it was held there was no defect arising from negligence and in the later case that there was. In the *Nimmo* case (3) the majority of the Law Lords held that the accumulation of inflammable gas in a section of a mine which was being worked and traversed by workmen in such quantities as to become explosive if a light were applied to it was a defect in the condition of the way within the meaning of s. 1 (1) of the *Employer's Liability Act* of 1880. As I read his judgment, the point of Lord Atkinson's dictum was that the word "defect" as used in the English Act of 1880 does not refer solely to a material defect in the structure or substance of the way, but covers as well such a development as the accumulation of poisonous gas or the development of any other dangerous condition which might have been detected by the exercise of due care on the part of the Coal Mining Co. Indeed His Lordship distinctly held that the neglect of the company's inspector to do his inspection duty was the main cause of the accident in that case. The dictum, in my judgment, goes no further than that already quoted from *Walsh* v. *Whiteley* (2).

As to the second ground of alleged error in law, viz: that the injury claimed for was not caused by the alleged defect, there is no doubt that, in order to entitle the workman to recover from the employer under the first part of s. 119 (1), it must be proved that the injury was caused by reason of the defect. That this does not mean that the injury was solely attributable to the defect is conclusively shewn by the express provision of s. 120 that contributory negligence on the part of the workman shall not afford a defence to the action "for the recovery of damages for an injury sustained by * * * the workman while in

(1) [1924] A.C. 595, at 606. (2) (1888) 21 Q.B.D. 371.
(3) [1924] A.C. 595.

1934

LEWIS v. NISBET & AULD LTD.

Crocket J.

the service of his employer for which the employer would otherwise have been liable," though s. 121 enacts that contributory negligence on the part of the workman shall be taken into account in assessing the damages in any such action. Reading sections 120 and 121 in connection with 119 (1), the clear intention is that the workman shall be entitled to recover from the employer for a personal injury sustained by him while in the service of his employer, whether the injury be caused by reason of a defect arising without negligence on the part of the employer or his servants or agents, or whether the injury be caused by reason of the negligence of the employer or of any person in his service acting within the scope of his employment, notwithstanding that the injury may have been in part brought about by some negligence on the part of the workman. All that is necessary, therefore, to entitle the workman to recover, is that the injury be in part directly attributable to the defect. The fact that some negligence of the workman may have operated with the existence of the defect to produce the injury makes no difference so far as the liability of the employer is concerned except as to the assessment of the quantum of the damages.

No other conclusion is possible upon the evidence, I think, than that if the window sill had been sound and securely fastened to the wall of the building the accident would not have happened. It may, of course, be said with equal truth that had Lewis not applied his weight to it while washing the first window and reaching over from it to wash the second the accident would not have happened either. Obviously the two facts—the defective condition of the sill, which the evidence shews was not visible on superficial inspection, and the deceased's placing his weight upon it—combined to cause it. The jury found that it was caused by the decayed condition of the sill and that the deceased was not guilty of any negligence contributing to it. That there was ample evidence to warrant the finding that the sill was decayed and that the accident was caused, at least in part, by that fact, I have no doubt. The fact of a section of the sill of the window frame proper breaking away with the piece of wood underneath in the recess at the top of the brick wall to which it was nailed, and dropping to the shed roof when the deceased himself fell,

itself affords strong evidence of its defective and insecure condition. In addition to this, however, there was positive testimony that the sill was dozy or rotten and that it was insecurely nailed to the piece of wood which was inserted in the wall as its support. The jury's first finding, in my view, is conclusive upon the question of the respondent's liability under the special provisions of the statute, for the reasons hereinbefore stated, whether the deceased in making use of the sill for the purpose of washing the windows was guilty of contributory negligence or not.

The question as to whether the deceased voluntarily and unnecessarily assumed a new and added risk independently of that attaching to his employment as janitor and caretaker of the building and different in kind therefrom, or whether he was simply doing something within the sphere of his employment in an improper or negligent manner, does not arise, in my opinion, upon the special provisions of s. 119. The principle affirmed in *Lancashire & Yorkshire Ry. Co.* v. *Highley* (1), upon which the Appeal Court relied, and other cases cited on the argument, is applicable only to claims for compensation for personal injuries caused to a workman "by accident arising out of and in the course of the employment," which are the governing words giving the right to compensation under the English *Workmen's Compensation Act*. The same words are used in Part I of the Ontario Act. The test, as it is called, has no application to the enactment here in question, which gives a right of action to a workman for personal injury caused to him "by reason of any defect in the condition or arrangement of the ways, * * * buildings or premises connected with, intended for or used in the business of his employer," while in the service of his employer.

I feel bound to say, however, that had the deceased been a workman in any of the industries to which Part I of the Act applies, and the question been whether his injuries were caused by accident arising out of and in the course of his employment within the meaning of these words as used in Part I, I should not have been able to recognize any analogy between the facts in any of the English cases cited in support of the respondent's contention and those in the present

(1) [1917] A.C. 352.

1934

LEWIS v. NISBET & AULD LTD.

Crocket J.

case, where Lewis had not moved from the defective window sill, which almost at the very moment when it broke down under him he was quite properly using in the washing of the outside glass of the window of which the defective piece was a part. I should have thought the case of *Pepper* v. *Sayer* (1), decidedly more applicable.

As to the finding that the deceased was not guilty of negligence contributing to the accident, this finding, as already pointed out, affects only the assessment of damages. We are not prepared to hold that it was a finding which was not warranted in any reasonable view of the evidence, and are of opinion, therefore, that it must stand.

We think, however, that the damages awarded by the jury are so manifestly excessive as to entitle the respondent to a new trial, but that in the circumstances such new trial should be limited to the assessment of damages only and upon the basis of the findings expressed in the answers to questions Nos. 1, 2 and 3, which are left undisturbed.

The order will therefore be that the appeal be allowed, that the judgment of the Court of Appeal be set aside and that there be a new trial, limited to the assessment of damages on the basis of the findings above mentioned. There will be no costs on the appeal to the Court of Appeal to either party. The costs of the former trial shall abide the event of the new trial, and the appellant administratrix shall have the costs of the appeal to this Court.

Appeal allowed with costs. New trial ordered, limited to assessment of damages.

Solicitors for the appellant: *Mackay & Matheson.*

Solicitors for the respondent: *Crabtree & McKee.*

(1) [1914] 3 K.B. 994.

FRED. B. STEVENS AND ORLAN E. WILLSON, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF STEVENS-WILLSON (PLAINTIFFS).... APPELLANTS;

1933
*Nov. 21, 22.
1934
*Mar. 15.

AND

THE MUNICIPAL CORPORATION OF THE CITY OF CHATHAM (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Negligence—Failure of firemen to prevent spread of fire—Dangerous situation—Alleged negligent delay by local Public Utilities Commission in shutting off electric current—Liability of municipality.

Appellants' mill in the city of Chatham, Ont., was destroyed by fire, which started by lightning striking the electric wires by which power was supplied to the mill by the Chatham Public Utilities Commission (established under the *Public Utilities Act*, R.S.O. 1914, c. 204), and setting up an electric arc or short circuit at a point where the wires entered the conduit pipe running down the outside corrugated iron covered wall. The fire brigade of respondent, the City of Chatham, came to the fire but feared to cut the wires (for which they had certain appliances), or to fight the fire until the electric current was shut off. Telephone calls were sent to the operator at the Commission's sub-station, who refused to switch off the current without the Commission manager's instructions, and by the time the manager arrived and the current was shut off and the wires cut, the fire had spread and the mill could not be saved. Appellants claimed damages from the respondent City, alleging that the destruction of the mill was owing to negligence of it or its servants or agents.

Held, Crocket J. dissenting, that the City was not liable. Judgment of the Court of Appeal for Ontario, [1933] O.R. 305, affirmed.

Per Duff C.J., Rinfret, Lamont and Smith JJ.: There appeared no adequate reason for rejecting the findings of the trial judge and the majority of the Court of Appeal that, in the circumstances, the Commission's officials or servants had not acted unreasonably or negligently. (As to the governing rule in regard to the questions of fact in the appeal, *Johnston* v. *O'Neill*, [1911] A.C. 552, at 578, was cited). (The questions, whether the Commission, and whether the City, would have been liable for negligence of the Commission's servants, were not decided, decision thereon being unnecessary). As to the complaint that the firemen failed to take proper measures to stop the fire—the City was not liable in damages for what was merely inactivity on the part of the firemen. (Duff C.J. and Smith J. agreed with the reasons of Davis J.A. in the Court of Appeal who so held and who was further of opinion that in any case the firemen were not negligent under the circumstances.)

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Per Crocket J., dissenting: It was the Commission's duty to provide for the promptest action in such an emergency, by having competent men always in charge of its substations, clothed with sufficient authority to extinguish promptly a short circuit threatening destruction of property or endangering firemen's lives in their efforts to save property. The Commission, in its failure to shut off the current when first requested to do so by the fire department, was guilty of negligence causing damage to plaintiffs; and its negligence was chargeable against the City, of which it was the statutory agent (the principle affirmed in *Young* v. *Town of Gravenhurst*, 24 Ont. L.R. 467, being applicable).

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Rose, C.J.H.C., dismissing their action.

The action was brought against both the City of Chatham and the Chatham Public Utilities Commission (established under the *Public Utilities Act*, R.S.O. 1914, c. 204), but upon the hearing of the appeal to the Court of Appeal the plaintiffs abandoned their appeal as against the latter ("recognizing * * * that there was no cause of action against the Commission, it being merely a statutory agent of the municipality", per Davis J.A. in his judgment in the Court of Appeal) and the present appeal was against the judgment of the Court of Appeal in so far as it dismissed the plaintiffs' appeal as against the City of Chatham.

The action was for damages for alleged negligence in failing to prevent the spread of a fire which, on spreading, destroyed the entire mill building of the plaintiffs in the city of Chatham.

The fire was started by lightning striking the electric wires by which power was supplied to the mill by the Commission, and setting up an electric arc or short circuit at a point where the wires entered the conduit pipe running down the outside corrugated iron covered wall of the building. The fire brigade of the City feared to cut the wires (for which they had certain appliances) or, until the electric current was shut off, to turn on the water, and telephone calls were made to the operator in charge of the Commission's power sub-station to shut off the current. Plaintiffs complained of delay, in shutting off the current after demands made, and in fighting the fire, which, they

(1) [1933] O.R. 305; [1933] 2 D.L.R. 407.

claimed, was negligence for which the defendant City was responsible.

The trial judge, Rose, C.J.H.C., dismissed the action. He was of opinion that it could not be found that the firemen acted negligently or improperly in not cutting the wires in the conditions existing; but, in any case, he held that the City was not liable for the alleged failure in this regard complained of, expressing his opinion as follows:

> The liability of the city, if any, in this regard must be for failing to put out, or to take proper measures for putting out, the fire. The action, in other words, is an action, not for damage caused to somebody by the negligent doing of something undertaken, but for damages for not acting. The firemen sat down and waited. The action is against the city for its inactivity, not for something positive done wrongly; * * * For this nonfeasance on the part of the city I think there is no liability to the individual who suffers.

He held also, in effect, that upon the evidence and upon the conduct of the officials of the Commission under all the circumstances in question, the plaintiffs had not established negligence on their part causing the damage complained of.

The Court of Appeal dismissed the plaintiffs' appeal, Fisher J.A. dissenting.

Riddell J.A., after remarking generally on the duty of the City in such a case and referring to certain aspects of the present case which tended to support the plaintiffs' claim, stated that, upon the evidence, he could not say "that there was necessarily negligence either in the system or in the conduct of the servants of the City".

Davis J.A. (with whose reasons Duff C.J. and Smith J., in their judgment now reported, agreed) said (*inter alia*) in the course of his judgment:

> It is plain that the firemen did not attempt to cut the wires and that it was between twenty minutes and a half hour before the electric current was cut off at the Hydro station. Had the current been cut off within a few minutes after the lightning struck the wires, there can be no doubt that the loss of the plaintiffs would have been much less than it was; it is not unlikely that the whole building might have been saved.
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> * * *
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> Having read the evidence carefully, I am convinced that the firemen in this case, confronted with the sudden and unusual emergency, and the extreme danger of the situation, were not negligent if there is, as a matter of law, any duty upon them or the Municipal Corporation to cut electric wires, or in fact do anything at a fire, in circumstances more common and less dangerous.
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> * * *

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

* * * It is true that they had ladders and rubber boots, a pair of rubber gloves and a pair of shears, but the firemen considered the situation too dangerous for them to deal with, and I think they were justified.

* * *

* * * While [the trial judge] could not find on the evidence that the firemen failed in doing what firemen ought to do, in abstaining from any attempt to mount the pole and cut the wires, he considered that discussion altogether unnecessary in his view of the law that the action was one not for something positive done wrongly, but for inactivity. With that statement I entirely agree.

There is no obligation upon a municipality in this province to maintain a fire brigade, and no obligation on a municipality to take charge of and extinguish fires that occur within the municipality. * * *

* * *

Nowhere in the statute is there any obligation imposed upon the municipality to provide fire protection—it is merely permissive.

The City of Chatham did, however, establish a fire department, and passed certain by-laws, rules and regulations (put in at the trial as exhibits), governing the organization, pay and management of the firemen, and sufficient equipment for ordinary purposes was furnished to the firemen for their work.

After referring to *Hesketh* v. *The City of Toronto* (1) (which he distinguished), he said:

In the case before us the complaint of the plaintiffs is that the firemen abstained from doing something that it is contended they ought to have done, and that it was negligence in law in that having taken control of the fire, they did not take proper and immediate steps to cut the electric wires that were on fire, so as to disconnect the current and make the use of water efficient to stop the spreading of the fire.

He thought that the principle of law applicable to this case is to be found in the decision of the English Court of Appeal in *Sheppard* v. *Glossop Corporation* (2) (which he discussed at length) and that that case "completely answers the plaintiffs' submission that there was a negligent breach of duty on the part of the Municipality". He referred also to certain Ontario cases.

Then, dealing with the allegation of negligence of the local Hydro Commission, he pointed out that any attack upon the "system" of the local Commission was not open upon the pleadings, and stated that, upon the complaint against it as pleaded, he agreed with the trial judge's conclusions on both the facts and the law. His judgment in this regard is quoted from at length in the judgment of Duff C.J. now reported.

Fisher J.A. dissented in a lengthy judgment, holding that there was a clear case of misfeasance; that the City, having established and maintained a fire department, was liable

(1) (1898) 25 Ont. A.R. 449. (2) [1921] 3 K.B. 132.

for damages if guilty of negligence in the performance of the duties undertaken; that the damage which ultimately arose from the initial escape could have been prevented by the exercise of reasonable care and courage on the part of the municipality or its statutory agents or in the proper actions of the fire department; and that there was negligence for which the City was liable in damages.

The plaintiffs appealed to this Court.

D. L. McCarthy K.C. and *A. L. Hanna* for the appellants.

W. N. Tilley K.C. and *J. A. McNevin K.C.* for the respondent.

The judgment of Duff C.J. and Smith J. was delivered by

DUFF C.J.—I have come to the conclusion that the appeal should be dismissed. The negligence charged is stated in two paragraphs of the statement of claim, paragraphs 10 and 11, which I quote:

> 10. The fire department of the defendant, the Municipal Corporation of the City of Chatham, were unable to fight the said fire, or in any event did not, for a long period after the arrival of the said department at the scene of the fire, by reason of the negligence of the defendants, or one of them, in that the defendants' servant in charge of the power at the Hydro station, operated by the defendant, the Chatham Public Utilities Commission, failed, neglected and refused to comply, with the demands made, by the officers of the fire department, operated by the defendant, the Municipal Corporation of the City of Chatham, to shut off the power, supplying the electrical energy, to the said building belonging to the plaintiffs.
>
> 11. The plaintiffs allege, as the fact is, that the fire department of the defendant, the Municipal Corporation of the City of Chatham, refused, failed and neglected to fight the said fire, until the power supplying the electrical energy to the said building, was shut off by the defendant, the Chatham Public Utilities Commission.

At the trial, the issues were strictly confined to those raised by these paragraphs, and the evidence directed to those issues; although the trial judge, upon a not il-liberal reading of paragraph 10, treated that paragraph as raising the issue whether a duty rested upon the Commission (as distinguished from the officer in charge of the substation) to respond to the alleged demands by the officers of the fire department by opening the switch. These are, therefore, the only issues which could properly be examined in the Court of Appeal, or can properly be examined here.

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Duff C.J.

Chatterton, who was in charge of the substation, says that, upon receipt of information that there was a fire near the appellants' premises, he telephoned first the line superintendent and then the manager. The manager proceeded at once to the scene of the trouble by motor; the superintendent had first to get his truck and appliances. The manager says that, arriving before the superintendent, and not having the necessary appliances for cutting the wires, he, after observing the situation, directed the proper switch to be opened; and, the wires having been cut, directed it to be closed. I mention these facts for the purpose of indicating what the officers of the Commission actually did. It is probable that if the line superintendent had not been accidentally delayed, he, being furnished with the necessary equipment, would at once have cut the wires, and that the switch would not have been opened. The manager's reasons for not directing the opening of the switch before reaching the scene of the fire are fully explained by him; and I perceive no adequate reason for rejecting the findings of the learned trial judge and the majority of the Court of Appeal that, in the circumstances, the Commission is not chargeable with failure to exercise proper energy and reasonable judgment because of the conduct of the manager or superintendent or that of the operator at the substation.

Rose C.J. says:

> Then as to the Public Utilities Commission. * * * The action against the Commission, as stated in the statement of claim, paragraph 10, is an action for damages resulting from the failure, neglect and refusal of the Commission to comply with demands made by officers of the fire department to shut off the power from the line supplying power to the plaintiffs' building. For the purposes of the case I treat the Commission as an entity, a corporation supplying power to consumers for purposes of light and other purposes, and having no special statutory privileges; and I treat information given to the man for the time being in charge of the Commission's substation as information given to the Commission, and requests made to that man as requests made to the Commission; and I judge of the duty of that man to act by attributing to him all the knowledge that the Commission by any of its officers possessed. I treat the case, then, as being a case against the Commission for failure, neglect and refusal upon the part of the Commission to comply with demands made to the Commission, and I ask myself what the liability is.
>
> I assume also that it is the obligation of such a corporation as for the purposes of the case I am treating the Commission as being, to use the utmost care in the handling of anything so dangerous as electricity under high voltage, and I assume, without the necessity of deciding, that if it is brought to the notice of such a corporation that its wires have become, without any default on its part, a source of danger to the public

in general or to some person in particular, it is the duty of the corporation to take adequate and prompt steps to remove the danger. Making all these assumptions, which are the strongest assumptions that can possibly be made against the Commission, I ask what the duty of the Commission was in the particular case.

First of all, one must ask what information the Commission had. The Commission had information that there was a fire near the plaintiffs' premises, and that, in the opinion of some persons—first a private individual, later a policeman, later a fireman, and later still the chief of the fire brigade—the wires of the Commission were in some manner a source of danger, and perhaps were in some way obstructing the efforts of the firemen; but, as far as the evidence here goes, no precise information as to the state of affairs existing was conveyed to the Commission. There was no statement, so far as I am aware, that the trouble was in the power wires rather than in the lighting wires or the other way around, or as to the manner in which the trouble, whatever it was, on the wires was either endangering the building or obstructing the firemen. I suppose that the persons who telephoned were telephoning under a good deal of stress and in more or less excitement. No doubt they made known their desire that, as they expressed it, the power should be cut off, but the reasons for that desire or the conditions which had given rise to that desire were not conveyed, so far as the evidence goes, to the Commission.

Well, what was the Commission to do upon getting that kind of information? In my opinion the proper action was to investigate as quickly as possible and to take such action as investigation by a competent person showed to be necessary. Investigation might show the necessity or the desirability of opening a certain switch or certain switches or it might show that the proper action was the cutting of the wires, or it might show that the thing to do was to open the switches for a very short time while the wires were being cut and then to close them; but it was a case in which I think the Commission could not know what action was necessary or desirable until investigation had been made, and so, as I say, I think the duty of the Commission was to investigate with the least possible delay. The Commission did investigate. There was some delay, of course, and it is suggested that the delay was greater than it need have been. I do not think, however, that it is shown that the delay was excessive, or that, if there was any excess, the excess was the cause of the damage of which the plaintiffs complain. When the manager of the Commission arrived on the scene he caused the power to be cut off. Soon thereafter he was in a position to have the wires leading into the plaintiffs' premises cut, and the wires were cut, and the power was again turned on. I think there is no evidence upon which it can be found that there was unnecessary delay in communicating with the manager or unnecessary delay on the part of the manager in betaking himself to the scene of the trouble.

I need not go into all the reasons why I think that this investigation, rather than some blind action from the power house, was the proper action on the part of the Commission. The reasons are pretty obvious, and have been stated by witnesses and elaborated by counsel. The Commission owes a duty, not only to the person whose property is supposed to be in danger, but to all its customers. It cannot unnecessarily shut off power; great inconvenience may be caused by an unnecessary shut-down, and danger of one sort or another may be created. If the power is cut off, except upon the instructions of someone on the spot who knows what lines ought to be switched, no one in the office of the Commission

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Duff C.J.

can by any means tell how long the switches ought to be kept open. The Commission in its office, with such information as this Commission had, would be acting blindly, I think improperly, in opening switches upon the type of information or at the requests that were made in the particular case. So I think that there is no liability on the part of the Commission for not acting.

I pause here to call attention to the nature of the three findings of fact which the learned trial judge has enunciated in his judgment.

After weighing the evidence of the various witnesses, and examining the facts disclosed by the evidence, he concludes, first, that, in the special circumstances, it was not unreasonable on the part of these officers, that is to say, on the part of the Commission, not to open the switch at once, in compliance with the suggestions or demands made, without first taking proper steps to obtain a more exact knowledge of the circumstances. Second, he finds that there was no "excessive" delay in taking such steps, or in acting upon the information obtained; and third, that it is not shewn, if there was excessive delay, that such delay was the cause of the damage of which the appellants complain.

It was pressed upon us during the argument with a good deal of vigour that the learned trial judge omitted to take into account the contention of the appellants that the operator at the substation, if he had acted with reasonable energy, would have ascertained from the chief of the fire brigade, or from others who telephoned him, the fact in respect of which the Commission was not informed, as the learned Chief Justice says, through the communication received by the operator. I think the learned Chief Justice cannot justly be supposed to have overlooked this contention.

During the course of the cross examination of the operator the witness stated that the chief of the fire brigade, when requesting him to "cut off the service", did not tell him where the fire was. The witness proceeded:

Q. You swear that positively? A. Yes, sir.

Q. All right; what did he say? A. He asked me to cut the power off.

HIS LORDSHIP: Q. What power? A. The power; he did not specify any power at all.

The learned Chief Justice then asked the witness:

Q. Well, why didn't you ask him? A. It was all done so hurriedly, and I had had so many calls in a few minutes, that I didn't ask him anything at all before he hung up.

The operator, no doubt, had already been told approximately where the fire was, but this and many other passages in the evidence must have impressed the learned Chief Justice as well as the Court of Appeal as indicating the difficulties he must have encountered, owing to the state of confusion and excitement of those who were urging him to "cut off the power", in attempting to obtain from them more exact and reliable information. The learned Chief Justice seems to have proceeded upon the view, this, I think, is plainly implied in his judgment, that such efforts on the part of the operator would have been fruitless; and that the Commission cannot be charged with any lack of due diligence in obtaining information by reason of the conduct of the operator.

The appreciation of the situation in this aspect was peculiarly a matter for the trial judge who, having all the parties concerned before him, was in a specially advantageous position to pass upon the question whether or not, in this respect, there was any lack of diligence.

The learned Chief Justice then proceeds:

> If that is so, I need not consider another of the difficulties in the plaintiffs' way. If the Commission was required to act upon the information received on the telephone from some of the persons who did telephone, one ought to be able to fix the time at which the action ought to have taken place, the state of affairs at the fire at the moment, and all the other conditions, and ought to be able to say before the plaintiffs have judgment that action at that particular time would have prevented the loss which the plaintiffs have sustained. It would be very difficult indeed, upon the evidence here, to fix the moment at which action ought to have taken place, or to say what the result of action at that moment would have been, although there is some evidence upon which perhaps it could be found that if the Commission had opened the switch controlling the 550-volt circuit at the moment when the chief of the fire brigade telephoned, the firemen would have been able to save the building. The building of course would have been damaged to some extent, but, if the opinion of the two firemen who were inside is correct, perhaps at that time the building as a whole could have been saved. However, it would be necessary to fix either the time of the first message by the chief of the fire brigade or some other time as the time at which the Commission ought to have acted, and to say, before giving judgment for the plaintiffs, that if there had been action at that moment the loss would not have occurred or would have been diminished.

In the Court of Appeal, Davis, J.A., says:

> The complaint in respect of the local Hydro Commission as pleaded was that it refused to comply with the demand of the fire department to shut off the power and reliance was had by the plaintiffs upon secs. 21 and 22 of a by-law of the municipal council making provision for preventing fires.

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Duff C.J.

Sec. 21 requiring obedience to the demands of the fire chief applies only to inhabitants of the city "being present at a fire", and sec. 22 providing that no person shall prevent or obstruct the fire chief, has no application to the officials of the local Hydro Commission on the facts of this case.

The learned trial Judge very carefully reviewed the evidence on this branch of the case, and I entirely agree with his conclusions on both the facts and the law. There is no doubt a duty upon anyone generating and distributing electricity under high voltage, to use the utmost care and to take prompt and adequate steps within a reasonable time to remove any danger of which it has notice or knowledge. But having regard to the unusual emergency that occurred, upon the facts of this case, and the confused and uncertain information that was telephoned in to the night operator at the station,—(first a private individual, later a policeman, later a fireman, and later still the chief of the fire brigade),—the lack of anything definite as to the nature or extent or location of the fire,—the immediate telephone communication of the night operator, who had not himself the knowledge or information to cope with the situation, to the manager of the Commission; the manager's arrival at the place of the fire as quickly as he could possibly get there; his personal investigation of the situation and his immediate order and direction to the night operator, to turn off the power, and the prompt compliance with that order, all seem to me to amply justify the conclusion of the trial Judge that there was no negligence on the part of the Commission. In any event the case pleaded, and to which the plaintiffs were properly confined at the trial, and should be confined in this Court, was merely an alleged neglect or failure on the part of the Commission to comply with the fire chief's demand. It was in fact complied with, and under all the circumstances, without any unreasonable delay.

As regards the questions of fact involved in the appeal, we must not overlook the settled rule which governs us in *Johnston* v. *O'Neill* (1). Lord Macnaghten there stated the rule which is proper here:

> The appeal is in reality an appeal from two concurrent findings of fact. In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong. In a Scotch case, *Gray* v. *Turnbull* (2), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither Court saw the witnesses, Lord Westbury, after referring to the practice in Courts of Equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Glamorgan Steamship Co.* (3), Lord Watson expressed himself as follows: "In my opinion it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at,—I will not say a certain, because in such matters there can be no absolute certainty,—but a tolerably clear conviction that these findings are erroneous."

(1) [1911] A.C. 552, at 578. (2) (1870) L.R. 2 Sc. & D. 53.
(3) [1893] A.C. 207.

Nothing has been advanced which produces in my mind such "conviction".

As to the issue raised by paragraph 11—here again I find myself in entire agreement with the views expressed by Rose C.J. and Davis J.A., and am quite content to rest my judgment in respect of this branch of the appeal upon those reasons. I add a reference to *Orfila's* case (1).

Two other questions were considered in the Court of Appeal. First, the question whether the Commission is answerable in legal proceedings for the negligence of its servants, in such a situation as that presented here, where negligence is established. It may be that—by reason of the pertinent decisions and the re-enactment, more than once, of the pertinent legislation after the decisions were pronounced, and the acceptance of the decisions as expressing the effect of the legislation, and, consequently, as giving an authoritative guidance in the conduct of municipal affairs—it may be that, for these reasons, these decisions are not now open to review. I express no opinion on that, or on the effect of the legislation. Neither do I discuss the question whether, by force of the legislation, the Corporation is responsible for the collateral negligence of the servants of the Commission in the execution of the duties of the Commission under the by-law and the statutes. On these questions it is better, I think, to say nothing, until a case arises in which a decision on one or more of them is necessary.

The appeal should be dismissed with costs.

RINFRET, J.—I concur with my Lord the Chief Justice.

The city is not legally responsible in damages, in this case, for mere inactivity on the part of its firemen. It is a question whether it is answerable for the negligence of the servants of the Public Utilities Commission, but assuming the point against the city, I do not feel warranted in disturbing the concurrent findings of fact made in this respect by the Honourable the Chief Justice of the High Court and by the majority of the Court of Appeal.

(1) *Sanitary Commissioners of Gibraltar* v. *Orfila*, (1890) 15 App. Cas. 400, at 411.

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

LAMONT, J.—I concur in the judgment of the learned Chief Justice, and I do so because I am convinced that the law of Ontario does not impose responsibility upon a municipality for mere inactivity on the part of its servants.

In so far as the Public Utilities Commission is concerned two questions were involved: 1. Was the Commission, or its servants, guilty of any negligence which contributed to the loss sustained by the appellants? And 2. If so, was the Commission the statutory agent of the municipality?

The learned trial judge held that the course pursued by the officials and servants of the Utilities Commission was a reasonable one and was justified under the circumstances. He, therefore, absolved the Commission from any blame in connection with the burning of the appellants' mills. This finding was affirmed by the majority of the Court of Appeal, and I am not prepared to differ from it. As the Utilities Commission was not guilty of any negligence contributing to the appellants' loss, it is unnecessary to determine whether or not the Commission was the statutory agent of the municipality, and that question I wish to leave open for future consideration. In view of the finding of fact just referred to, the dropping of the Commission from the action as a separate defendant had no effect upon the rights of the plaintiffs.

The case against the municipality is different. As pointed out by the trial judge it is not an action for something positive done wrongly, but one for damages for inactivity. The allegation against it is: "that its fire department refused, failed and neglected to fight the fire until the power supplying the electricity to the building was shut off by the Utilities Commission". The truth of that allegation is admitted. The firemen arrived at the scene of the fire promptly after it commenced, and they saw an arc or ball of fire about three feet wide at the point where the wires entered the conduit pipe leading into the mill. This point was about sixteen feet from the ground and about four to six inches from the side of the metallic covered building, and was the place where the lightning had struck the wires. This arc or ball of fire gave forth what is described as a "sputtering noise", a "hissing sound as from an acetylene torch", a "sizzling ball of flame which sounded like a lot of fire crackers or fuses exploding". Before this unusual sight the firemen quailed. They annexed the hose

to the hydrant but did not turn on the water because they did not know what the water would do. They were afraid to do anything until the power was shut off, although they had in their possession the necessary equipment for cutting the wires and the evidence shews that they could have cut them and could have turned the water on the fire with perfect safety to themselves. This they did not do but stood milling around in helpless confusion until the fire had melted the conduit pipe and entered the building and got such a start that when, some twenty-five minutes after the fire commenced, the manager of the Utilities Commission arrived, shut off the power, cut the wires and got the water turned on, it was then too late to save the mill from destruction. It does appear to me not to be open to doubt that had the firemen, when they first arrived, cut the wires and turned on the water, very little damage would have been done to the mill. Their failure to act resulted from ignorance on their part as to what firemen should do in circumstances there existing. It seems to me to be too obvious for argument that at the present day, in a city where the lighting is derived from electricity and the power for most industries comes from the same source, the fire chief, or some person on the force, should know where and how to cut the wires leading into a burning building even if a short circuit has occurred. However, granting that this may be so, it does not affect the liability of the municipality, for, under the authorities referred to by the trial judge and the judges of the Court of Appeal, the law of Ontario seems undoubtedly to be that a municipality cannot be held liable for mere inactivity on the part of its servants.

The conclusion at which we have been forced to arrive in this case is to me very unsatisfactory, but the reason for its unsatisfactory character rests on the state of the law and not on the courts.

CROCKET, J. (dissenting).—The plaintiffs commenced this action against the respondent Corporation of the City of Chatham and the Chatham Public Utilities Commission to recover damages to the amount of $26,363.15 for the destruction by fire on September 15, 1931, of their flour mill in that city through the negligence, as they alleged in their statement of claim, of both the defendants or of one or other of them.

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Crocket J.

The action was tried before Rose, C.J.H.C., without a jury, by whom it was dismissed against both defendants, His Lordship holding that the negligence complained of against the city consisted merely of nonfeasance for which a municipal corporation was not liable and that there was no negligence upon the part of the Chatham Public Utilities Commission.

During the hearing of the plaintiffs' appeal from the trial judgment their counsel, acting upon the suggestion of the court that the Public Utilities Commission was the statutory agent of the City Corporation on the principle affirmed in *Young* v. *Town of Gravenhurst* (1) and other cases and was therefore an unnecessary party to the action, abandoned their appeal against that corporation, though maintaining that the City of Chatham was liable for the negligence, if any, of the Utilities Commission. The Appeal Court accordingly considered the appeal upon that assumption and dismissed it on a division of opinion, Riddell and Davis, JJ.A., supporting the judgment of the learned trial judge, while Fisher, J.A., dissented.

The fire in question started between 1.30 and 2 o'clock a.m. and was admittedly caused by lightning striking the electric wires by which the Utilities Commission supplied power to the plaintiffs' mill, and setting up an electric arc or short circuit at a point where the wires entered the conduit pipe running down the outside corrugated iron covered wall. The arc was noticed immediately by a witness (Whitely), who lived across the street from the mill, and who at once telephoned an alarm to the fire department. A fire brigade of eight men under charge of Captain Johnston arrived within a few minutes. The fire chief arrived on the scene some minutes later, possibly ten minutes according to the fire captain. The conduit pipe attached to the building was still aflame, while the wires about 20 to 25 feet away at the pole, from which they were carried to the conduit pipe, were throwing out sparks and sputtering. Both Captain Johnston and the fire chief decided that the water should not be turned on the arc or on the inside of the building until the electric current was shut off. Before the chief's arrival the operator in charge of the Commission's power substation had been

(1) (1911) 24 Ont. L.R. 467.

informed of the fire over the telephone by Whitely and asked to switch off the current in that district; in fact Whitely telephoned him immediately after telephoning the alarm to the fire station, when he was told this could not be done until the manager came. The operator had also received a message to the same effect from a fireman acting on the instructions of the fire captain before the fire chief's arrival on the scene, when he said a man would be sent to the mill at once to open the line. The fire chief himself called up the substation operator within a few minutes of his arrival, requesting that the current be shut off in that section of the city, and was told that he could not cut off the current until he got hold of the manager. The fire chief called again two or three minutes later when he was told that the manager was on his way. In the result, the power was not shut off until the lapse of nearly half an hour after the arrival of the fire brigade, all efforts on the part of the firemen to save the building from destruction having been suspended until the current had thus been shut off. In the meantime the fire had broken out in the interior of the building and made such progress that the whole mill with its equipment was practically destroyed.

The evidence shews that the fire brigade upon their arrival were equipped with shears with rubber insulated handles for cutting electric wires but that no attempt was made to cut the wires because of the belief on the part of the fire chief and Captain Johnston that the situation was such as to involve too much danger to anyone making such an attempt.

These were the two main specific grounds of negligence which the plaintiffs sought to establish at the trial: first, the failure to open the switch at the hydro substation; and, second, the failure of the fire brigade, in the circumstances, to fight the fire until the electric current was shut off. The first primarily involves the Commission and the second the fire department.

Evidence was tendered by the plaintiffs for the purpose of proving that the Commission's system was insufficient and defective for want of an automatic expulsion fuse, which would have at once opened the circuit in the area where the fire occurred, but the learned trial judge, on objection being made by the Commission's counsel, rejected

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Crocket J.

it as irrelevant on the ground that plaintiffs had made no allegation of a defective plant or system against the Commission in their statement of claim, and that the Commission was, therefore, not prepared to meet it. His Lordship held that the plaintiffs had based their claim of negligence against the Commission entirely on the ground of its or its servants' failure to comply with the request of the fire department to shut off the power.

In dealing with the case against the Commission he accordingly considered it solely from this standpoint. His decision that there was no negligence on the part of the Commission was clearly based on his finding that the messages to the Commission's operator at the substation did not convey sufficiently precise information of the emergency to warrant the Commission in shutting off the power without further investigation, having regard to the duty it owed to all its customers in the area affected; and that, although the information which these messages did convey imposed upon the Commission the duty of investigating the situation with the least possible delay, it was not shewn in the circumstances that there was any excessive delay, or, if there was, that it was the cause of the damage the plaintiffs sustained.

By their abandonment of their appeal against the Commission the plaintiffs have staked their whole case, in so far as it concerns the negligence which they charge against the Commission or its servants, upon the assumption that the Commission, though a separate corporation, is the agent of the municipality for the management of its light and power system, and that the present respondent, the City of Chatham, is therefore quite as fully responsible for any negligence on the part of the Commission or its servants as it is for the negligence of any other department of the civic government.

This at once raises the question as to whether the Commission is in fact the statutory agent of the respondent in the sense that its negligence is the negligence of the respondent and, if so, whether it is now open to the plaintiffs to impeach the finding of the learned trial judge that the Commission was guilty of no negligence in the circumstances.

The respondent contends that the question of negligence on the part of the Commission is *res adjudicata,* the plain-

tiffs having abandoned their appeal against that corporation. We think in the circumstances that it cannot well be so held and that the whole question as to whether there was any negligence on the part of the Commission for which the respondent municipality would be liable as the Commission's principal is now open to review as it was in the Court of Appeal. The intention of the court and of the parties plainly was that the plaintiffs' case, in so far as it was based upon charges of negligence on the part of the Commission, should be dealt with in the same way as if it had been charged against the municipality as being responsible for the negligence of its statutory agent.

Considering this branch of the case from this standpoint, the first question which naturally arises is as to whether the Commission is in fact the statutory agent of the respondent for the management of its light and power plant. As to this we think the Court of Appeal were right in holding that it was. All three of the Appeal Judges concurred in this view, though differing upon the question of negligence. It was argued by the learned counsel for the respondent that *Young* v. *Town of Gravenhurst* (1), on which the Appeal Court's decision was based, was not correctly decided. We think it was and that there is no substantial difference between the provisions of R.S.O., 1897, caps. 234 and 235, upon which that case was decided, and the provisions of the *Public Utilities Act,* R.S.O., 1914, cap. 204, in pursuance of which the Public Utilities Commission of the Corporation of the City of Chatham was constituted. The provisions of subs. 2 of s. 38, introduced into the Act in 1917, making the salaries of the commissioners as fixed by the various municipalities throughout the province subject to the approval of the Provincial Hydro-Electric Power Commission, cannot affect the question of agency as between the several municipalities and their local commissions; neither do any of the provisions of the provincial *Power Commission Act* relied upon by the learned counsel for the respondent authorizing the Provincial Commission to make rules and regulations regarding the construction, installation, repair, extension or alteration of all municipal works for the distribution of electrical power or energy throughout the province.

(1) (1911) 24 Ont. L.R. 467.

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Crocket J.

It is further contended that in any case the employees of the Commission are not subject to the direction or control of the municipality and that the latter consequently cannot properly be charged with a loss caused by the negligence of the Commission's employees. This may be true as regards a loss directly attributable to a particular act of negligence on the part of a particular employee unless that act of negligence can be directly brought home to the Commission itself. The respondent claims that the act with which it was sought on the trial to charge the Commission was the failure or refusal of the operator at the Commission's substation to comply with the request of the fire department to shut off the power. It is true that this was the specific negligence charged in paragraph 10 of the statement of claim which seems to treat the operator as the servant of both the municipality and the Commission, and that the learned trial judge confined his consideration of the question of negligence on the part of the Commission solely to this allegation and the question as to whether there was any unnecessary or excessive delay in investigating the situation so as to see if the emergency was such as to warrant the current being shut off in the district in which the fire was burning. But he distinctly stated in his reasons that he treated "information given to the man for the time being in charge of the Commission's substation as information given to the Commission, and requests made to that man as requests made to the Commission", and that he judged "of the duty of that man to act by attributing to him all the knowledge that the Commission by any of its officers possessed". He added:

> I treat the case, then, as being a case against the Commission for failure, neglect and refusal upon the part of the Commission to comply with demands made to the Commission.

And again:

> If it is brought to the notice of such a corporation that its wires have become, without any default on its part, a source of danger to the public in general or to some person in particular it is the duty of the corporation to take adequate and prompt steps to remove the danger.

I am not at all prepared to say that, if it were sought to charge the municipality with liability for the consequences of the specific act of the operator in charge of the Commission's substation in failing in such circumstances to shut off the power without reference to any duty on the part of the Commission itself to provide for such an emergency, I would not agree with the respondent's

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Crocket J.

argument. It must be borne in mind, however, that the appellants in paragraph 13 of their statement of claim allege that they suffered the loss claimed for by reason of the negligence and want of care of the Commission and the municipality "or one or both of them". And it seems to me that, apart from the specific act charged against the operator at the Commission's substation in failing or refusing to comply with the request of the fire department, there is evidence which points very strongly to the fact that the operator's failure had its real origin in a failure of duty on the part of the Commission itself. I cannot but think that it was the clear duty of the Commission to provide for the promptest action in such an emergency as occurred by seeing to it that competent men were always in charge of its substations, clothed with sufficient authority to promptly extinguish a short circuit threatening the destruction of property or endangering the lives of firemen in their efforts to save property of the ratepayers of the city for whom the Commission had undertaken the management of the city's light and power distribution system, instead of allowing their hands to be tied with instructions that they must not, apparently in any emergency, shut off the power without the express authority of the manager or superintendent of the Commission.

It is quite apparent that the charge of negligence against the substation operator as alleged in paragraph 10 itself necessitates an investigation of the conduct of the manager and superintendent of the Commission in relation thereto. Indeed, as already intimated, the learned trial judge in making his finding considered the conduct of both the substation operator and the Commission's manager and superintendent. It is equally apparent that the consideration of the substation operator's conduct involves the question of his authority and instructions regarding the shutting off of the power as well as his knowledge and competency to take the appropriate steps in such an emergency. The learned trial judge, however, failed to deal with these features of the case, his finding, as already stated, resting solely upon his view that there was no excessive delay in investigating the situation after the request was made to open the switch. The members of the Appeal Court apparently considered the whole question of negligence on the part of the Commission open

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Crocket J.

for review upon the evidence before them with the exception of the suggested negligence regarding the non-provision of automatic expulsion fuses which the trial judge refused to consider because that had not been complained of in the plaintiffs' pleading.

We agree with the Appeal Court that the appellants are precluded from availing themselves of this ground of negligence against the Commission or the Municipality. It was open to them to ask for an amendment on the trial which undoubtedly would have been granted upon the usual terms but they made no application therefor.

If the evidence in the appeal book satisfies us that there was any negligence upon the part of the Commission or of the Municipality which would entitle the plaintiffs to recover damages against the Municipality there can be no doubt that it is the right and the duty of this court to pronounce judgment accordingly notwithstanding that that negligence was not specifically complained of in the plaintiffs' statement of claim.

In my opinion, there cannot be any doubt upon this evidence that the loss which the plaintiffs sustained by the destruction of their mill would have been entirely prevented if the power had been shut off at the Commission's substation when the operator was first informed of the fire and requested to open the switch or if the fire brigade upon its arrival at the scene of the fire had used the implements with which they were provided and cut the electric wires. Moreover, I think there can be no doubt that had either of these things been done, even after the arrival of the fire chief, the plaintiffs' loss would have been, if not wholly avoided, confined to but a very small proportion of the loss which the plaintiffs sustained.

With all deference, I cannot agree that the information telephoned to the substation operator was not sufficient to warrant the immediate shutting off of the power and merely imposed upon the Commission the duty of investigating the situation without unnecessary delay. He had been called up by three different persons and asked to shut off the power before the fire chief himself asked him in the most urgent terms to do so: first, by Whitely, who informed him that the Kent Mills were on fire on Wellington Street East; second, by a member of the fire department at the instance of the fire captain then in charge of the

fire brigade, who told him he was a member of the fire department, that there was a fire in the Kent Mill and asked if he could turn off the power; and third, by the police sergeant in charge of the city police, who told him who was calling, exactly where the fire was, that it was a dangerous looking fire, one he thought was very bad, and made the same request that Whitely and the fireman had already made, that he cut off the line. All these calls had been made. Then five or six minutes after the police sergeant's call, the fire chief, on his arrival at the scene, himself called the substation, asked the operator to shut the power off and told him it would burn up the whole east end if they didn't. The fire chief called the substation a second time a few minutes later, and was heard asking "what the hell was the matter with them, they would burn up the whole town."

Surely these five calls conveyed sufficient information to do more than merely impose upon the Commission the duty of undertaking an investigation to ascertain whether the power should really be shut off. If the information conveyed by the first call was not sufficiently precise to justify the shutting off of the power, one would think that it would, on the receipt of the second request, made by a member of the fire department, who had just come to the telephone from the scene of the fire, have at once occurred to a man of ordinary prudence and intelligence, that he could instantly have ascertained from the fireman then at the telephone what the exact situation was, so as to be able to report it by telephone to the Commission's manager or superintendent and receive the necessary authorization instantaneously and thus avoid the fatal delay of awaiting the latter's personal arrival on the scene.

Moreover, if the explanation of the delay is to be found in the failure of the firemen to communicate sufficiently precise information, and the Commission is to be exonerated of all negligence upon that ground, is not the fire department thereby fixed with the responsibility as for misfeasance for the Commission's failure to shut off the power? In any event, if the municipality is responsible for the negligence of the Commission as well as for the negligence of the fire department, it makes no difference in the result whether the failure to shut off the power at

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Crocket J.

the substation is attributable to one or to the other as the real cause of the plaintiffs' loss.

On the other hand, the plaintiffs' acceptance of the Appeal Court's decision dismissing their appeal against the Commission on the ground stated has produced the anomalous situation of the municipality, as the only respondent in the present appeal, now challenging, as the very basis of its legal position on this appeal, the correctness of the Appeal Court's decision that the Commission was improperly joined with it as a co-defendant in the action, while the plaintiffs support on that crucial point the judgment against which they are appealing. The practical result is that, if the Commission was guilty of the real negligence which caused the plaintiffs' loss, as I think it was, and it, as an independent corporation, and not the municipality as its principal, was legally responsible for such negligence, as the municipality now contends, the Commission has escaped its legal responsibility for its own negligence, on a mere question of misjoinder of parties; the plaintiffs' action is wholly defeated and this Court rendered powerless to correct the error because the Commission is not before us as a party to this appeal.

I am glad therefore, convinced, as I am, that the judgment of the Appeal Court ought not to be affirmed on the question of the negligence of the Commission, that a careful comparison of the statutory provisions under which the Public Utilities Commission of the City of Chatham was constituted with those upon which *Young* v. *Town of Gravenhurst* (1) was decided, has firmly assured me that the Appeal Court was fully justified in holding that the Commission is the statutory agent of the respondent municipality and that any negligence, of which it may be guilty, is properly chargeable against the municipality as its principal. The principle affirmed in *Young* v. *Gravenhurst* (1) has indeed been so consistently followed by the courts of Ontario in so many other cases that it may well be said to be the established law of that province.

It is obviously unnecessary, in the view I take of the case, to discuss the question as to whether there was any negligence on the part of the fire department either in the nature of non-feasance or misfeasance, in waiting upon the Commission to shut off the power before taking any

(1) (1911) 24 Ont. L.R. 467.

1934

STEVENS-WILLSON v. CITY OF CHATHAM.

Crocket J.

active steps, other than the laying out of its hose, to prevent the spread of the fire. I shall only say that it seems to me in the circumstances that the fire department did the natural and prudent thing in first requesting the substation to shut off the current rather than subjecting any of its men to the danger which it appeared might attend any attempt to cut the wires at the pole.

In my opinion, this appeal should be allowed with costs throughout and the action referred to the local master in accordance with the terms of the agreement between counsel for the determination of the quantum of the damage sustained by the plaintiffs as a result of the failure of the Commission to promptly shut off the power when the operator was first requested to do so by the fire department.

Appeal dismissed with costs.

Solicitor for the appellants: *A. L. Hanna.*
Solicitor for the respondent: *J. A. McNevin.*

1934

* Mar. 9, 12.
* April 24.

HENRY GREISMAN (DEFENDANT AND THIRD PARTY) ..... APPELLANT;

AND

DAVID GILLINGHAM (PLAINTIFF).... RESPONDENT;

AND

SHIFFER-HILLMAN CLOTHING MANUFACTURING CO. (DEFENDANT AND THIRD PARTY)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Defective condition of elevator in building—Injury to person using it while cleaning out tenant's premises in building—Liability of owner of building—Licensee with an interest—Contributory negligence, whether bar to recovery—Joinder of defendants—Costs.

G. had leased a floor in his building to S. H. Co. The lease required the lessees to keep the premises clean. On the last day of the lease plaintiff was cleaning up for S. H. Co. While taking refuse on to, as he thought, a freight elevator, he fell down the elevator shaft and was injured. The elevator had previously been standing there with the safety gate up, in which case mechanical devices were supposed to lock the machinery so that the elevator could not be moved until the gate was lowered, but in some way the elevator had been moved up to the next floor, the gate remaining raised. Plaintiff sued for damages. The jury found that the elevator (its interlocking safety device on that floor) was in a defective condition, causing the acci-

*PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Hughes JJ.

1934

GREISMAN v. GILLINGHAM.

dent; that this condition could have been discovered by the exercise of reasonable care prior to the accident, by G., but not by S. H. Co.; that plaintiff could by the exercise of reasonable care have avoided the accident, his degree of fault being 10% of the whole fault. The trial judge gave judgment against G. for 90% of plaintiff's damages as found by the jury, with costs, dismissed the action as against S. H. Co. without costs, and dismissed the action as against certain other defendants (by whom plaintiff had alternatively alleged that he was employed) with costs, but directed that plaintiff should recover these costs from G. The Court of Appeal for Ontario affirmed the judgment, subject to disallowing plaintiff recovery of the costs last mentioned, and subject to a deduction in an item of damages.

Held: The judgment of the Court of Appeal aforesaid ([1933] O.R. 543) should be affirmed.

Plaintiff was a licensee with an interest; the work at which he was employed was in pursuance of the lease which required removal of the refuse.

Holmes v. *North Eastern Ry. Co.*, L.R. 4 Ex. 254; *Wright* v. *London & North Western Ry. Co.*, 1 Q.B.D. 252; *Mersey Docks & Harbour Board* v. *Proctor*, [1923] A.C. 253 at 259, 272; *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K.B. 746, and other cases, cited.

There was ample evidence to support the jury's findings that the elevator was in a defective condition and that such condition could have been discovered by the exercise of reasonable care.

Plaintiff's contributory negligence was not a bar to his right to recover, under the law in Ontario.

As the Court of Appeal varied the judgment at trial, this Court should not interfere with its disposition of costs (*Donald Campbell & Co.* v. *Pollak*, [1927] A.C. 732).

The costs (in the appeals) payable by plaintiff to S. H. Co. should not be added to his judgment against G.

APPEAL by the defendant Greisman from the judgment of the Court of Appeal for Ontario (1) affirming in the result, subject to certain variations, the judgment of Wright, J. (1).

The action was brought against Greisman, Shiffer-Hillman Clothing Manufacturing Co. (a partnership) and certain other defendants, and was for damages for personal injuries suffered by the plaintiff (by reason, so it was alleged, of negligence of defendants) when he fell down an elevator shaft in the building owned by the defendant Greisman, while employed in cleaning up for the Shiffer-Hillman Clothing Manufacturing Co. the latter's premises in the building, which premises they had leased from Greisman under a lease which was terminating.

The action was tried by Wright, J., with a jury and the findings of the jury on questions submitted to them are set out in the judgment now reported. By the judgment

(1) [1933] O.R. 543; [1933] 3 D.L.R. 134.

at trial, the plaintiff recovered against the defendant Greisman $8,856.63 and his costs of the action, the plaintiff's claim as against Shiffer-Hillman Clothing Manufacturing Co. was dismissed without costs, and the plaintiff's claim as against the other defendants (by whom plaintiff had alternatively alleged that he was employed) was dismissed with costs, but costs paid by plaintiff to these defendants were to be recovered by plaintiff against the defendant Greisman; third party proceedings between the defendant Greisman and the defendant Shiffer-Hillman Clothing Manufacturing Co. were dismissed without costs.

By the judgment of the Court of Appeal, the amount to be recovered by plaintiff against the defendant Greisman ($8,856.63 in the judgment at trial) was reduced to $8,406.68, and plaintiff was not allowed to recover from the defendant Greisman the costs paid to the other defendants as aforesaid; otherwise the judgment at trial was not disturbed.

The defendant Greisman appealed to the Supreme Court of Canada from the judgment in favour of the plaintiff against him; and alternatively he claimed indemnity against the defendant Shiffer-Hillman Clothing Manufacturing Co., as claimed in third party proceedings, or for contribution from the latter pursuant to the provisions of the *Negligence Act* (Ont., 1930, c. 27). The plaintiff cross-appealed against the variations made by the Court of Appeal in the judgment at trial and further contended that, should the defendant Greisman be held not liable, the defendant Shiffer-Hillman Clothing Manufacturing Co. should be found liable to plaintiff.

The material facts of the case are sufficiently stated in the judgment now reported.

R. H. Greer, K.C. for the appellant.

N. A. Keys, K.C. and *A. J. Doane* for the respondent (plaintiff) Gillingham.

I. F. Hellmuth, K.C. and *J. Singer* for the respondent Shiffer-Hillman Clothing Manufacturing Co.

The judgment of the court was delivered by

HUGHES J.—This action was brought by David Gillingham and his wife, Beatrice May Gillingham, to recover damages for injuries sustained by David Gillingham on the 29th of April, 1930, when the former fell into an elevator

1934

GREISMAN v. GILLINGHAM.

Hughes J.

shaft at the fifth floor of the Spadina Building, in the City of Toronto, owned by Henry Greisman, one of the defendants. The claim of Beatrice May Gillingham was abandoned at the trial.

For a short time before the accident, the plaintiff had been in the employ of the Balfour Building Company, a partnership composed of the last five defendants. At the time of the accident, the fifth floor of the Spadina Building was still under lease from Henry Greisman to Shiffer-Hillman Clothing Manufacturing Company, a partnership composed of two of the owners of the Balfour Building Company. The lease provided, among other things, that the lessees would not allow any refuse, garbage or other loose or objectionable material to accumulate in the demised premises, and that they would at all times keep the premises in a clean and wholesome condition. The lease further provided that the lessees, their clerks, employees, servants and agents, should have the use in common with the lessor, his tenants and others entitled thereto, of the passenger and freight elevators in the building giving access to the fifth floor between the hours of 7.45 a.m. and 6.15 p.m. on all ordinary working days but not including Sundays and holidays, and that the lessees and their clerks, employees, servants and agents and all others permitted to use such elevators should do so at their own risk and that the lessor should under no circumstances be held responsible for any damage or injury happening to any person by such elevators or their appurtenances or by the operation thereof, whether such damage or injury happened by reason of any act or omission of the lessor, his clerks, employees, servants or agents. The accident happened on an ordinary working day between one and two o'clock in the afternoon.

On the morning of the day of the accident, Benjamin Hillman requested Cecil Hayes, superintendent of the Balfour Building Company, to procure some men to clean up the fifth floor of the Spadina Building. Hayes took over the plaintiff and Charles Flick, both employees of the Balfour Building Company. The freight elevator in question was at the southeast corner of the building. There were two fire doors on each floor at the elevator entrance. On each floor there was also a safety gate. This gate could be raised and, when raised, mechanical devices were sup-

posed to lock the machinery so that the elevator could not be moved until the gate was lowered. It appears, however, that the mechanical catches at times became worn, possibly due to pulling of the propelling cables from other floors. There was evidence that some of these catches had been out of order previously and that repairs had been made in December and April. Just previous to the accident in question, the elevator was standing at the fifth floor and the gate was up. Gillingham was, as he thought, in the act of carrying or pulling a bundle of refuse on to the elevator, but in some way the elevator had moved up to the sixth floor, although the gate on the fifth floor remained raised, as a result of which, Gillingham stepped into space, fell down the elevator shaft and was seriously injured.

The action was tried before the late Mr. Justice Wright and a jury. The following are the questions and answers of the jury:

1. Was the elevator in question in a defective condition at the time of the accident? A. Yes.

2. If so, state wherein it was defective? A. The interlocking safety device on fifth floor was in a defective condition.

3. Could the defective condition of the elevator have been discovered by the exercise of reasonable care prior to the accident? (*a*) By the defendant Greisman, the owner of the building? A. Yes. (*b*) By the defendants Shiffer-Hillman Clothing Co.? A. No.

4. Was the accident to the plaintiff caused by the defective condition of the elevator? A. Yes.

5. If your answer to number 4 is yes, then state if the plaintiff could by the exercise of reasonable care have avoided the accident. A. Yes.

6. If your answer to 5 is yes, then state what the plaintiff could and should have done which would have avoided the accident. A. By being a little more careful in looking before stepping, presumably, on the elevator hoist floor.

7. At what sum do you assess the plaintiff's damages?—A. See below. $9,840.75.

8. If your answer to number 5 is yes and to number 4 is also yes, then do you find it practicable to apportion the respective degrees of fault as between the plaintiff and the parties responsible for the condition of the elevator? A. Yes.

9. If your answer to number 8 is yes, then state the respective degrees of fault. A. The plaintiff 10 per cent. The defendants 90 per cent.

Re Question No. 7. Damages $9,840.75.

Out of pocket expenses—As per expenses (Exhibit 3).....		$1,840 75
Subject to the recommendation that Dr. Wilson and Dr. McCormack be approached to reduce their bills 50%.		
Damages for wages up to date and for wife.....	$2,000	
Compensation	5,000	7,000 00
Pain and suffering		1,000 00
		$9,840 75

1934

GREISMAN v. GILLINGHAM.

Hughes J.

The learned trial judge reserved judgment and later gave judgment against Henry Greisman and dismissed the action against Shiffer-Hillman Clothing Manufacturing Company without costs. At the conclusion of the plaintiff's case, the learned trial judge had dismissed the action against the last five defendants with costs and in his judgment he directed that the plaintiff should recover these costs from Henry Greisman.

The Court of Appeal for Ontario deducted $500 from the allowance of $2,000 made by the jury as "damages for wages up to date and for wife," answer No. 9, upon the ground that the jury had apparently included something for the wife, although her claim had been abandoned. The Court of Appeal further held that Greisman should not be liable for the costs of the last five defendants as he was not responsible for the joining of them in the action. In other respects the Court of Appeal dismissed the appeal with costs.

From this judgment the defendant, Henry Greisman, appealed to this Court, and the plaintiff cross-appealed in respect of the changes made by the Court of Appeal in the judgment of the learned trial judge and asked judgment against Shiffer-Hillman Clothing Manufacturing Company if Henry Greisman should not be considered liable by this Court.

It was contended before us by counsel for the appellant that the respondent, David Gillingham, at the time of the accident, was a bare licensee and not an invitee as far as the appellant was concerned.

Holmes v. *The North Eastern Railway Co.* (1). In this case it was the habit to unload coal wagons at the defendants' station at C. by shunting them and tipping the coal into cells; it was also the practice for the consignees of the coal, or their servants, to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons. The plaintiff was consignee of a coal wagon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the station master, he went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon, and descended on to the flagged path. The

(1) (1869) L.R. 4 Ex. 254.

flag he stepped on gave way, and he fell into one of the cells and was injured.

It was held, that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged, with the consent and invitation of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition.

Channell B., at page 258, said:

> I quite concur in the rule laid down by the cases, that where a person is a mere licensee he has no cause of action on account of dangers existing in the place he is permitted to enter. Now in one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word *mere* has a very qualifying operation. * * * In the delivery and receipt of the coal there was a common interest in them and in the plaintiff, since they were bound to deliver it; and this prevents the case from being that of one who is a mere licensee.

Wright v. *The London & North Western Railway Co.* (1). In this case the plaintiff sent a heifer, which was put into a horse-box, by defendants' railway, to their station at P. On the arrival of the train at the station there were only two porters available and so the plaintiff assisted in shunting the horse-box, and while he was so assisting he was run against and injured by a train which was negligently allowed by the defendants' servants to come out of a siding. There was evidence that the station-master knew that the plaintiff was assisting in the shunting.

It was held that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the premises with their consent for the purpose of expediting the delivery of his own goods and the defendants were liable to him for the negligence of their servants. Lord Coleridge, C.J., at page 255 refers with approval to the statement of Channell B., above quoted, and goes on to state that the *Holmes* case (2) is one of the greatest authority.

Mersey Docks & Harbour Board v. *Proctor* (3). In this case the defendants owned two floating docks called the East and West Floats. A boiler maker, who was working for a contractor on a ship lying in the East Float, left the ship at 4.45 on a December afternoon to go to the latrine and was never seen alive again, His body was found in the West Float opposite the point where there

(1) (1876) 1 Q.B.D. 252. (2) (1869) L.R. 4. Ex. 254.
(3) [1923] A.C. 253.

1934

GREISMAN v. GILLINGHAM.

Hughes J.

was a gap in the line of chains, the chain having been taken down for the convenience of some men working on the quay, and having been left down for several days.

It was held by Viscount Cave, L.C., Lord Sumner and Lord Carson; Lord Shaw of Dunfermline and Lord Buckmaster dissenting; that in the circumstances, the failure of the defendants to keep the chain in position was not a breach of any duty owed by them to the deceased and that the action failed.

Viscount Cave, L.C., said at p. 259:

The respondent's case is rested on the well-established principle that where a landowner invites or induces a person to go upon his land, not as a bare licensee but for some purpose in which both have an interest, he must make reasonable provision for that person's safety. This rule was clearly stated in the judgment of Willes J. in *Indermaur* v. *Dames* (1), where that learned judge summed up the law as follows:—

"The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

In the present case it is not disputed that the deceased man came within the class described by Willes J. He came upon the dock property and passed to and from the vessel where he was engaged upon business which concerned both the dock company and himself; and he was entitled, subject to using reasonable care on his part, to expect that the dock company should use reasonable care to protect him from any unusual danger known to the company and not known to or reasonably to be expected by him. If so, the questions of fact which arise or may arise are three—namely, (1) Were the appellants guilty of negligence or want of reasonable care for the safety of the deceased? (2) If so, was their negligence or want of care the cause of his death? and (3) Was there any contributory negligence or want of reasonable care on his part for his own safety?

Lord Sumner, at page 272, said:

The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none. The common interest here is that ships in the docks should, when necessary, be able to employ boilermakers on board of them. In the other case, the licensee has an individual interest in being allowed to pass, while the licensor, the leave being gratuitous, has no interest in the matter at all, so long as the licensee does not get into trouble or into mischief.

(1) (1866) L.R. 1 C.P. 274, 288; affirmed L.R. 2 C.P. 311.

1934

GREISMAN v. GILLINGHAM.

Hughes J.

Fairman v. *Perpetual Investment Building Society* (1). In this case, the defendants owned a block of flats which they let to various tenants, the defendants keeping possession and control of the common staircase giving access to the flats. The stairs were made of cement reinforced by iron bars embedded in the cement and running along the whole length of the tread. Owing to the wearing away of the cement, in some cases irregular depressions were scooped out behind the iron bars. The plaintiff, who lodged with her sister in a flat on the fourth floor, of which the sister's husband was tenant, whilst descending the stairs, caught her heel in a depression so formed, and fell and was injured.

It was held in the House of Lords that the only duty owed by the defendants to the plaintiff was not to expose her to a concealed trap.

Lord Atkinson said at page 86:

The plaintiff, being only a licensee, was therefore bound to take the stairs as she found them, but the landlord was on his side bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, or ought to have known. He owed a duty to her not to lay a trap for her. But even if the plaintiff was in the position of an invitee of the defendants, her rights and duties in that character would be those described and measured by the well-known passage from Willes J.'s judgment in *Indermaur* v. *Dames* (2).

Lord Wrenbury at page 95 said:

It is well to define at the outset what, in my judgment, is the relation between the plaintiff and the landlord in respect of which she can sue. There was no contractual relation. She was a person who, as between herself and the landlord, was entitled to use the landlord's staircase, because she was there rightly for the purpose of gaining access to premises which he had demised to a tenant with an implied right of use by the tenant and all persons lawfully resorting to the tenant's premises. She was, I think, the invitee of the tenant, and, in consequence, the licensee of the landlord.

The position as between the owner of premises and a licensee is that permission is given to come upon the premises, such as they are, and the licensee must take them as they are. The owner of dilapidated premises may demise them as they are: *Cavalier* v. *Pope* (3): "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house." Per Erle C.J.: *Robbins* v. *Jones* (4), approved by Lord Macnaghten in *Cavalier* v. *Pope* (3). The licensee must take the premises as he finds them; but this is apart from and subject to that which follows as to concealed dangers. The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to

(1) [1923] A.C. 74.

(2) (1866) L.R. 1 C.P. 274, 288.

(3) [1906] A.C. 428, at 430.

(4) (1863) 15 C.B. (N.S.) 221, 240.

1934

GREISMAN v. GILLINGHAM.

Hughes J.

have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable.

In *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1), a boy four years of age was killed by machinery belonging to a colliery company. The field was surrounded by a hedge which was inadequate to keep out the public and it was known to the colliery company that it was used as a playground by young children. Lord Hailsham, Lord Chancellor, page 365, said:

> In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

The Court of Appeal of Ontario considered that the case most nearly analogous was *Sutcliffe* v. *Clients Investment Company* (2). In that case, the owners of a flat let it to a tenant and agreed to contribute to the cost of decorating and repairing it at the commencement of the term. The tenant employed a firm of builders to do the work. The firm's advertisement board was fixed to a balcony with a balustrade projecting from the front wall of the flat. The judge at the trial found that the balcony was not part of the demised premises, but was part of the exterior of the premises which the lessors were bound to repair. The jury found that the balcony was dangerous and that the lessors knew or ought to have known this. When the work was completed, the firm's foreman went on to the balcony to remove the advertising board. The balustrade gave way and the man was killed. It was held by the Court of Appeal that the widow was entitled to recover, as the plaintiff was more than a bare licensee and was at least a licensee with an interest, with the same right as an invitee, and that there was evidence to support the finding of the jury that the defendants ought to have known the balcony was dangerous. Banks, L.J., said that the responsibility of the occupier of premises towards a bare licensee was merely not to set a trap for him, and that, apart from dangers of which the occupier knows and the licensee does not know, the licensee must take the premises as he finds

(1) [1929] A.C. 358. (2) [1924] 2 K.B. 746.

them. He doubted if Lord Atkinson or Lord Wrenbury in the *Fairman* case (1) intended to make any alteration in the law. Scrutton, L.J., also considered that the plaintiff was a licensee with an interest and referred to the judgment of Hamilton, L.J., in *Latham* v. *Johnson* (2). See also *Hillen* v. *I.C.I. (Alkali) Ltd.* (3).

As already stated, the lease provided that the lessees would not allow any ashes, refuse, garbage, or other loose or objectionable material to accumulate in the premises, and would at all times keep the premises in a clean and wholesome condition. On the morning of the accident, Cecil Hayes, Superintendent of the Balfour Building Company, was summoned by Benjamin Hillman who directed Hayes to send all the men available to clean up the premises on the fifth floor of the Spadina Building. Hayes had only two men available, the plaintiff, and one, Flick, and he took them over and shewed them their duties to clean up and take the debris and rubbish downstairs into the stokehole of the Balfour Building. The work had to be finished that day.

The plaintiff testified that he was told by Hayes to clear the garbage up and get the room cleared up as the lease was up that day and that the floor had to be cleared up. Before the accident, he had taken some of the loose material down and thrown it into the Balfour Building.

Charles Flick testified that immediately before the accident there was a lot of garbage there, old clothes, coats, pants, lumber, partitions, boxes and cardboards. There was a lot of stuff left there that had to be cleaned up.

It seems clear, therefore, that it would have been a breach of the lease if the lessees had left the debris and rubbish, referred to, on the premises subsequent to the termination of the lease. The work, therefore, must have been done in pursuance of the lease, and I am of opinion that the plaintiff was a licensee with an interest, as found by the Court of Appeal.

As to the condition of the elevator, Wilfrid Howson said that sometimes the elevator worked properly before the accident and sometimes it operated with the gates up. He thought that a change was made as a result of complaints which he made.

(1) [1923] A.C. 74. (2) [1913] 1 K.B. 398, at 412.
(3) (1933) 103 L.J. K.B. 163.

1934

GREISMAN v. GILLINGHAM.

Hughes J.

Jack Rogers testified that the gates, especially the first floor gate, would remain up after the elevator had moved away. He had last observed the condition six or seven days before the accident.

John O'Driscoll, a police constable, testified that within an hour or two after the accident he saw a government inspector making tests and the elevator would move up or down with the gates raised on the fifth floor.

J. W. Dayes testified that on December 10th previously, he found the interlocks out of order and repaired them. He reported to Henry Greisman's superintendent. He did not inspect again until the day following the accident, when he found the interlocks again out of order, especially on the fifth floor. He found that the constant pulling by a person at another floor, who wanted to get the elevator, had worn the lock to such an extent that the key would turn around in its keeper and could be forced right around. On April 30th, he and Superintendent Norton operated the elevator with the gate up. That had been the condition on one or more of the floors on December 10th previously, and Dayes had given Norton a blank recommendation to have all put in shape. It was just a case of wear and tear. On the day following the accident, the lock on the fifth floor was worn very considerably. He said that there would not have been any difficulty in discovering the condition if the lock had been inspected regularly. It should have been replaced as soon as it gave evidence of wear and tear.

Arthur Norton, Superintendent, testified that he had inspected the elevator five days before and that it was in perfect working order. He produced an account from Otis-Fensom Elevator Company Limited for adjustments on freight elevator as of February 11th, 1930.

There was therefore ample evidence to support the finding of the jury that the elevator was in a defective condition and that the defective condition could have been discovered by the exercise of reasonable care.

It was also contended in behalf of the appellant, Henry Greisman, that the plaintiff was not entitled to recover because there was negligence upon his part; but we agree with the Court of Appeal that the contributory negligence of the plaintiff was not a bar to his right to recovery in the Province of Ontario.

The appeal of Henry Greisman should, therefore, be dismissed with costs.

The plaintiff cross-appealed against the deduction by the Court of Appeal of $500 above referred to, and urged that the wages alone would have amounted to more than $1,500, the amount allowed by the Court of Appeal in lieu of the sum of $2,000 allowed by the jury as "damages for wages up to date and for wife". The jury, however, did not make any separate finding of the amount of the wages, and there was no assurance that the plaintiff would have received steady employment at the same rate of wages if he had not been injured.

The plaintiff cross-appealed also against that part of the judgment of the Court of Appeal which varied the judgment of the learned trial judge which required the appellant, Henry Greisman, to pay to the plaintiff the costs of the last five defendants who constituted the Balfour Building Company.

As the Court of Appeal varied the judgment of the learned trial judge, this Court should not interfere with the disposition of costs made by the Court of Appeal. *Donald Campbell & Company & Pollak* (1).

The cross-appeal will, therefore, be dismissed without costs.

The appeal of the respondent against Shiffer-Hillman Clothing Manufacturing Company will be dismissed, and the third party proceedings taken by the appellant, Henry Greisman, against Shiffer-Hillman Clothing Manufacturing Company, will be dismissed. Shiffer-Hillman Clothing Manufacturing Company will be entitled to one set of costs in this Court, of which the respondent, David Gillingham, should pay three-quarters and the appellant, Henry Greisman, one-quarter.

The only question remaining is whether the costs payable by the respondent to Shiffer-Hillman Clothing Manufacturing Company should be added to the judgment of the respondent against the appellant, Henry Greisman. In my opinion, they should not be added.

Fraser v. *Payne* (2). *Besterman* v. *British Motor Cab Co. Ltd.* (3).

It may have been reasonable for the respondent to join Henry Greisman and Shiffer-Hillman Clothing Manufac-

(1) [1927] A.C. 732. (2) (1926) 58 Ont. L.R. 361.
(3) [1914] 3 K.B. 181.

1934
GREISMAN
v.
GILLINGHAM.
Hughes J.

turing Company in the original action, but the jury found that the defective condition of the elevator could not have been discovered by the exercise of reasonable care on the part of Shiffer-Hillman Clothing Manufacturing Company, and it cannot very well be said to have been reasonable to continue the joinder of Shiffer-Hillman Clothing Manufacturing Company to this Court, particularly after the finding of the jury had been affirmed by the Court of Appeal.

Appeal dismissed with costs; cross-appeal dismissed.

Solicitors for the appellant: *Smith, Rae & Greer.*

Solicitors for the respondent Gillingham: *Butters & Doane.*

Solicitors for the respondent Shiffer-Hillman Clothing Manufacturing Co.: *Singer & Kert.*

1934
*Feb. 15.
*Mar. 6.

ANDERSON, GREENE & COMPANY, LTD. (DEFENDANT) ..... APPELLANT;

AND

WILLIAM S. KICKLEY (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Contract—Dispute as to nature of agreement—Documents—Course of dealing—Evidence—Reversal of findings of trial judge—Trust—Moneys impressed with trust—Implication—Repudiation—Failure of object of trust—Responsibility—Resulting trust.

Under an arrangement, the nature of which in certain respects was in dispute, respondent delivered to appellants certain certificates of shares belonging to him in G. Co. Under the arrangement, appellants sold the shares and, after the sale of them, remained accountable for $2,250 as part of the proceeds. Respondent sued appellants for said sum. His action was dismissed at trial, on the ground that the certificates of shares were delivered by respondent, who was president of G. Co., to appellants as the property of G. Co., having been lent by respondent to G. Co. for that purpose, to carry out a G. Co. transaction, and that appellants were accountable to G. Co. only (against which company they had an alleged, but disputed, counterclaim, not connected with the transaction now in question). The Manitoba Court of Appeal reversed the judgment, holding that respondent personally held the shares, personally dealt with appellants, and was entitled to recover from them.

Held: The judgment of the Court of Appeal should be affirmed.

From the documents, the course of dealing, and the broad features of the situation as disclosed by the evidence (to which matters, it was held, in view of his reasons, the trial judge had failed, in respect of the

*PRESENT:—Duff C.J. and Rinfret, Lamont, Crocket and Hughes JJ.

cardinal issues of the case, to give sufficient weight), the dealings between respondent and appellants were with respondent personally. Even assuming (as appellants contended) that the moneys for which appellants were accountable were to be paid to respondent as president of G. Co., in other words, to G. Co., to be applied by it in payment of shares to be issued to respondent to replace respondent's shares delivered to appellants, then such moneys, being moneys to be devoted to the payment of the purchase price of shares to be issued to respondent, were impressed with a trust in favour of respondent; and the implication arose (applying the principles enunciated in *The Moorcock*, 14 P.D. 64, at 68, and *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, at 491) that it would be a violation of respondent's rights, a breach of the trust under which the moneys were held, to apply them in payment of any claim of appellants against G. Co., arising, at all events, out of matters not connected with the transaction in question. Appellants, by their long retention of these moneys under a claim of right to apply them against their alleged counterclaim, had repudiated the trust. Also, by reason of appellants' wrongful retention, the trust had become impossible of fulfilment because, before the trial, G. Co. went into liquidation. The moneys which, under the arrangement, were to be paid to respondent, whether as president of G. Co. or not, could no longer be applied in execution of the trust. The legal result was that, the object of the original trust having failed in consequence of repudiation by appellants and present impossibility of performance, a resulting trust attached to these proceeds of the sale of respondent's property, in favour of respondent.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba which, reversing the judgment of Adamson J., held that the plaintiff was entitled to recover from the defendant the sum of $2,250 as being the balance owing for shares of stock in the Gem Lake Mines Ltd. placed by the plaintiff in the hands of the defendant under an arrangement, the nature of which in certain respects was in dispute. The material facts of the case and the questions in dispute are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

A. M. S. Ross K.C. for the appellant.

J. A. Ritchie K.C. for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The appellants are brokers in Winnipeg. They appeal from a judgment against them, pronounced by the Manitoba Court of Appeal, in an action brought by the respondent, claiming $2,250 as moneys payable to him by them, under an arrangement by which he put in their hands certain shares of the Gem Lake Mining Company;

1934

ANDERSON, GREENE & CO. LTD. v. KICKLEY.

Duff C.J.

one term of the arrangement being that 15 cents per share of the proceeds received from the sale of the shares should be paid to the respondent. The Court of Appeal upheld the claim, reversing the judgment of the trial judge, who had dismissed the action.

It is not open to question on the evidence that the shares placed by the respondent in the hands of the appellants were the property of the respondent. It is not disputed that the whole of these shares (75,000), so placed in the appellants' hands, were sold by them; or that the appellants have not paid the sum of $2,250, for which, in July, 1930, and in November, 1930, they admitted they were accountable, as part of the proceeds of such sales.

In their defence, the appellants contented themselves with what must now be treated as a denial of the allegations in the statement of claim; although, strictly read, the defence would involve an admission of the primary facts alleged with the single exception of an averment that the appellants held the money in their hands in trust for the respondent.

The defence to which the trial judge gave effect is not hinted at. That defence was this: that the shares—(75,000)—delivered to the appellants, were the property of the Gem Lake Mining Company; and were deleivered by the respondent in his capacity as the president of that Company; that they were accountable for the proceeds of sales to the Company only; and that as against the Company they had a counterclaim. The view upon which the learned trial judge acted was that the shares were the property of the Mining Company as well as the proceeds of the sale of them.

The proper inferences from the documents in evidence and the admitted facts appear to be that the Court of Appeal rightly reversed the judgment of the trial judge.

It will be convenient, at the outset, to outline the facts as they are admitted, or indubitably established, by the evidence. As early as January, 1930, the people interested in the Mining Company, which included the two members of the appellant firm (an incorporated company) and the respondent, were concerned to find that the market for the Company's shares was very dull. While they had hoped to sell them at not less than 20 cents a share, the shares were then offering at a price as low as 11 cents, in considerable quantities.

In the latter part of February and the beginning of March, the respondent and Mr. Anderson, of the appellant firm, in the absence of the other directors, decided to secure the services of one Lott, a share salesman, in order to endeavour, as the witnesses say, "to make a market" for the Company's shares. It was accordingly arranged with Lott that, if he would devote himself to procuring purchasers of the Company's shares through the appellants as brokers, the Company would undertake to "protect" him to the extent of 75,000 shares to be paid for by him at 15 cents a share, the shares to be allotted and delivered upon payment. The two directors had no authority to bind the Company to this arrangement; but, as it appeared to be necessary in the common interest, they felt assured that their action would be approved and ratified; as it was.

We pause to point out the precise character of this arrangement with Lott. It is evidenced by several documents; the first in which it is explicitly recognized being this letter of the 19th of March, 1930,

March 19, 1930.

Messrs. Anderson, Greene & Company, Limited,
Notre Dame Avenue,
Winnipeg, Manitoba.

Gentlemen,—This is to advise that we are protecting Mr. Lloyd Lott up to seventy-five thousand (75,000) shares of Gem Lake Mines Limited stock at fifteen cents (15c.).

Yours very truly,
GEM LAKE MINES LIMITED.
"W. S. KICKLEY"
President.

The arrangement was ratified at a meeting of the Board of Directors of the Mining Company, held at the office of the appellants on the 10th day of April, 1930, the respondent and Mr. Anderson being present, as well as two other directors, Mr. Donaldson and Mr. Roe. The arrangement which had been made by the respondent and Mr. Anderson, without the concurrence of the other directors, who, as already mentioned, were then absent from Winnipeg, was, as the minutes disclose, reported to the meeting by the respondent thus:

Accordingly on the 3rd of March, 1930, an arrangement was made by the President and Mr. Anderson with R. E. Lloyd Lott of Winnipeg under which Mr. Lott undertook if given a position, to create a market provided the Company would make delivery to him of 75,000 shares of stock on payment by him to the Company of 15 cents per share.

1934

ANDERSON, GREENE & Co. LTD. v. KICKLEY.

Duff C.J.

A resolution was passed which is recorded in the minutes in these terms:

> On motion of Mr. Roe seconded by Mr. Donaldson it was unanimously resolved that 75,000 shares be allotted and delivered to R. E. Lloyd Lott or his nominee or nominees on payment into the treasury of 15 cents per share.

It is most important to notice and to emphasize the fact that the arrangement with Lott, to which Mr. Anderson was a party, as reported by the respondent to the directors, of whom Mr. Anderson was one, was to the effect that Lott was to receive 75,000 shares of stock, on payment by him to the company of 15 cents a share; and that, under the resolution sanctioning the arrangement, allotment and delivery were both to be conditional upon payment.

Then there is this letter in evidence, dated the 17th of November, 1930, from the Mining Company to the appellants:

> November 17, 1930.
>
> Anderson, Greene Company, Limited,
> Winnipeg, Manitoba.
>
> Gentlemen,—This will confirm once more arrangements made by us last winter with R. E. Lloyd Lott where he was to have a call on 75,000 shares at 15 cents and a call on a further amount at 19½.
>
> These arrangements were confirmed at Directors' Meeting and there has been no other arrangement made.
>
> Yours very truly,
> GEM LAKE MINES LIMITED.
> W. S. KICKLEY,
> President.

The arrangement between the Company and Lott in respect of the 75,000 shares, with which alone we are concerned, was that confirmed at the Directors' meeting of the 10th April set forth in the passage quoted above from the minutes. There is no evidence of any authority to the respondent to vary this arrangement by placing the Company's "treasury stock" in the hands of Lott or the appellants before receiving payment for it. The respondent says he had no such authority; and there he is plainly right.

Now, the terms of this arrangement with Lott—the only terms authorized—were never, in fact, carried out. Lott admittedly had no money, and the respondent says that the appellants were unable to furnish the funds necessary to pay for the shares in advance of the sale of them. At all events, the 75,000 shares delivered to the appellants

were the personal property of the respondent, and were delivered by the respondent to the appellants to enable them in turn to make delivery to purchasers. What is most significant is that, in fact, they were not paid for by the appellants on delivery, but, as to the 15 cents a share of the purchase price, were only accounted for after sale on receipt of the purchase money by them. Apart altogether from the oral evidence, the documentary evidence leaves no doubt that this was the invariable course of business and, indeed, that is not disputed.

The appellants' account with the respondent in connection with this transaction is in the appellants' books, and was produced in evidence. The entries are on two pages. On one page there is a series of entries under the caption "Stock received from Mr. W. S. Kickley"; on the second page there are entries under the heading "Account with Mr. W. S. Kickley." These entries show that, on the 12th March, five certificates for 25,000 shares in the aggregate, were received by the appellants. Deliveries were made at various dates down to the 21st of March; and payments to "W. S. Kickley" were made by cheque on succeeding dates. On the 7th of April the appellants had completely accounted to the respondent for his share of the proceeds of the sales between the 12th and 21st of March inclusive. This course of business continued until the end.

The respondent used the term "loan" in describing the transaction between himself and the appellant. The learned trial judge was much impressed by the use of this term, and his judgment largely turns upon it. It is clear enough, however, that the word was used without reflection, and, when the learned trial judge suggested that the transaction was rather in the nature of a sale, the respondent agreed that "sale" would be the better term.

"Sale" does not, however, give a true picture of the transaction as carried out. It is evident that the respondent did not intend to say that the appellants had purchased these shares from him on delivery; but that they were placed in their hands to enable them to fulfill their contracts of sale, and that, out of the proceeds of sales, they were to pay him 15 cents a share. Greene, who is the manager of the appellants, in a letter to which we shall have to refer, describes the arrangement as an "option." It

1934

ANDERSON, GREENE & CO. LTD. v. KICKLEY.

Duff C.J.

was, in a sense, an option, because it is clear that the appellants were only bound to pay for shares as they were sold, and the purchase money received. From another point of view, the transaction might, in layman's language, be described as a "loan"; since unsold shares would, of course, be returned to the respondent.

Nomenclature is really of no importance. The critical point is that the arrangement between the respondent and the appellants, as evidenced by the conduct of the parties, and the delivery of shares pursuant to it, was, in its essence, inconsistent with the essential terms of the Company's arrangement with Lott. The respondent says that this arrangement was concluded between himself and Greene, a partner and the manager of the appellants; who proposed it with the very object of enabling the appellants to complete sales made by them without being obliged first to pay to the Company the purchase price in order to obtain allotment and delivery of certificates, as the undertaking of the Mining Company required. This view of the nature of the arrangement was accepted by the Court of Appeal. It may be added that the profit, which proved to be a little over $3,000, on the sale of the 75,000 shares, was to be, and was, divided between the appellants and Lott, in the proportion of two-thirds and one-third. It was understood, no doubt, that $11,250 (15 cents a share for 75,000 shares) was to pass into the treasury of the Mining Company from the respondent, as the price of certificates to be delivered to him by the Company, in recoupment for the shares placed in the hands of the appellants by him, or to enable him to provide such shares.

The respondent produces two cheques of $10,000 and $5,000, both of which were paid to the Mining Company, as the Court of Appeal finds, as the price of shares purchased by him to carry out this understanding.

At this point, it is not without interest to consider the position taken by the appellants. They have sold the respondent's shares and received payment for them, and the sum of $2,250, the balance of the purchase money, has been in their hands since July, 1930, when they sent the respondent a statement of account showing that balance due to him. They have refused to pay the respondent, and counsel for the appellant stated explicitly that they

deny liability to the Mining Company. They have retained this money in their hands. Their excuse for refusing to pay the Mining Company is based on a claim against it arising out of matters which occurred after the sum of $2,250 became payable, and which, the evidence seems to show, has little substance.

Thus, from the respondent's point of view, he delivered his shares under this arrangement, by which Lott and the appellants were to divide the profits over 15 cents a share, and 15 cents a share was to be paid to him out of the proceeds of his shares sold by the appellants; and to this day he has received neither money nor shares. The appellants have refused to pay him his share of the proceeds, and they have refused to pay it to the Company as the price of shares to be allotted to him by the Company. The appellants have kept both shares and money; the respondent, having given up his shares, has received neither shares nor money in return.

It is admitted by the appellants that it was one of the terms of the arrangement between the parties that the 15 cents a share, for which, after the division of profits between themselves and Lott, they would be accountable, was to be paid to the respondent. The appellants contend it was to be paid to the respondent only in his character as president of the Company; in other words, it was to be paid to the Company. The respondent said it was to be paid to him personally, as part of the proceeds of the sale of shares which were his property, and which had been sold by the appellants under the arrangement with him already indicated.

The learned trial judge has found, as already mentioned, that the shares delivered by the appellants were the shares of the Company, that is to say, shares "loaned" by the respondent to the Company for the purpose of enabling the Company to give effect to their agreement to protect Lott; and he held, notwithstanding the evidence of the respondent and of the documents, that the moneys paid and to be paid to the respondent were paid and to be paid to him for the Mining Company. These two findings can be most conveniently discussed together.

Ex facie, the dealings between the respondent and the appellants were dealings with the respondent personally.

1934

ANDERSON, GREENE & CO. LTD. v. KICKLEY.

Duff C.J.

We have already mentioned the account kept by the appellants. The first part of the account shows a list of share certificates received from "Mr. W. S. Kickley". These share certificates admittedly were "street certificates" in the personal possession of the respondent, and his own private property. The other part of the account headed "Account with Mr. W. S. Kickley" shows a list of cheques. In this account "Mr. W. S. Kickley" is charged with these cheques. Each of the cheques is payable to "W. S. Kickley". Each of them was deposited in the respondent's own private banking account, as the appellants must have known. It should be observed, in passing, that the Mining Company had a banking account of its own, into which the sum of $10,000 was paid to the Company by the respondent by cheque for the purchase of shares on the 29th of March. The learned trial judge says that the Company had no authorized banking account, treating that, apparently, as an explanation of the fact that the respondent had paid these moneys into his own personal account. But the truth is that there was an account with the Bank of Toronto during all this time, and there is not the slightest evidence to show that the account was not authorized. In point of fact, Mr. Anderson, a member of the appellants' firm, countersigned cheques drawn upon it.

Then, for each lot of share certificates delivered by the respondent to the appellants, there is a receipt which, in every case but one, is addressed to "Mr. W. S. Kickley" personally. Again, there is an account of the 29th of July delivered to the respondent by the appellants in response, as the respondent says, to a request by him, in which there is an acknowledgment of a balance of $2,250 due to "Mr. W. S. Kickley" in respect of the "purchase" of these 75,000 shares. At this date, it should be noted, the shares had all been disposed of, and the completed transaction might, very naturally, be treated by a book-keeper as a purchase. Then, there is the latter of November 20, 1930, written by Mr. Greene, the manager of the appellants, and addressed to "Mr. W. S. Kickley" in which there appears this sentence:

> Reference our conversation we beg to state that at the present time we owe you for 15,000 shares of Gem Lake Mines Ltd. at 15 cents, a total of $2,250 in relation to our option.

Comment perhaps naturally arises from the use of the term "option". That has already been sufficiently discussed.

On the face of it, this letter affords substantial corroboration of the respondent's account of the arrangement.

Turning for a moment to the finding by the learned trial judge that the certificates received by the appellants from the respondent had been lent by the respondent to the Mining Company, and, as the property of the Company, delivered by him as its president, to the appellants. First of all, as already observed, the respondent had no authority on behalf of the Company to vary the terms of the arrangement with Lott as set forth in the minutes of the Directors' meeting of the 10th of April. He had no authority from the Company to deliver any shares, the property of the Company, to the appellants, or to anybody, except upon the terms of payment on delivery. The arrangement between him and the appellants, as to the delivery of shares, and as to the terms of payment, as actually carried out, was not authorized by the Company, and he speaks with substantial accuracy when he intimates that, if he had been delivering the Company's shares, he would have been acting illegally.

Then, Mr. Anderson was a director of the Company, was a party to the arrangement with Lott, was present at the Directors' meeting at which the terms of the arrangement were reported and ratified. He and the respondent both knew that the actual course of dealing between the appellants and the respondent was not in compliance with anything authorized by, and that it had not, in fact, been authorized by the Company. That, no doubt, is the reason why the transaction appears in the books of the appellants, and in all the communications between the appellants and the respondent, not as a transaction between the appellants and the Mining Company, but strictly, in its proper form, as a transaction between the appellants and the respondent personally.

Then, there is no trace of authority, disclosed or suggested, under which the respondent could have been empowered to enter into an agreement, as president of the Company, with himself personally, for lending his shares to the Company. It could hardly be suggested that he was making a gift of his shares. If there was not a gift, there must have been some consideration. He had no authority to agree, on the part of the Company, to give to himself any consideration for handing over these shares.

1934

ANDERSON, GREENE & CO. LTD. v. KICKLEY.

Duff C.J.

Turning to the observations of the learned trial judge upon the evidence. First of all, he accepts the explanation of the book-keeper of the appellant firm as to the manner in which the account was kept. We do not think it necessary to dwell upon that, because we agree with the Court of Appeal that the explanation, so-called, does not really meet the point. It does not account for the fact that the account, instead of being kept in the name of the president of the Mining Company, or of W. S. Kickley as president of the Mining Company, was kept in the name of "Mr. W. S. Kickley". This same observation applies to the attempts to explain the receipts, the statement, the letter written by Greene, and, above all, the cheques. The book-keeper says the cheques were made payable to the respondent as president of the Company. In point of fact, they were payable to "W. S. Kickley" with no addition, and we have already pointed out how they were dealt with. The book-keeper says she knows they were payable to the respondent as president because they were given in payment for "treasury shares". It is plain enough that she was speaking with no knowledge of the facts bearing upon the ownership of the shares; and, indeed, with no very precise appreciation of the words she was using. We agree with the Court of Appeal that no great weight can be ascribed to these explanations.

There is another point which influenced the judgment of the learned trial judge. He says, in effect, that the significance of the course of business between the respondent and the appellants, which, as we have seen, on the face of it indicates so plainly that the respondent was considered by all parties as acting for himself, and not for the Company,

is quite nullified as evidence of a debt due him by the defendants by what took place later. Kickley made no claim, or demand, for his money until March, 1932.

His view is: the fact that the respondent made no claim during two years, justifies the inference that he had no belief in the existence of such a claim; or so little belief in it, as to destroy the value of all the documentary evidence pointing to the recognition by the appellants of the validity of the claim.

Now, as we have already observed, at the end of July, an account was delivered showing a debt due to "Mr. W. S.

Kickley" in respect of the "purchase" of these 75,000 shares by the appellants. The respondent says that account was delivered in response to a request from himself.

Again, on the 20th of November, there is the letter from which we have already quoted, which the respondent likewise says was sent at his request; the terms of the letter itself corroborate this statement.

Then there is the evidence of the respondent and of his solicitor, Mr. Hart Green. The respondent says that in the spring of 1931 he instructed Mr. Green to sue the appellants. There is a telegram from Mr. Green to the respondent, at that time, which corroborates this statement. The evidence of Mr. Green, whose veracity is not attacked, is that he received instructions from the respondent to press for payment of the claim; that he interviewed Mr. Anderson and Mr. Greene in respect of it, and that he finally advised the respondent against proceeding, for the reason that, if he recovered judgment, it was improbable that the judgment could be collected.

The learned trial judge deals with this last mentioned evidence in this fashion. He says,

> It is true he communicated with his own solicitor at this time about this claim, but this is not evidence against the defendants. The significant fact is that he did not say anything to the defendant at the time concerning this claim.

Here, in the first place, the learned trial judge quite overlooks the evidence of Mr. Hart Green that he had interviewed the appellants' manager with respect to this claim; and, in the second place, it seems difficult to understand the view that, in answer to the contention that the respondent's forbearance to press his claim established his disbelief in the existence of it, he was not entitled to prove that he had instructed his solicitor to sue. In this matter, we think, with great respect, that the learned trial judge has based conclusions that greatly influenced his decision upon serious misconceptions of the evidence adduced.

At the end of his judgment he reiterates his statement about the absence of any claim. He says,

> It is unfortunate that this claim was not made * * * before Greene went to South Africa.

This seems to be irreconcilable with the evidence of Mr. Hart Green.

We have said sufficient to show that the findings of the learned trial judge were not necessarily binding on the

1934

ANDERSON, GREENE & CO. LTD. v. KICKLEY.

Duff C.J.

Court of Appeal. With respect, in our opinion, his reasons afford solid grounds for thinking that he has failed, in respect of the cardinal issues of the case, to give sufficient weight to the documents, the course of dealing, and the broad features of the situation as disclosed by the evidence.

There is a matter of some importance which, probably, to some extent, affected the view of the learned trial judge in respect of the relative weight of Mr. Anderson and the respondent as witnesses. As we have pointed out, the appellants have failed to account to the Mining Company. The learned trial judge says that if the Mining Company "are the proper plaintiffs, the defendants would have a counterclaim."

Now, as regards the so-called counterclaim, it appears to be set up first in a letter of the 10th of July, 1930, addressed to "Mr. W. S. Kickley, Gem Lake Mines Ltd." by "Anderson, Greene & Co. Ltd." It is a letter in respect of expenses incurred by Lott in connection with a certain transaction described as the "Minneapolis Deal," which had nothing to do with the 75,000 shares we have been discussing. That letter was answered, the respondent says, by the Company, on the 15th of July, in which letter the appellants are told that no authority was ever given for charging these expenses to the Company. The letter proceeds,

> The Minutes of the Gem Lake Mines Limited Directors' Meeting provide for the payment of 10% on the Minneapolis deal provided it goes through, to be divided equally between Mayor Webb and Lloyd Lott and the assumption was that they would stand their own expenses. That, I think, would be the usual practice.

Anderson denies that this letter was ever received by his Company. The denial is not very convincing; but, however that may be, there was a further letter of the 17th of November, already quoted, the receipt of which is not disputed, that negatives the claim made in the appellants' letter of the 10th of July. Moreover, there is no suggestion that the respondent had any authority to vary the arrangement authorized by the directors, which admittedly was that Lott was to receive 10 per cent. of the proceeds of "the deal" if it was effectuated; under such an arrangement no valid claim for expenses could arise.

Some attempt was made on the argument to cast doubt on the evidence of the respondent that the cheque of $10,000, paid into the Mining Company's account on the

29th of March, was in payment of shares acquired for the purpose of effectuating the arrangement between the respondent and the appellants. These suggestions were not put to the respondent in cross-examination. They are based on inferences drawn by a witness from the examination of the books, and there appears to be exceedingly little, if any, admissible evidence in support of them. We accept the view of the Court of Appeal with regard to this cheque as well as the cheque for $5,000.

There is another point of view from which this appeal should be considered.

The respondent in his statement of claim stated the basis of his claim thus:

> 3. Between the said months of February and December, 1930, the Defendants were selling to the public shares of the capital stock of said Mining Company at a price in excess of 15 cents per share, and not having a sufficient number of shares for delivery, requested the Plaintiff to deliver to them 75,000 shares of the Plaintiff's holdings in said Mining Company in blocks as required from time to time, to enable them to make delivery of shares which they had contracted, or would contract to sell, upon the terms that the proceeds of said shares up to the extent of 15 cents per share would be held by the Defendants in trust for the Plaintiff and paid over to him.

Counsel for the appellants admitted he could not dispute the contention advanced by the respondent that the shares represented by the share certificates delivered by the respondent to the appellants were the private property of the respondent. The substance of his argument was that they were treated as shares belonging to the Company, made available to the Company by loan from the respondent for the purpose of enabling Anderson to carry out sales made under Lott's option; and that, consequently, any moneys for which the appellants were accountable were to go to the Company, in payment of shares, to be allotted and delivered to the respondent, to replace the shares lent by him.

It is quite obvious that rational people, entering into such an arrangement, would have regarded it as essential that the respondent should be protected, and that delivery to him of shares, in return for shares advanced by him, would be secured. In the view advanced by the appellant, one form of security would be to have the appellants account to him, as president of the Company, on the understanding that the moneys received were to be applied in payment for shares to be allotted and delivered to him; and this is what

1934

ANDERSON, GREENE & CO. LTD. v. KICKLEY.

Duff C.J.

the appellants contend was contemplated. In view of the facts, that seems to be the only intelligible and plausible form in which the appellants' case could be put.

Let us assume, then, that the moneys owing by the appellants were, as the appellants contend, to be paid to the respondent as president of the Company; in other words, to the Company; to be applied in payment of shares to be issued to him.

Such an arrangement might not unnaturally be referred to by laymen as a loan of shares from the respondent to the Company; and it would follow, as a consequence, as the appellants' counsel put it in his reply, that these shares were to be returned to the respondent. If this was the arrangement, then there is no substantial inconsistency with the facts in the respondent's pleading, because the moneys for which the appellants were accountable were moneys to be devoted to the payment of the purchase price of shares to be issued to the respondent. In other words, they were moneys impressed with a trust, which, in that sense, was a trust in favour of the respondent.

It is perfectly obvious, looking at the matter from this point of view, that the parties could never have contemplated that the moneys received by Anderson in respect of these shares were to be paid to the Mining Company to be used as it might see fit,—to pay its creditors, for example. It is equally implied that it would be a violation of the rights of the respondent, a breach of the trust under which the moneys were held, to apply these moneys in payment of any claim by the appellants against the Company, arising, at all events, out of matters not connected with these 75,000 shares. This follows from an application of the principles enunciated by Bowen, L.J., in *The Moorcock* (1), and by Lord Esher in *Hamlyn* v. *Wood* (2). And yet, ever since July, 1930, these appellants have kept these moneys under a pretense that they were entitled to apply them in satisfaction of the claim for expenses already mentioned.

The action was tried in September, 1932. For three and one-half years they have held these moneys without any right to them which can be even plausibly stated. What, then, is the legal result?

(1) (1889) 14 P.D. 64, at 68. (2) [1891] 2 Q.B. 488, at 491.

1934

ANDERSON, GREENE & Co. LTD. v. KICKLEY.

Duff C.J.

In the first place, the appellants repudiated the trust when they retained these moneys under a claim of right to apply them in the liquidation of their so-called counterclaim. In the second place, and this is the critical point, by reason of their wrongful detention of the moneys, the trust has become impossible of fulfilment, because of the fact that, before the trial, the Company went into liquidation. The moneys which, under the terms of the arrangement, were to be paid to the respondent, whether as president of the Company or not, can no longer be applied in execution of the trust. The legal result is beyond controversy. The object of the original trust has failed in consequence of repudiation by the trustee and present impossibility of performance; a resulting trust, therefore, attaches to these proceeds of the sale of the respondent's property, in favour of the respondent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. M. S. Ross.*

Solicitor for the respondent: *J. F. McCallum.*

IN THE MATTER OF THE ESTATE OF HERBERT CARLYLE HAMMOND, DECEASED

1933

*Nov. 28.

1934

*March 6.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO

Will—Construction—Vesting—Time of payment.

A testator's will, after some specific bequests, gave the residue of his estate to his excutors in trust for purposes defined in the will. Then, after certain directions and gifts of annuities, the will provided, par. 14, that "on the death of my said wife or when my youngest son shall or would have attained the age of 25 years whichever event shall first happen" the trustees should divide the net residue into two equal parts, and one part (subject to a charge) "shall be equally divided between my said two sons" (with provisions for gifts over in events which did not happen); then, par. 15, that the "other half" of the said residuary estate (subject to charges) "upon the death of my said wife * * * shall subject as hereinafter be distributed in equal shares amongst" certain named beneficiaries, including B., with provisions that should any of them "predecease my said wife or die before the period of distribution with reference to this half of my residuary estate leaving a child or children surviving, such child or children living at the date of such distribution * * * shall take

*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Hughes JJ.

1934

In re HAMMOND.

the share which the parent * * * would have received if living at the time of such distribution" and that the share of any of said named beneficiaries "who shall die before the period of distribution aforesaid without leaving any child or children who shall be living at the date of distribution shall belong to my said two sons in equal shares"; and that, in the event (which did not happen) of the wife dying before the youngest son "shall or would have attained the age of 25 years", then the period of distribution with regard to this half of the residuary estate should be delayed until the latter event.

The testator died in 1909, leaving his widow and two sons. The widow is still living. The younger son attained the age of 25 years in 1912, and conformably to (and subject to) par. 14 of the will, the trustee then divided the net residue of the estate into two equal parts and divided one part between the two sons. The older son died in 1915 and the younger son in 1930. In 1922, B., one of the said named beneficiaries in par. 15 of the will, died without issue. The present question was concerned with her share.

Held: Upon the words in par. 15 (a construction supported by comparison of language in other parts of the will) both sons took, on the testator's death, a vested interest in equal shares in the "other half" (of the residuary estate) disposed of in par. 15 (subject to charges there mentioned), subject to partial defeasance in favour of any of the said named beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution; and therefore the sons' estates took the benefit of the aliquot part of the residuary estate which B. would have received under par. 15 had she lived until the time therein fixed for distribution; but that aliquot part was not payable until the testator's wife's death.

Busch v. *Eastern Trust Co.*, [1928] Can. S.C.R. 479, distinguished.

APPEAL by The Royal Trust Company, executor and trustee of the last will and testament of Herbert R. Hammond, deceased, one of the sons of Herbert Carlyle Hammond, deceased (the construction of whose will was in question), from the judgment of Kingstone J., delivered on an originating motion made in the Supreme Court of Ontario for the determination of certain questions affecting the rights of certain persons under the will of the said Herbert Carlyle Hammond, deceased.

An appeal was taken by the present appellant to the Court of Appeal for Ontario, but such appeal never came on for argument before that court. Upon the consent of the solicitors for all interested parties who had taken any part in the proceedings, an order was made by the Court of Appeal granting leave to appeal direct from the judgment of Kingstone J. to the Supreme Court of Canada.

The said Herbert Carlyle Hammond died on January 26, 1909, and by his will he appointed the National Trust

Company Ltd. executor of his estate. He left him surviving his widow, Fannie Hammond, and two sons, Frederick S. Hammond and Herbert R. Hammond. The widow is still living.

The older son, Frederick S. Hammond, died on May 7, 1915, having made a will, whereof he appointed the National Trust Company Ltd. the executor. By it he bequeathed the whole of his estate to his wife, Kathleen Saunders Hammond. The latter died on September 22, 1919, having made a will. Letters of administration with the will annexed of her estate was granted to the National Trust Company Ltd. Subsequently, by *The Soldiers' Aid Commission Amendment Act, 1922,* Ontario, 12-13 Geo. V, c. 40, it was enacted that the Soldiers' Aid Commission of Ontario should be the beneficiary as to one-half of the residue of her estate.

The younger son, Herbert R. Hammond, died on August 12, 1930, and by his will appointed The Royal Trust Company executor.

The terms of the will of the said Herbert Carlyle Hammond, deceased, material on the present case, and the questions for determination, are sufficiently set out in the judgment now reported, and are indicated in the above headnote.

G. M. Huycke for the appellant.

McGregor Young K.C., Official Guardian.

W. B. Milliken K.C. for Mrs. Fannie Hammond.

C. M. Garvey K.C. for Soldiers' Aid Commission.

C. A. Thompson for National Trust Company Ltd. (Executor and Trustee of the Herbert Carlyle Hammond Estate).

The judgment of the court was delivered by

RINFRET J.—We are to construe the will of the late Herbert Carlyle Hammond, broker, of the city of Toronto, for the determination of certain questions submitted, by way of originating motion, to the Supreme Court of Ontario.

The will is elaborate and there are many codicils. They provide for several specific bequests, with which we are not concerned. The clauses material to the present submission are those which deal with the residue of the estate.

1934

In re HAMMOND.

Rinfret J.

Paragraph 8 begins in this way:—

8. I give devise and bequeath all the rest residue and remainder of my estate to my executors and trustees in trust to realize such portions thereof from time to time as it may be necessary to realize * * *.

Then follow directions as to the realization of the estate and the administration by the trustees.

Paragraph 9, amongst other bequests, directs the trustees, "out of the income and profits of my estate," to pay to the widow the sum of $12,000 per annum during her life and to pay certain other annuities to named beneficiaries during their lives, subject to a provision for final distribution referred to in paragraph 15 presently to be set out. One of the beneficiaries so named is "Jessie Butler of Toronto."

The main provisions are to be found in paragraphs 14, 15 and 16, and, in order to grasp this case, it is necessary that they should be read in full:

14. On the death of my said wife or when my youngest son shall or would have attained the age of twenty-five years whichever event shall first happen my trustees shall divide the net residue and remainder of my estate into two equal parts and one of such equal parts subject and charged as hereinafter shall be equally divided between my said two sons and In Arriving at the net residue and remainder of my estate for the purposes of division there shall be taken into account such sums as may have been given to my sons in my lifetime by way of advancement and such advances as may have been made after my death not exceeding twenty thousand dollars each to my said two sons or either of them out of the Principal of my estate and the shares of each of my said two sons in the said one-half of my Estate shall be charged with such sums by way of advancement and such advances after my death out of the principal as shall have been made to them respectively.

One-half the annuity of twelve thousand dollars to my said wife shall be charged upon and be payable out of the half of my residuary estate to be divided between my said two sons as aforesaid and on the period of distribution arriving and my said wife being then living my trustees shall retain from such one-half of my residuary estate in equal proportions from each son's share if both then be living a Capital sum sufficient to provide for the payment to my said wife of six thousand dollars per annum during her life. If either of my said sons shall die before the period of distribution and without having disposed of his share by his last will and testament and leaving lawful issue him surviving the share of such son so dying charged as aforesaid shall go to his said issue and if more than one in equal shares and in the event of either of my said sons dying before the period of distribution without leaving lawful issue him surviving and not having disposed of the same by his last will and testament the whole of the said half share reduced and charged as aforesaid shall go to the survivor of my said sons.

15. The other half of my said residuary estate shall be charged with the payment to my said wife of one half of the annuity of twelve thou-

sand dollars given to her as aforesaid and with all the other annuities and annual charges above mentioned and I will and direct that upon the death of my said wife the said other half of my residuary estate subject to all the existing annuities or annual charges above mentioned and after making provision for the said annuities continuing thereafter shall subject as hereinafter be distributed in equal shares amongst the following persons namely: Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily and Thomas W. Butler.

Should any of them the said Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily and Thomas W. Butler predecease my said wife or die before the period of distribution with reference to this half of my residuary estate leaving a child or children surviving such child or children living at the date of such distribution (and in equal shares if there be more than one) shall take the share which the parent respectively of such child or children would have received if living at the time of such distribution.

The share of any of them the said Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily and Thomas W. Butler who shall die before the period of distribution aforesaid without leaving any child or children who shall be living at the date of distribution shall belong to my said two sons in equal shares.

In the event of my said wife dying before my youngest son shall or would have attained the age of twenty-five years then the period of distribution with regard to this half of my residuary estate shall be delayed and such distribution shall not take place until my youngest son shall or would have attained the age of twenty-five years.

From the time the said Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily or Thomas W. Butler receive their share of the principal under this my will the said annuities in their favour respectively shall no longer be paid to them.

16. If both my said sons shall die before the period of distribution to them as aforesaid and without lawful issue him or them surviving and not having disposed by will of the share of my estate to which they or the survivor of them are entitled the same shall be divided in the same way as is directed in reference to the other half.

There are other passages of the will which may be helpful in determining the matters involved, but it will be sufficient to refer to them as we proceed.

The pertinent facts are:

Herbert Carlyle Hammond, the testator, died on the 26th January, 1909. In his will, National Trust Company, Limited, was appointed executor and trustee.

He left him surviving his widow, Fannie Hammond, and his two sons, Frederick S. Hammond and Herbert R. Hammond.

The widow is still living.

1934

In re HAMMOND.

Rinfret J.

The youngest son, Herbert, attained the age of twenty-five on the 19th December, 1912.

As a consequence, and conformably to paragraph 14 of the will, the trustee then divided the net residue and remainder of the estate into two equal parts and one of these parts, subject to the other conditions and charges therein provided, was divided between the two sons.

The older son, Frederick, died on the 7th May, 1915. He left a will appointing National Trust Company, Limited, executor and bequeathing the whole of his estate to his wife, Kathleen Saunders. She has also died leaving a will. Her estate is now represented by National Trust Company Limited and by The Soldiers' Aid Commission of Ontario (under c. 40 of Statutes of Ontario, 12-13 Geo. V).

Herbert Hammond, the younger son, died on the 12th August, 1930. He left a will appointing The Royal Trust Company executor.

But, at a prior date, to wit, on the 30th April, 1922, and, therefore, while Herbert Hammond was still living, one of the beneficiaries named in paragraph 15 of the will, Jessie Butler, died without issue.

And the present submission is really concerned with the question: In the events that have happened, what becomes of the share of Jessie Butler?

The questions were submitted to the court in the following form:

1. Is the interest of the said Herbert R. Hammond, deceased, one of the residuary legatees of the said deceased, in the share of Jessie Butler deceased, also one of the residuary legatees of the said testator, now payable to the estate of the said Herbert R. Hammond, deceased, the period of distribution mentioned in said paragraph 15 of the Will of the Testator not yet having arrived?

2. Did Frederick S. Hammond, deceased, one the residuary legatees of the said testator, have a vested interest in the share of the said Jessie Butler now deceased, and if so is such interest now payable to the estate of the said Frederick S. Hammond, deceased?

3. If the interest of the said Herbert R. Hammond, deceased, and the interest of Frederick S. Hammond, deceased, if any, in the share of the said Jessie Butler, deceased, are now payable to their respective estates, on what basis should the assets constituting the one-half of the residuary estate of the said testator out of which such interests are payable be apportioned to effect such payments?

Kingstone J., before whom the motion was returned, held that, Jessie Butler having died without issue prior to the death of the widow, Fannie Hammond, neither son of the

1934

In re HAMMOND.

Rinfret J.

testator had, at their respective deaths, a vested interest in the share directed to be distributed to her; that the share did not pass to any other person under the will and it should be distributed as upon an intestacy. He adjudged accordingly.

The appeal is from that judgment, *per saltum,* pursuant to an order of the Court of Appeal for Ontario.

The learned judge of first instance based his decision on the rule "laid down in Williams on Executors, 11th Ed., p. 981" (now: 12th Edition, p. 795) and referred to our judgment in *Busch* v. *Eastern Trust Company* (1), where, applying the rule to the peculiar circumstances of that case, we held that the vesting was postponed until the time of distribution. But while, for wills as well as for other documents, there are no doubt recognized canons of construction, the cardinal principle—to which any rule is always subservient—is that effect shall be given to the testator's intention ascertainable from the actual language of the will. Indeed, the rule itself relied on by the learned judge, as stated in Sir Edward Vaughan Williams' treatise, contains the qualifying words: "unless, from particular circumstances, a contrary intention is to be collected."

In this case, the expressed language of the testator indicates plainly the intention that no part of the residuary estate should remain undisposed of; and, in particular, does it negative intestacy with regard to the share of Jessie Butler. Provision having been made for special bequests, the "rest, residue and remainder" of the estate is given to the executors and trustees in trust for the purposes defined in the will. Until certain events happen, the trustees are to pay fixed annuities to a number of named beneficiaries. On the death of the testator's wife, or when the "youngest son shall or would have attained the age of twenty-five years whichever event shall first happen," the trustees must divide the net residue and remainder into two equal parts. And, as already seen, upon the youngest son attaining the specified age, this division was actually made.

The testator then proceeds to declare who shall be the beneficiaries of each of the two equal parts of the residuary estate. For one part, they are to be his two sons, charged however with half the annuity payable to the widow. With

(1) [1928] Can. S.C.R. 479.

1934

In re HAMMOND.

Rinfret J.

regard to that one part, we do not think, upon the language of paragraph 14, any doubt could be entertained as to its immediate vesting in the two sons, subject to being divested in the event of certain contingencies which have not happened. It is unnecessary further to follow the possible incidence under the will of that part of the estate, in respect of which there is no controversy.

The disposition of the other part of the residuary estate is made in paragraph 15. That particular part is charged with the payment of one-half the annuity due to the widow and with all the other annuities and annual charges mentioned in the will. Upon the death of the testator's wife or when the youngest son "shall or would" have attained the age of twenty-five years, whichever event happens last, the trustees, "after making provision for the annuities continuing thereafter," are directed to make a distribution in equal shares between the beneficiaries. The beneficiaries who may then receive a share are certain named persons (or, alternatively, their children) and the two sons of the testator.

There is, however, a material difference between the language used to express the bequests to the named beneficiaries or to their surviving children and that used to express the bequest to the two sons. The named beneficiaries do not constitute a class. They are, each of them, independent legatees. The direction is that the distribution to any of them is to be made only "subject as hereinafter" and that is to say: only to "any of them" who shall not "predecease my said wife or die before the period of distribution with reference to this half of [the] residuary estate." So as to be entitled to a share, they must be "living at the time of such distribution." That is a condition precedent to the very existence of their right, for, if they be not living at the period mentioned, the share goes to their children then living and, if no children are then living, it belongs to the two sons. It is therefore apparent that the testator, in this case, meant to annex the time to the gift of the legacy and not merely to the payment of it. And, for the same reasons, the rights of the surviving children of the named beneficiaries stand upon exactly the same footing. But when it comes to deal with the legacy to the "two sons" the language of paragraph

15 is essentially different. It says that "the share * * * shall belong to my said two sons in equal shares." The words "shall belong" are words of gift, by force of which the "two sons" take independently of the direction to divide. Nor is that gift made to depend upon the contingency of the "two sons" having survived the period of distribution. On the contrary, the language rather contemplates that the sons' estates will share in the distribution, notwithstanding the possibility of their death prior to the specified period, for such is the natural and logical meaning to be given to the subparagraph prescribing that

> in the event of my said wife dying before my youngest son shall or would have attained the age of twenty-five years then the period of distribution * * * shall be delayed and such distribution shall not take place until my youngest son *shall* or *would* have attained the age of twenty-five years.

There would seem to be no possible ground under paragraph 15, upon which it could be said that the gift to the sons was not intended at least to vest immediately upon the death without issue of one of the named beneficiaries. And it would follow that, when Jessie Butler died without leaving children, the share which she "would have received if living at the time of distribution" vested, at least from the date of her death, in one of the sons, Herbert Hammond, who survived her.

We are, however, led to the view that the intention of the testator, as it appears from the particular words he has used in paragraph 15, was that the two sons, and not only the survivor, should get the benefit of the legacy. Such is, it seems to us, the fair and literal meaning of the expression: "shall belong to my said two sons in equal shares." That becomes still more apparent when the expression is compared with the language in other parts of the will. When he desired to make a bequest primarily vesting in both his sons, but subject to being divested in favour of the survivor, the testator was not lacking in words explicitly to indicate his intention. The last part of paragraph 14 and the whole of paragraph 16, already set out, afford illustrations of the almost meticulous manner in which he expresses his wish in such cases. Other examples are furnished by paragraph 18, where the testator first disposes of a house and lot on the southwest corner of Beverly and Cecil streets. The use thereof is given to Ethel Butler

1934
In re
HAMMOND.
Rinfret J.

and to Jessie Butler for the purpose of personal occupation by them so long as they remain unmarried. If one should marry, "the right of occupation shall continue to the other and after each shall have either married or died I give and devise the said house and lot to my sons and the survivor of them." The testator then bequeaths an insurance policy on his life "to my sons in equal shares to be divided between them by my trustees when the distribution to them above mentioned takes place or if only one son living the whole shall go to him."

On the contrary, in paragraph 5, the testator is dealing with his residence in Toronto. He gives the use thereof to his wife and devises that, after her death, the residence "shall go to my two sons equally." Then, in paragraph 23, he refers again to it and he directs that his

> Trustees may at any time sell the residence owned by [him] at the time of [his] death with the consent of [his] wife and with her consent purchase another house to be held on the same terms and if she does not require another house to be purchased then she shall be entitled to the income received from the proceeds of the house sold during her life and these proceeds at her death shall go to my two sons equally.

Both in paragraphs 5 and 23 the unmistakable intention appears that the beneficial interest in the residence or in the proceeds of the sale thereof shall, immediately upon the death of the testator, vest finally and definitely in the two sons. We will be following the course of authority in holding that a similar expression used in paragraph 15 ought to carry a similar meaning and to be given the same effect.

Our interpretation is therefore that both sons took at once a vested interest "in equal shares" in the "other half of the residuary estate" disposed of in paragraph 15, charged with one-half of the annuity provided for the widow and with all the other annuities and annual charges there mentioned, subject to partial defeasance in favour of any of the named beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution.

On the other hand, we are unable to find in paragraph 15 any language indicating that, upon the death without issue of any of the named beneficiaries, the aliquot part which he would have received if living at the time stated, shall immediately become payable to the two sons. For the purpose of this discussion, we may disregard the pro-

vision postponing the division, in any event, until the youngest son "shall or would have attained the age of twenty-five years," for this condition no longer stands in the way. But there is nothing in the whole clause to alter the explicit intention of the testator that the distribution of that part of the estate shall take place only "upon the death of [his] said wife"; and, on the contrary, there is every indication that the trustee is not empowered to distribute until that time has arrived, if, indeed, it were possible to do so before the exact number of shares into which the division is to be made has been definitely ascertained.

We must give full effect to the testator's intention.

The appeal will be allowed and the judgment of the Supreme Court of Ontario set aside, costs of all parties throughout to be paid out of the estate, and to the Executor and Trustee on a solicitor and client basis. The questions will be answered as follows:

To Question No. 1: No.

To Question No. 2: Frederick S. Hammond, deceased, took a vested interest in the aliquot part of the residuary estate which Jessie Butler might have received under paragraph 15 of the will, if she had lived till the time therein fixed for distribution; but such interest is not "now payable."

Question No. 3 does not arise.

Appeal allowed.

Solicitors for the appellant: *Osler, Hoskin & Harcourt.*

Solicitors of National Trust Company Ltd., Executors of Herbert Carlyle Hammond Estate: *Aylesworth, Garden, Stuart & Thompson.*

Solicitors for The Soldiers' Aid Commission of Ontario: *C. M. Garvey & Company.*

Official Guardian: *McGregor Young.*

Solicitors for Mrs. Fannie Hammond: *Mulock, Milliken, Clark & Redman.*

1933
*Nov. 27.
1934
*Feb. 6.

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT)..... APPELLANT;

AND

ELIZABETH LILLIAN PRINCE AND WHIRLWIND CARPET CLEANERS, LTD. (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—City by-law expropriating land for park purposes—Action against city for amount of compensation on an alleged agreement—Requirements to create binding contractual obligation on city—Necessity of further by-law—Municipal Act, R.S.O. 1927, c. 233, ss. 5, 9, 258 (1), 267 (1), 342, 351, 396 (45).

The appellant City, by its Council, passed a by-law, on November 2, 1931, enacting that certain described lands, which included land owned by P., respondent, of which the other respondent was tenant, "are hereby expropriated and taken for park purposes". The city assessment commissioner wrote P. enclosing a copy of the by-law, and a correspondence ensued between the assessment commissioner and respondents' solicitors as to compensation. The City Council, on December 14, 1931, passed a resolution adopting a report of the Board of Control recommending the adoption of a report submitted by the assessment commissioner as to agreement with P. as to compensation and possession and conveyance of the land; and this fact was communicated by the assessment commissioner to respondents' solicitors. Early in 1932 the by-law of November 2, 1931, was repealed. Respondents sued the City for the amount of compensation as having been agreed upon and as owing by the City under a valid and binding contract.

Held: (1) Upon the actions of the City Council and the communications which took place, and even apart from the point of law next mentioned, the respondents had failed to prove that an agreement was concluded in fact.

(2) Assuming, contrary to this Court's finding, that the Council acting on the City's behalf did profess to assent to an agreement having the effect (alleged by respondents) that the City was to pay $25,000 as compensation for the expropriation of respondents' part of the property described in said by-law, and that respondents were to execute and deliver a conveyance to the City together with vacant possession, a resolution of the Council, authorizing and embodying the terms of such an agreement, was not sufficient to bind the City in the circumstances; a by-law under the seal of the City was essential. Secs. 5, 9, 258 (1), 267 (1), 342 (1), (2), 351 (1), (2), 396 (45), of the *Municipal Act*, R.S.O. 1927, c. 233, particularly considered. *Mackay* v. *City of Toronto*, [1920] A.C. 208, at 210, 213, 214, cited.

The "expropriating by-law" of November 2, 1931, did not constitute in itself a sufficient compliance with the enactments of ss. 396 (45), 5, and 258 (1), so as to commit the City to take the property or to pay compensation. Reading s. 5 with s. 351, it sufficiently appears that, where the municipality is proceeding under its compulsory powers

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Hughes JJ.

alone, the distinction between an "expropriating by-law" and a by-law which, in addition to being an "expropriating by-law," authorizes entry upon the property or the making use of the property to be taken, is a practical distinction of great importance; where the initiating by-law is an "expropriating by-law" simply (and, on its proper construction, the said by-law of November 2 was such), no act or proceeding on the part of the persons interested in the property can have the effect of binding the municipality to acquire the land (such a by-law has not the effect of a notice to treat under other systems of expropriation, e.g., under the provisions of the English *Lands Clauses Consolidation Act,* 1845); there must, in addition, be an "entry on" or use made of the property, as contemplated by s. 351, under the authority of by-law, or a further by-law adopting an award, or an agreement between the municipality and the parties interested settling the amount of compensation.

The "expropriating by-law" of November 2 did not operate to empower the Council to fasten upon the City an obligation to acquire the land, or to effect an acquisition thereof, by resolution alone, because (1) the magnitude of the compensation to be paid is so radical a matter and the settlement of it so important a step in the process of acquiring land under s. 396 (45) as to justify the conclusion that the authority to assent to such an agreement must proceed from a by-law enacted under that clause; to hold that a simple "expropriating by-law," where there is no express or implied authority by by-law to settle the compensation, creates such authority by force of the statute, would postulate an intention out of harmony with that manifested by the enactments of s. 351; and (2) the power to settle compensation by agreement is one of those powers contemplated by s. 258 (1); the power to create a binding contractual obligation fixing the amount of compensation to be paid in circumstances such as in the present case, is clearly *ejusdem generis* with the power to acquire by purchase; a power which (ss. 396 (45), 5, 258 (1), of the Act; *Mackay* v. *City of Toronto, supra*) can only be executed by by-law.

Judgment of the Court of Appeal for Ontario, [1933] O.R., 442, reversed.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) dismissing (by a majority) the defendant's appeal from the judgment of Wright J. (2) holding that the plaintiffs were entitled to recover from the defendant the sum of $25,000, as being the amount agreed upon as compensation for land expropriated by the defendant. The plaintiff Mrs. Prince was owner, and the plaintiff Whirlwind Carpet Cleaners Ltd. was tenant, of the land in question. The material facts of the case are sufficiently stated in the judgment now reported, as are also the questions (indicated in the above headnote) arising for determination. The appeal was allowed, and the action dismissed, with costs throughout.

(1) [1933] O.R. 442; [1933] 3 D.L.R. 201.

(2) (1932) 41 Ont. W.N. 285.

1934

CITY OF TORONTO v. PRINCE.

C. M. Colquhoun K.C. and *J. P. Kent* for the appellant.

N. Sommerville K.C. and *R. Bigelow* for the respondents.

THE COURT: The primary facts in this appeal are not in dispute. On November 2nd, 1931, the appellant Corporation, by its Council, passed by-law No. 13405, entitled

> A by-law to acquire certain lands for park purposes as an addition to Bickford Ravine.

On November 9th, the City Assessment Commissioner wrote to Mrs. Prince, enclosing a copy of the by-law, and informing her that the expropriated land included property owned by her, and asked her to advise him

> the lowest amount you would be prepared to accept in full settlement for the conveyance to the City, free of all encumbrances, easements and other rights whatsoever of the property expropriated, as above described, vacant possession to be given to the City, free of any tenancies, upon the payment of the compensation.

A correspondence ensued which sufficiently appears from the discussion which follows.

On the 18th December, the Commissioner of Parks and the Assessment Commissioner were requested to appear before the Board of Control to explain why it was necessary to acquire additional lands for the improvement of Bickford Ravine Park property. At the first regular meeting of the City Council for the year 1932 the "expropriating by-law" was repealed. After this repeal the respondents brought this action and claimed that the passing of the by-law and the resolution of the City Council adopting a report of the Assessment Commissioner fixing the amount of the compensation to be paid, constituted a valid and binding contract between the appellant Corporation and the respondents. On the other hand, the Corporation contends that there was no binding agreement in fact, and could be none in point of law until the Corporation, by by-law, had expressed its willingness to take the property and pay the compensation agreed upon; conditions admittedly not fulfilled.

The trial judge gave judgment in favour of the respondents for $25,000 (1), holding that an enforceable contract had been entered into. On appeal, this was affirmed by the Ontario Court of Appeal (Latchford C.J.A. and Magee J.A. dissenting) (2).

(1) (1932) 41 Ont. W.N. 285.

(2) [1933] O.R. 442; [1933] 3 D.L.R. 201.

The first question is the question whether, in point of fact, the parties entered into an agreement fixing the compensation. The respondents rely upon the resolution of the Council, already adverted to, as evidencing such an agreement. The resolution adopts the following report of the Board of Control and was passed 14th December, 1931:

The Board recommend the adoption of the appended report submitted by the Assessment Commissioner, *re* the above, viz:

Mrs. Elizabeth L. Prince is the owner of premises No. 779 Bloor Street West, the land having a frontage of 20 feet by a depth of 120 feet, upon which is erected two storey brick buildings. She also owns a parcel of land in rear of No. 781 Bloor Street West, having a frontage on Montrose Avenue of 50 feet by a depth of 20 feet, the property being occupied for business purposes by The Whirlwind Carpet Cleaners Limited. This property was expropriated as an addition to Bickford Ravine by By-law No. 13405, passed by Council on November 2nd last.

I have arranged with Mrs. Elizabeth L. Prince, subject to the approval of your Board and Council, through her solicitors, Norman Sommerville & Company, a settlement of the compensation and the amount agreed upon is $25,000 in full of all claims, which includes business disturbance and the moving of plant and equipment, the owner to be allowed occupation of the property until April 15th, 1932, upon which date the City is to receive vacant possession. I therefore recommend that the City Solicitor be instructed to pay to Mrs. Elizabeth L. Prince, or whomever he may find to be entitled to receive it, the sum of $25,000 upon the receipt of which the property in question, as above described, is to be conveyed to the City, free from all encumbrance, easements and other rights whatsoever, vacant possession to be given to the City, free of any tenancies, upon payment of the compensation.

The property in question is assessed for the sum of $5,400.

CERTIFIED a true copy of an extract of Report No. 29 of the Board of Control adopted in Council 14th day of December, 1931.

There are several points raised on behalf of the Corporation, in connection with this resolution, which must be examined. The duties of the Assessment Commissioner, on whose report the resolution proceeded, are set forth in a by-law relating to the officials of the Corporation, passed in 1904, of which the pertinent provisions are these:

31. In addition to all duties imposed upon the Assessment Commissioner under any Act or Statute, or under any By-law of the Corporation, the said Assessment Commissioner shall perform the following duties and be subject to the following regulations:—

1. To have charge of the renting and leasing of all properties belonging to the Corporation, except as otherwise provided (B.4597, sec. 2), and to carry on all necessary negotiations in connection therewith, and to advertise the said properties, with the approval of the Chairman of the Committee on Property; to advise on the rentals to be received, and, if a sale or purchase by the Corporation is proposed, to advise on the price to be received or paid, as the case may be, and make such recommendation in respect of the proposed transaction as he may deem advisable, and to advise as to the laying out and handling of the Corporation

1934

CITY OF TORONTO v. PRINCE.

property to the best advantage; no final disposition of any property, except properties bought in by the Corporation at sales of lands for taxes, is to be made except upon the report of the Committee on Property, adopted by Board of Control and Council, in accordance with the by-laws of the Council;

The Court.

It will be observed that the duties so described are in addition to duties imposed upon the Commissioner under any Act or statute or any by-law of the Corporation. The Commissioner, therefore, obviously had no authority to enter into an agreement on behalf of the Corporation determining the amount of compensation payable in respect of land expropriated under a municipal by-law. Nor had the Council any power to confer such authority upon him by resolution. Moreover, when the correspondence between the Commissioner and the solicitors for the respondent is examined, the material parts of which are set out in paragraphs 4, 5 and 6 of the statement of claim, it will be seen that the Commissioner is not professing on behalf of the Corporation to enter into an agreement with the respondents settling the compensation to be paid for the property in question or for the purchase of the property. On the one hand, the Commissioner is notified of the amount of the compensation that the respondents will accept and the terms under which the property and possession of it will be handed over to the City; and, on the other hand, the Commissioner advises the respondents that he will recommend the payment of the amount of compensation named by them, and the terms also upon which the payment is to be made and the property is to be taken over.

When the Commissioner, in his report, speaks of having arranged a settlement of the compensation, and says that the amount agreed upon is $25,000 in full of all claims, etc., it is not fair to read his report as a statement that he has entered into an agreement in the legal sense on behalf of the Corporation, even subject to the approval of the Council. The fairer construction is that, as the correspondence shews, the respondents have declared their willingness to accept the sum of $25,000, and that the Commissioner had informed them he would recommend to the proper authority the payment of that sum upon the terms set forth by him. (See *per* Parker J. in *Pollard* v. *County Council of Middlesex* (1)). Then, in fact, the respondents had not expressed

(1) (1906) 95 L.T. 870, at 871.

their assent, or their willingness to agree, to the terms stated in the report. The respondents' express proposal was that they should retain possession for three months after the payment of compensation. The proposal in the report is that the respondents shall retain possession until the 15th of April and that on the delivery up of vacant possession on that date, and the delivery of a conveyance, the compensation shall be paid.

It is impossible to regard the resolution as the acceptance of an offer to enter into an agreement made by the respondents to the Corporation settling the compensation; because, if the letter of the respondents can properly be construed as such an offer, the resolution is most assuredly not an acceptance of it. Nor can the resolution properly be regarded as a ratification of an agreement in the legal sense between the Assessment Commissioner, on behalf of the Corporation, and the respondents, for the settlement of compensation because: first, the correspondence shews that the Assessment Commissioner was not professing to enter into any such agreement, or into any agreement on behalf of the Corporation, which, moreover, would have been entirely outside his functions; and, on a fair reading, his report ought not to be construed as stating he had made such an agreement; and, in the second place, in point of fact, there had been no assent by the parties to common terms.

Then, the respondents rely upon the communication made by the Assessment Commissioner to them of the terms of this resolution. Now, the Assessment Commissioner had no general authority to make a communication to the respondents of either a binding acceptance by the Corporation of an offer made by the respondents, or of a binding offer on behalf of the Corporation to the respondents of a settlement of compensation upon the terms of the resolution. If the Assessment Commissioner's letter was intended by him to operate in either of these characters, he was exceeding his duty. The letter cannot properly be treated as a communication made by the Corporation in either of these senses, nor was it a communication authorized by the Council. The resolution declares that the Board recommends the adoption of the appended report. The only recommendation made by the report is

1934

CITY OF TORONTO v. PRINCE.

The Court.

that the City Solicitor be instructed to pay to Mrs. Elizabeth L. Prince, or whomever he may find to be entitled to receive it, the sum of $25,000 upon the receipt of which the property in question, as above described, is to be conveyed to the City, free from all encumbrance, easements and other rights whatsoever, vacant possession to be given to the City, free of any tenancies, upon payment of the compensation.

The resolution itself gives the City Solicitor authority to act upon it by doing certain specified acts; the payment of $25,000 to the respondents or "whomever he may find to be entitled to receive it", upon the receipt of which the property is to be conveyed to the Corporation and possession delivered up on the 15th of April. It is plain the 15th of April is fixed as the date of taking possession and that upon the delivery of a conveyance by all the parties interested and of possession, the compensation is to be paid.

The resolution does not in terms authorize the City Solicitor to enter into an agreement with respondents nor does it in terms express an intention to enter into such an agreement. He is to pay the compensation to the persons who may be entitled to it. Contemporaneously with payment, the property is to be conveyed and delivered to the Corporation by, of course, those who are interested in it.

Then, if the resolution of the Council could be considered as authorizing the communication of an offer to settle the compensation, or to purchase the property on the terms stated, that offer was never communicated by the Corporation to the respondents.

The City Solicitor did not communicate the resolution to the respondents or any notice of an intention of the Corporation to enter into an agreement for acquiring the property or for the settlement of compensation. His letter of the 4th of January states explicitly that the matter is under consideration by the Board of Control and his letter of the 15th of January states that the Board of Control has made a recommendation to the Council. Both of these communications are incompatible with the notion that he is communicating an unconditional offer to acquire the property.

Moreover, if we could assume that the resolution authorized the communication to the respondents of an offer of an agreement to purchase or to settle the compensation,

and if we could assume further that such communication had taken place, we should still be confronted with the letters of the respondents' solicitors of the 31st of December and the 13th of January. In the first of these letters the respondents state that there was an agreement between the Assessment Commissioner and the respondent that the Corporation should pay $25,000; that this agreement was approved by the Board of Control and adopted by the Council on the 14th of December, 1931.

> On this date the property had been expropriated, the price had been fixed, the contract had been confirmed by both parties and the sum of $25,000 is therefore due and owing to Elizabeth L. Prince and The Whirlwind Carpet Cleaners, Limited.
>
> On behalf of both of these parties, for whom we act, we now request you to pay the sum of $25,000, according to the terms of the contract.

It is quite clear that the respondents did not treat the resolution as the offer of an agreement but as the confirmation of an agreement already assented to. The resolution, if communicated as an offer, was plainly not accepted. The respondents declare that they are entitled to be paid $25,000 under an agreement already completed and upon terms different from those contained in the resolution. In other words, if an offer had been communicated, it was met by a counter offer, which was never accepted by the Council.

The letter of the 13th of January is almost equally significant. Referring to an opinion of the City Solicitor reported in the newspapers that there was no binding agreement because there was no communication of the Corporation of an intention to purchase the lands, the letter says:

> We again repeat our request that a cheque for the amount of the compensation be sent us forthwith.

Here again the respondents are not treating the resolution as an offer but take their stand on the position that they are entitled to something different from anything sanctioned by the resolution under an agreement already concluded. The letter of the City Solicitor of January 15, 1932, as we have mentioned above, apprises the respondents of the fact that "The Board of Control has made a recommendation to the Council" and that nothing further can be done "until the Council deals with such report". In view of all the circumstances, the letter of the 18th of January, which is not a little ambiguous, cannot be treated

1934

CITY OF TORONTO v. PRINCE.

The Court.

as a valid acceptance of an offer still open. If there was communication of an offer in terms of the resolution, that, we repeat, had been met by a counter offer which had never been accepted, in other words, by a rejection, and the original offer was no longer open. It is, perhaps, worth noting that the letter of the 18th of January was only written after the respondents had been informed that the Council was reconsidering the matter.

In a letter of January 25th, 1932, the respondents' solicitors still assert:

> The City is now indebted to our clients in the sum of $25,000 for the property thus expropriated.

The action was brought and the statement of claim delivered before the 15th of April, the date fixed by the resolution for payment. The claim of the respondents in the pleading is free from doubt. In par. 8 they aver that, on

> the 31st day of December, 1931, the plaintiffs, through their solicitors, having executed and completed a deed of the said lands, and a release of all claims against the said Corporation, delivered the said deed and release to the Corporation of the City of Toronto, and did complete in all respects the said transaction and agreement and requested the payment of the said sum of $25,000 according to the terms of the said agreement.

This letter of the 31st of December, as already observed, in unambiguous terms makes a request for immediate payment, and declares that, under the contract between the parties, "the sum of $25,000 is * * * due and owing" to the respondents; and proceeds, "we now request you to pay the sum of $25,000, according to the terms of the contract."

In par. 12 it is alleged that "an agreement was duly made for the payment of the sum of $25,000 as the purchase price for the said lands;" that the plaintiffs accepted and adopted the same and acted thereon and "that the said Corporation cannot now rescind or revoke the said contract." In the same paragraph they allege that "compensation * * * was duly fixed, and that the same is now due and payable by the defendant to the plaintiffs." The respondents, it will be noticed, do not by their pleadings advance a claim to payment on the ground that the appellant has repudiated an agreement to be performed by payment in April. They claim, consistently with the letters quoted, that, under the terms of an agreement between the Corporation and themselves, they had become entitled to

the payment of compensation before the commencement of the action—as early as the 31st of December, 1931.

The respondents, we think, have failed to prove that an agreement was concluded in fact. This alone would suffice to dispose of the appeal; but we think it right to discuss the questions raised by the judgments in the Ontario courts.

The ground upon which the majority of the Court of Appeal affirmed the judgment of the trial judge was that the expropriating by-law

> connotes an offer by the Corporation of Toronto to take the property at a price to be ascertained. Before that offer was withdrawn and while it was in full force it was accepted by the owner and by such acceptance there arose a completed contract valid in law; for on the part of Toronto it was supported by a by-law under the seal of the corporation. The contractual obligation arose on the acceptance of the offer.

In England, when the value of the land taken under compulsory powers has been fixed by an assessment tribunal in conformity with the requirements of the *Lands Clauses Consolidation Act,* 1845, or has been agreed upon, there is a final and completed contract and either party may maintain an action for specific performance of the contract. This right of action exists because, under the English statute, upon giving notice to treat, the rights of the parties are at once fixed. The notice gives the owner a right to insist upon the company taking that which it has given a notice of its intention to take. "Neither party can get rid of the obligation, the one to take, the other to give up." (Kindersley, V. C., in *Haynes* v. *Haynes* (1)).

The relevant statutory provisions are in the Ontario *Municipal Act* (R.S.O. 1927, c. 233). Sections 5, 9, 258 (1), 267 (1), 342 (1) and (2), 351 (1) and (2) and 396 (45) are as follows:

> 5. Where power to acquire land is conferred upon a municipal corporation by this or any other Act, unless otherwise expressly provided, it shall include the power to acquire by purchase or otherwise and to enter on and expropriate.
>
> 9. The powers of a municipal corporation shall be exercised by its council.
>
> 258. (1) Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.
>
> 267. (1) Every by-law shall be under the seal of the corporation, and shall be signed by the head of the council, or by the presiding officer at the meeting at which the by-law was passed, and by the clerk.

(1) (1861) 30 L.J. Ch. 578.

1934

CITY OF TORONTO v. PRINCE.

The Court.

342. (1) Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated and for any damage necessarily resulting from the expropriation of the land, or where land is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

(2) The amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

351. (1) Where the arbitration is as to compensation, if the expropriating by-law did not authorize or profess to authorize any entry on or use to be made of the land before the award, except for the purpose of survey, or if the by-law gave or professed to give such authority, but the arbitrator by his award finds that it was not acted upon, the award shall not be binding on the corporation, unless it is adopted by by-law, within three months after the making of the award, or after the determination of any appeal therefrom, and if it is not so adopted, the expropriating by-law shall be deemed to be repealed, and the corporation shall pay the costs between solicitor and client of the reference and award, and shall also pay to the owner the damages, if any, sustained by him in consequence of the passing of the by-law, and such damages if not mutually agreed upon shall be determined by arbitration and if the by-law has been registered or a caution in respect of it has been filed the corporation shall forthwith cause a certificate signed by the mayor and clerk and sealed with the corporation's seal, stating that the by-law stands repealed, to be registered in the proper registry office or the caution to be removed as the case may be.

(2) Subject to the provisions of subsection 3, where the expropriating by-law did not authorize or profess to authorize any entry on or use to be made of the land except for the purpose of survey, or if the by-law gave or professed to give such authority but it has not been acted on, the council may at any time before the making of the award, and whether or not arbitration proceedings have been begun, repeal the by-law, and if that is done the repealing by-law shall, if the expropriating by-law has been registered, be forthwith registered by the corporation in the proper registry office, or if the land is under *The Land Titles Act* and a caution has been filed, the corporation shall forthwith remove the caution and the costs and damages mentioned in subsection 1 shall be paid by the corporation as therein provided.

396. By-laws may be passed by the councils of all municipalities:

45. For acquiring land for and establishing and laying out public parks * * *

The precise question raised by the judgments in the court below on this phase of the case is this: Assuming, contrary to the conclusion at which we have clearly arrived, as already explained, that the Council acting on behalf of the appellants did profess to assent to an agreement having the effect alleged by the respondents, viz., that the

appellant corporation was to pay $25,000 as compensation for the expropriation of the respondents' part of the property described in the expropriation by-law, and that the parties interested were to execute and deliver a conveyance of that part to the appellant Corporation together with vacant possession: is a resolution of the Council, authorizing and embodying the terms of such an agreement, sufficient to bind the appellant Corporation in the circumstances, or is a by-law under the seal of the Corporation, essential?

In considering this question, it is necessary to scrutinize with some care the statutory provisions governing the appellant Corporation now reproduced textually. First of all, the Corporation is given the express power by s. 396 (45) for acquiring land "for * * * public parks"; and this power, specifically given, is to be exercised by by-law. The effect of the phrase "acquiring land" in s. 396 (45) is set forth in s. 5 in these words:

> 5. Where power to acquire land is conferred upon a municipal corporation by this or any other Act, unless otherwise expressly provided, it shall include the power to acquire by purchase or otherwise and to enter on and expropriate.

The words "by purchase or otherwise" would appear to be used in contradistinction to the phrase "enter on and expropriate," and the words probably extend to every acquisition by voluntary transaction.

There is specific authority by statute vested in the Corporation, therefore, "for acquiring land for * * * public parks" (s. 396 (45)) and, in acting upon this specific authority, the Corporation is expressly empowered "to acquire by purchase or otherwise and to enter on and expropriate" (s. 5).

Then there is the important enactment of s. 258 (1):

> Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.

Ex facie, these provisions of the *Municipal Act* seem to contemplate that when a municipal corporation, executing the authority given by s. 396 (45), acquires land for the purposes of a public park, whether "by purchase or otherwise," that is to say, by voluntary transaction, or in pursuance of its right "to enter on and expropriate," the corporation will proceed by by-law. Land may be acquired for such a purpose by voluntary transaction or the Corpora-

1934

CITY OF TORONTO v. PRINCE.

The Court.

tion may "enter on and expropriate." In either case, it must, the statute seems to say, proceed by by-law, unless there is some provision to the contrary.

In the words of Lord Haldane, in delivering the judgment of the Judicial Committee in *Mackay* v. *City of Toronto* (1), the enactment of s. 258 (1) constitutes a "prohibition imposed by the Municipal Act" against "the exercise of its distinctive powers otherwise than by by-law under seal." Indeed, Lord Haldane's judgment (at pp. 210, 213 and 214) seems to be a sufficient basis for this proposition: that the execution of the specific authority created by s. 396 (45) can only be effectually accomplished by by-law.

By s. 10 of the Act the powers of a municipal corporation are to be exercised by the council. By s. 249, except where otherwise provided, the jurisdiction of every council is to be confined to the municipality which it represents, and its powers are to be exercised by by-law. By s. 258 [now s. 267] every by-law is to be under the seal of the corporation, and is to be signed by the head of the council, or by the presiding officer at the meeting at which the by-law is passed, and by the clerk.

* * *

* * * this corporation is not the creature of charter and as such endowed with capacity by the common law, but it is the pure creation of a statute. It may be that the effect of the Interpretation Act of Ontario (R.S. Ont., c. 1, s. 27), which gives to every corporation the power to contract, makes this power a general feature of its statutory equipment. But the section cannot affect the prohibition imposed by the Municipal Act of the exercise of its distinctive powers otherwise than by by-law under seal. Their Lordships do not desire to be understood as saying that the powers referred to in the context are to be taken as covering the whole field of the capacity of such a corporation to contract. It can hardly have been intended by the Legislature that, for example, notepaper cannot be bought for daily use except by a special by-law under seal; it may well be that the power to engage a servant is not a power *ejusdem generis* with the powers with which the Municipal Act is dealing when it imposes restrictions on their exercise.

* * *

The decision of the Supreme Court of Canada in *Waterous Engine Works Co.* v. *Corporation of Palmerston* (2) was cited at the bar, and their Lordships were invited to prefer the dissenting judgment of Gwynne J. to those of the other learned judges who took part in that decision. There a municipal corporation was given express power under the then Ontario Municipal Act to purchase fire apparatus. The Act provided that all the powers of the council should be exercised by by-law unless (which was not done by the Act) the exercise of a special power was otherwise expressly authorized or provided for. The defendant corporation contracted with the appellants for the purchase of a fire engine and 550 feet of hose. No by-law was passed sanctioning the purchase. It was held by a majority in the Supreme Court, consisting of Strong, Taschereau and Patterson JJ., that this contract was not enforceable in the absence

(1) [1920] A.C. 208, at 213. (2) (1892) 21 Can. S.C.R. 556.

of a by-law. As the power to purchase fire apparatus was one of the powers expressly conferred by the Act, this appears to have been right. These pronouncements of the Judicial Committee would appear to make it unnecessary to consider the distinction dwelt upon in the judgment of the majority of the Court of Appeal between "legislative powers," so-called, and "administrative powers."

The view taken by the Court of Appeal appears to have been that the "expropriating by-law" of the 2nd November, 1931, constituted a sufficient compliance with the enactments of s. 396 (45), s. 5 and s. 258 (1). The by-law is in these words:

No. 13405. A BY-LAW

To acquire certain lands for park purposes as an addition to Bickford Ravine.

(Passed November 2nd, 1931).

WHEREAS by Report No. 14 of the Committee on Parks and Exhibition, adopted in Council October 5th, 1931, it was recommended that the lands hereinafter described be acquired for park purposes, as an addition to Bickford Ravine:—

Therefore the Council of the Corporation of the City of Toronto enacts as follows:—

I.

The lands described by Tracy D. LeMay, Esquire, City Surveyor, as follows, namely:—

All and singular that certain parcel or tract of land and premises situate, lying and being in the City of Toronto, in the County of York and Province of Ontario, being composed of the westerly forty feet (40') of Lot No. 43, according to a plan filed in the Registry Office for the Registry Division of Toronto, as No. 1223

are hereby expropriated and taken for park purposes.

In the sections of the statute quoted above, a distinction is patently recognized between the procedure which is described by the verb "expropriate" and that which is described by the phrase "enter on."

Reading s. 5 with s. 351, it sufficiently appears that, where the municipality is proceeding under its compulsory powers alone, the distinction between an "expropriating by-law" and a by-law which, in addition to being an "expropriating by-law," authorizes entry upon the property or the making use of the property to be taken, is a practical distinction of great importance.

The "expropriating by-law," no doubt, may be registered, and the registration of it may affect the powers of disposition possessed by those interested, in the sense that anybody purchasing must purchase subject to the muni-

1934

CITY OF TORONTO v. PRINCE.

The Court.

cipality's right to acquire the property compulsorily, on the footing of paying compensation as of the date of the by-law, or, at least, as of the date of the registration. But an "expropriating by-law" in the sense in which the words are used in s. 351, does not, in itself, commit the municipality to take the property or to pay compensation for it. We assume that, in such a case, the parties interested may insist upon arbitration, but, unless, under the authority of by-law, the Corporation has entered on or made use of the property in the sense of s. 351, then the "expropriating by-law" can be repealed at any time before the award is made (s. 351 (2)); and even when an award has been pronounced, the corporation is not bound to acquire the property, or to pay compensation on the footing of having acquired it, except by force of a by-law accepting and adopting the award. A by-law which, in the sense mentioned, is simply an "expropriating by-law" not only is not, in itself, an acquisition of the property; does not, in itself, authorize such an acquisition on the terms set forth in an award, in the absence of a fresh by-law adopting such award. Such a by-law, therefore, has not the effect of a notice to treat under other systems of expropriation, under the provisions of the *Lands Clauses Consolidation Act,* for example; and one may incur some risk of misleading oneself, if one resort to supposed analogies in proceedings under other statutes, and in decisions in respect of such proceedings, for the purpose of ascertaining the rights of the parties, under the compulsory clauses of the *Municipal Act.*

Where the Corporation proceeds under its compulsory powers alone, and the initiating by-law is an "expropriating by-law" simply, no act or proceeding on the part of the persons interested in the property can have the effect of binding the corporation to acquire the land. There must, in addition, we repeat, be an "entry on" or use made of the property, as contemplated by s. 351, under the authority of by-law, or a further by-law adopting an award, or an agreement between the corporation and the parties interested settling the amount of the compensation.

Now, the by-law of November 2nd professes to "expropriate" *simpliciter.* "Take" adds nothing to "expropriate" in view of the definition of "expropriate" in s. 337 (*a*). We agree with the view expressed by Meredith,

C.J.C.P., in *Re City of Toronto and Grosvenor Street Presbyterian Church Trustees* (1) to the effect that the intention to grant authority to "enter on" or "make use" of the land must be expressed or given by implication in a by-law. Here, such power is not given in express terms, and we see no sufficient reason for implying it. Indeed, it should be observed that the "expropriating by-law" professes to expropriate the whole of the westerly forty feet of a certain lot 43, while the land with which we are concerned, and which it is contended was taken by the by-law, is only part of the property described in it,—something between one quarter and one half of it. We cannot think that this by-law, in itself, authorizes—by implication—the officials of the corporation, without a further by-law, to commit the corporation to the taking of this fraction of the land, the whole of which, we must assume, was required for the purposes of the scheme, by entering upon or making use of it without having arranged or ascertained the terms upon which the residue of the land involved in the scheme could be acquired. In our opinion, the "expropriating by-law" had not the effect of authorizing the officials of the corporation to do any act or take any proceeding which would deprive the corporation of the benefit of the *locus poenitentiae* provided for by s. 351.

We turn now to the immediate question. An "expropriating by-law" having been passed, which in itself did not bind the Corporation to acquire the property, which could not be converted into a binding obligation to acquire it by any act or proceeding of the parties interested in it, and which, therefore, in itself, did not constitute an acquisition or authorize the officials of the Corporation to effect an acquisition: did that by-law operate to empower the Council, to fasten such an obligation upon the Corporation, and to effect such an acquisition, by resolution alone?

There are two grounds upon which this question must, we think, be answered in the negative. First, the amount of compensation to be paid is frequently the most important element entering into the considerations which influence the decision of public authorities in respect of the acquisition of lands for public purposes; and where there is a proposal to acquire land for a public park, or for the pur-

(1) (1917) 41 Ont. L.R. 352, at 360-1.

1934
CITY OF TORONTO v. PRINCE.
The Court.

poses of a public park, under s. 396 (45), the most weighty consideration would, probably, in most cases be this element of cost. The magnitude of the compensation to be paid seems to be so radical a matter, and the settlement of it, therefore, so important a step in the process of acquiring lands under s. 396 (45), as to justify, in our opinion, the conclusion that the authority to assent to such an agreement must proceed from a by-law enacted under that clause. To hold that a simple "expropriating by-law", where there is no express or implied authority by by-law to settle the compensation, creates such authority by force of the statute, would, we think, postulate an intention out of harmony with that manifested by the enacments of s. 351, which (in such circumstances) so carefully protects the interests of the ratepayers by making adoption by by-law a condition of the efficacy of an award of the arbitrators.

The second ground is that the power to settle compensation by agreement is one of those powers contemplated by s. 258 (1). It might with some force be argued that the transaction under consideration in this appeal was, in its true character, a purchase; that the acquisition was a voluntary acquisition; that the "expropriating by-law" was nothing more than a negotiating instrumentality of not much greater efficacy than the existence of the power itself to expropriate. But we do not proceed upon that ground. The power to create a binding contractual obligation fixing the amount of the compensation to be paid in circumstances such as those under review is, we think, clearly *ejusdem generis* with the power to acquire by purchase; a power which, as we have seen, can only be executed by by-law.

We think the appeal should be allowed, and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *C. M. Colquhoun.*

Solicitors for the respondents: *Norman Sommerville & Company.*

MASSEY HARRIS COMPANY LIMITED (PLAINTIFF) ..... APPELLANT;

1934

* Feb. 14
* Mar. 28.

AND

A. E. SKELDING (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Sale of goods—Farm machinery—Tractor—Damages for breach of warranty—Measure of damages—Onus.

In determining the damages to the purchaser of a tractor against the vendor, for what was held to be a complete failure of the tractor in respect of the fulfilment of certain warranties as to its performance, it was *held* that, *prima facie*, the loss incurred by the purchaser amounted to the full purchase price; and that it was incumbent upon the vendor to adduce evidence in support of its contention that the damages so measured should be reduced by reason of the possession of the tractor of some merchantable value (establishment of the amount of that merchantable value not being upon the purchaser). The judgment of the Appellate Division, Alta., [1933] 2 W.W.R. 567; [1933] 4 D.L.R. 303, holding that the purchaser by his use of the tractor had lost his right to return it, but allowing him damages for the amount of the full purchase price, was affirmed in the result.

The judgment of this Court in *Nolan* v. *Emerson-Brantingham Implement Co.* ([1921] 2 W.W.R. 416; 60 Can. S.C.R. 662) explained (this Court not agreeing with the interpretation of it by the Appellate Division in the present case).

APPEAL by the plaintiff, and cross-appeal by the defendant, from certain parts respectively of the judgment of the Appellate Division of the Supreme Court of Alberta (1).

The plaintiff sued the defendant upon two lien notes, amounting together to $1,740, covering the purchase price of a tractor, price $1,400, and a disc, price $340, for the sale and purchase of which there was a written agreement between the parties.

The defendant, besides denying the allegations of the statement of claim and alleging failure of consideration, counterclaimed, alleging (*inter alia*) that the plaintiff's agent made certain representations as to the tractor's performance, that "upon said conditions" defendant agreed to purchase it and to try it out, that it failed to fulfil the conditions, that defendant did not accept it and returned it. Defendant was prepared to pay for the disc but pleaded tender before action. He asked for an order cancelling the

* PRESENT:—Duff C.J. and Rinfret, Lamont, Crocket and Hughes JJ.

(1) [1933] 2 W.W.R. 567; [1933] 4 D.L.R. 303.

1934

MASSEY HARRIS CO. LTD. v. SKELDING.

notes, and alternatively, "if the said conditions are to be treated as warranties," he claimed damages to the extent of the price of the tractor, and for the use of extra fuel and oil and for loss of time. Plaintiff denied defendant's said allegations.

The action was tried before Tweedie J., who found that the tractor did not comply with the representations made by the plaintiff's agent on the sale, and further it was not reasonably fit for the purpose for which it was intended; that, notwithstanding a clause of the agreement limiting the representations to those in the agreement, the plaintiff was bound by the verbal representations (not expressed in the agreement) of its agent (*The Farm Machinery Act*, R.S.A. 1922, c. 152, s. 4); that, while defendant did not strictly comply with the provisions of the clause of the agreement as to testing and giving notice, plaintiff was not prejudiced thereby as it had actual notice and waived strict compliance; that the retention of the machine for 16 months was not, under all the circumstances, unreasonable, and plaintiff acquiesced in such retention in its endeavours to so adjust it that it would operate in the manner and do the work that it was represented that it would; that, the tractor not fulfilling the representation made concerning it, and that provided by statute, defendant was justified in not accepting it, other than for the purpose of testing it, and acted within his rights in returning it to plaintiff in whom the title still remained; that there was no legal tender of payment for the disc. He held that, there being a total failure of consideration as to the tractor, the plaintiff was not entitled to recover for it and, to the extent of its price, $1,400, the plaintiff's claim should be dismissed. He gave judgment to plaintiff for the price of the disc, $340, and interest.

On appeal to the Appellate Division of the Supreme Court of Alberta, Harvey C.J.A., in delivering the judgment of the majority of the court, said:

> With all respect I find myself unable to accept the conclusion of the learned trial Judge that the defendant did not accept the tractor and was entitled to return it. The time that he retained it is not of so much importance as the work he made it perform. He was not merely testing it after each effort by plaintiff's expert to make it perform satisfactorily to see if it would perform satisfactorily but he was actually continuing to do his work on hundreds of acres of land though it did not do it satisfactorily.
>
> * * *

I think, therefore, the defendant's remedy is by way of damages and not by way of rescission or rejection of the tractor. And I do not think he is barred by the clause of the agreement which says that "The purchaser agrees not to bring any suit for breach of warranty or plead any alleged breach of warranty as a defence or by way of set off after one year from the date of delivery of the machine to him." He is not setting up a breach of warranty but is claiming damages for breach of a condition, it being too late to resort to it for other remedy, and it does not make it a warranty because he relies on it as on a warranty. If it were not so it would be necessary to consider whether under the facts in evidence the Court would hold the clause reasonable under the authority of *The Farm Machinery Act*.

The situation then becomes the same as it was in the case in this Court of *Nolan* v. *Emerson-Brantingham Implement Co.*

In that case the trial Judge, Stuart J., held that it was too late for rescission which was claimed but held that "the tractors were practically [i.e., for practical purposes on a large farm] valueless", and he awarded damages in the full purchase price of the tractors though they still remained in the possession of the purchaser.

On appeal (1), this Division reduced the damages, being of opinion that the tractors could not be said to be valueless and were still the property of the purchaser.

On appeal to the Supreme Court of Canada (2), the judgment of the trial Judge was restored. Anglin J. (as he then was) at p. 419 says: "No doubt the 'L' tractors did some useful work while operated by the appellant. But it sufficiently appeared that they could not be profitably used for the purposes for which he purchased them upon evidence accepted by the learned trial Judge as worthy of credence".

In the present case the learned trial Judge has found that there was a total failure of consideration, in other words, that the tractor was valueless to the defendant. There is undoubtedly evidence to support his finding and in view of the decision in the *Nolan* case, I do not see how we can reverse it and as the tractor is in the possession of the plaintiffs and no claim is made by the defendant in respect of it we are not met with the difficulty presented in this respect in that case.

I feel myself bound, therefore, to accept his conclusion in substance.

I think in form, however, there should be judgment for the plaintiffs for the amount claimed and that there should be judgment on the counterclaim for so much of the amount of the claim as relates to the price of the tractor. The plaintiffs should have the costs of the claim with only the nominal costs of the trial since the only ground of controversy in which they succeed is on the question of tender. The defendant should have the costs of the counterclaim including costs of discovery and the general costs of the trial.

I see no reason for differing from the learned trial Judge in dismissing the defendant's other claim for damages. He certainly had enough value from the use of the tractor to offset any extra expense and loss of time occasioned.

As substantial success is with the respondent I would give him the costs of the appeal.

McGillivray J.A., dissenting, held that the Appellate Division might not now assess the defendant's damages, for

(1) 15 Alta. L.R. 353; [1920] 2 W.W.R. 470.

(2) [1921] 2 W.W.R. 416; 60 Can. S.C.R. 662.

1934

MASSEY HARRIS CO. LTD. v. SKELDING.

breach of condition, in the full amount of the purchase price. In discussing the judgment at trial, he observed that, while the trial judge did find that there was a total failure of consideration as alleged in the defence, yet an examination of the judgment as a whole showed that the trial judge did not find as a fact that the tractor was valueless either to the defendant or to anyone else; the trial judge's judgment turned upon non-acceptance and could not in any sense be construed as an assessment of damages; it followed that the *Nolan* case, *supra*, in which damages were fully assessed, had no application. After discussing the *Nolan* case, and distinguishing it from the present case, he said:

> I make these observations concerning the *Nolan* case because that case was so much discussed in the course of argument, but whether I be right or wrong in the view I take of the *Nolan* case, it is enough to say that the learned trial Judge has found that there has been breach of conditions of purchase and that the defendant is therefore entitled to such damages as he may establish that he is lawfully entitled to, before a trial Judge, and that the learned trial Judge in this case, not having directed his mind to damages, it is impossible to say what evidence he would have believed with respect thereto, and so in my view the proper course for this Court to pursue is to set aside the judgment dismissing the counterclaim and to direct an assessment of damages, * * *

The formal judgment of the Appellate Division adjudged that the plaintiff recover the sums claimed and interest (amounting in all to $2,061.07), and that the defendant recover damages on his counterclaim for $1,400 (the amount of the price of the tractor) and interest (amounting in all to $1,670.10); that plaintiff recover the costs of the claim with only the nominal costs of the trial, and that defendant recover the costs of the counterclaim, including costs of discovery and the general costs of the trial; and that defendant recover his costs in the appeal.

The plaintiff appealed to the Supreme Court of Canada from that part of the judgment of the Appellate Division by which it was adjudged that defendant recover as damages on his counterclaim the sum of $1,670.10 (and the costs awarded him) and from the assessment only of the said damages. The defendant cross-appealed, asking, in the event that the Supreme Court of Canada varied or disallowed the judgment for damages awarded him by the Appellate Division, that that part of the judgment of the Appellate Division which held that he had accepted the tractor be reversed and set aside and that the finding

of the trial judge be restored, and plaintiff's claim (as to the tractor) be dismissed. Each party obtained leave, to appeal and cross-appeal respectively, from the Appellate Division.

W. H. McLaws for the appellant.

M. E. Moscovich for the respondent.

The judgment of the Court was delivered by

DUFF C.J.—We do not differ from the conclusion of the Appellate Division that the respondent had by his use of the machinery lost his right to return it. It is unnecessary to discuss the reasons for this view, as counsel for the respondent in this Court was content to accept the judgment below.

The sole question, therefore, concerns the amount of damages to which the respondent is entitled. The learned trial judge found that

> the tractor delivered by the plaintiffs to the defendant did not comply with the representations * * * as alleged in the statement of claim, and further it was not reasonably fit for the purpose for which it was intended.

The "representations as alleged in the statement of claim" are the representations set forth in paragraph one of the counterclaim which is in these words:

> The defendant says that on or about the 25th day of April the plaintiff's agent came and represented to him that he had a Wallace tractor "which will put a 8½ ft. plough in high gear and also a 3 Bottom Breaking Plough, that it would burn distillate, that the tractor would function better than the defendant's Hart Parr tractor and would save the defendant $250 on the year's use and run.

There is some evidence that the tractor, although useless for the purposes for which it was purchased, had some merchantable value, and the appellants contend that it was incumbent upon the respondent to establish that value in order to determine the amount of the damages to which he was entitled.

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

1934

MASSEY HARRIS CO. LTD. v. SKELDING.

Duff C.J.

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. (1). 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.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McLaws, Redman, Lougheed & Cairns.*

Solicitor for the respondent: *M. E. Moscovich.*

1934

*Feb. 26, 27.
*April 24.

ELECTROLIER MANUFACTURING COMPANY LTD. (DEFENDANT)..... } APPELLANT;

AND

DOMINION MANUFACTURERS LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Sufficiency of advance upon prior art and of inventive ingenuity—Infringement.

The judgment of Maclean J., President of the Exchequer Court of Canada, [1933] Ex. C.R. 141, holding that plaintiff's patent (relating to improvements in coffin handles) was valid and had been infringed by defendant, was affirmed.

It was *held* that the construction invented, whereby a certain method of locking was made possible, was novel and ingenious; that the advance upon the prior art, and the inventive ingenuity in the discovery, were sufficient to make it good subject matter of a patent.

As to infringement, it was *held* (distinguishing *P. & M. Company* v. *Canada Machinery Corporation Ltd.*, [1926] Can. S.C.R. 105, and *Gillette Safety Razor Co. of Canada Ltd.* v. *Pal Blade Corporation*

* PRESENT:—Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

(1) [1921] 2 W.W.R. 416; 60 Can. S.C.R. 662.

1934

ELECTROLIER MANUFACTURING CO. LTD. v. DOMINION MANUFACTURERS LTD.

Ltd., [1933] Can. S.C.R. 142) that, even assuming that the pivoting means used by defendant were not precisely and exactly covered by the claims of the patent, the article placed on the market by defendant embodied the principle itself of the invention in question; defendant had taken that which constituted the patentable article in the inventor's disclosure; at best, defendant had borrowed the essence of the patented structure with a small variation in its unimportant features or its non-essential elements.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiff's patent in question (relating to improvements in coffin handles) was valid and had been infringed by the defendant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

O. M Biggar K.C. and *R. S. Smart K.C.* for the appellant.

W. L. Scott K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—This is an action for the infringement of a patent relating to improvements in coffin handles which was granted on November 25, 1919 (No. 194,209) to one Gustav C. Pahlow and assigned on March 7, 1924, to the plaintiff. The action was tried before the President of the Exchequer Court who, on April 8, 1933, held the patent valid and infringed. The judgment granted the usual relief by way of injunction and damages. From it the defendant appeals, contending that the patent is not valid and that, even if it were, there was no infringement of it.

Although before the Exchequer Court, the invalidity of the patent was urged on several particulars of objection, the appellant in this Court limited its defence on that branch of the case to one contention only, viz., that the patent in suit was void because, having regard to the state of the art, the advance, if any, therein disclosed was not sufficient to be regarded as an invention in the legal sense or, in other words, that the patent ought to be set aside for want of subject-matter.

It is essential, therefore, to appreciate clearly what the respondent claims to be his invention. And that is to be gathered from the specification.

(1) [1933] Ex. C.R. 141.

1934

ELECTROLIER MANUFACTURING CO. LTD. v. DOMINION MANUFACTURERS LTD.

Rinfret J.

The invention is said to relate to new and useful improvements in handles adaptable for use on caskets and other receptacles. The handle described in the patent consists of two members: the plate or base, which is attached to the side of the receptacle by means of screws, and the "grip", which is the portion of the handle grasped by the hand in lifting the receptacle.

The device forming the subject-matter of the specification

aims to provide novel means whereby, when the grip portion of the handle is raised, a part of the grip will be distorted or bent, so as to form a permanent pivotal connection between the grip and the base member of the handle.

The specification then proceeds to describe the device, "the combination and arrangement of parts" and "the details of (its) construction" by way of reference to "the accompanying drawings".

The base member is preferably made out of metal. It has a semi-circular opening across which a pivot bar extends. The grip

may be variously constructed, without jeopardizing the utility of the invention. As shown, but not necessarily, the grip is trough-shaped in cross section, and is provided at its lower end with a tongue having a reverse bent. Ears project inwardly from the side portions of the grip, and engage the bent of the tongue to hold the tongue about a side bar.

In the side walls of the grip, at the upper end thereof, slots are formed, the slots defining bendable tongues having depending lugs. On its top, and near to its upper end, the grip may be supplied with a transverse rib.

Having thus described the construction of the handle, the specification indicates how it operates. The upper end of the grip is inserted into the opening of the base member, the pivot bar being received in the slots; and when the grip is raised and "fulcrums" on the pivot bar, the bendable tongues at the upper end of the grip, being inside the base or plate, engage the latter at the lower edge of the opening and they are bent upwardly at their free ends, thereby diminishing the width of the slots, at the inner ends thereof, or, in effect, closing them so that, although the grip may still be swung upwardly and downwardly as occasion may demand, it cannot be retracted out of the plate's opening or be removed from the pivot bar. It is permanently assembled with the pivot bar and, therefore, with the base member.

In practical operation, the upper end of the grip (having the bendable tongues) simply is inserted into the opening

of the plate. The lower end of the grip is raised, whereupon the grip will be "securely but pivotally assembled" with the plate.

If the transverse rib has been supplied on the top and near to the upper end of the grip, as alternately suggested, it will, when the grip is raised and in use, bear against the base member above the opening and, co-operating with the pivot bar, receive a portion of the weight of the receptacle. If the bendable tongues have "depending lugs", the latter will engage the plate at the lower edge of the opening and further help in bending the tongues. One other point only need be mentioned. The specification states it should be

understood that, within the scope of what is claimed, changes in the precise embodiment of the invention shown can be made without departing from the spirit of the invention.

And now, here are the claims:

1. A handle comprising a base member having an opening and provided with a pivot bar extended across the opening and a grip insertible into the opening and having a slot receiving the pivot bar, the slot defining a bendable finger in the grip, the finger co-operating with the base member at the lower edge of the opening, when the grip is raised, to secure a bending of the finger, a partial closing of the slot, and a permanent pivotal mounting of the grip on the pivot bar.

2. A handle comprising a base member having an opening and provided with a pivot bar extended across the opening and a grip insertible into the opening and having a slot receiving the pivot bar, the slot defining a bendable finger in the grip, the finger having a lug adapted to engage the base member at the lower edge of the opening, the finger and the lug co-operating with the base member, when the grip is raised, to secure a bending of the finger, a partial closing of the slot, and a permanent pivotal mounting of the grip on the bar.

The only difference between the two claims is the lug adapted to the bendable finger, which is mentioned in the second claim and is not mentioned in the first one.

It will therefore appear that the thing or combination which the inventor regarded as new, and for which he claimed "an exclusive property and privilege" (*Patent Act*, s. 14), is a handle comprising a base member and a grip member. The base member must have an opening into which the grip is insertible. The base member is provided with a pivot bar extended across the opening. The grip has a slot receiving the pivot bar; and that slot defines a bendable finger.

Such is what we would call the constructional part of the specification, and it must have been evident to persons having the technical skill and knowledge, to whom, after

1934

ELECTROLIER MANUFACTURING CO. LTD. v. DOMINION MANUFACTURERS LTD.

Rinfret J.

all, claims of this nature are primarily addressed (*Osram Lamp Works Ltd.* v. *Pope's Electric Lamp Co. Ltd* (1))—it must have been evident that, having regard to the state of the art as disclosed in the evidence, there was no novelty in the integers of the combination so far enumerated.

But the claims proceed to say that the bendable finger co-operates

> with the base member at the lower edge of the opening, *when the grip is raised,* to secure a bending of the finger, a partial closing of the slot, and a *permanent* pivotal mounting of the grip on the pivot bar;

and there lies the gist of the invention. The article thus described is a construction which will permit the permanent assembly of the two parts of the handle by merely "raising" the grip. The principle disclosed in the claims is the arrangement of the bendable finger in such a way that, in the words of the inventor at the trial, it will "hook-up automatically" by the mere upward lift of the grip. That is an interpretation of the claims to which, in our view, the respondent is entitled upon a fair reading of the whole of the specification (*Lister* v. *Norton* (2)). In the light of that specification, the words "the finger co-operating" in the claims may reasonably be construed as meaning: "capable of co-operating". In that sense and contrary to what was urged by the appellant, the invention does not consist solely in a mode of attachment or in a method of locking the parts, to which, when the finger is once bent or when the closing of the slot is once permanently secured, the claims no longer apply. The invention is not precisely the method of locking. It is rather the particular construction whereby that method is made possible, the arrangement whereby the bendable finger will close by the mere raising of the grip and will procure "a permanent pivotal mounting of the grip" on the base member. No other two such parts had ever been constructed before. It was a combination which appeared to the learned President of the Exchequer Court "quite novel and ingenious indeed"; and we agree with his decision.

There was nothing similar in the prior art. Fletcher (U.S. patent no. 438,349) disclosed a handle built up of a knuckle and slot made to receive a pintle and drilled transversely for the insertion of a fastening pin. It was

(1) (1917) 34 R.P.C. 369, at 391. (2) (1886) 3 R.P.C. 199, at 203.

the clear intention of that inventor that the two parts of the handle should be held together by the pin and that the insertion of this pin should constitute a separate operation. No way was provided in this patent whereby the tongues defining the slot could be bent. In fact, no thought of bending the tongues was in the mind of the inventor.

Raymond (U.S. patent 1027067) suggested a stamped or pressed metal handle whereof the prongs were bendable; but he provided for bending them by tool or by machine; and, assuming the device he disclosed could be made to work automatically—an assumption not warranted by the evidence—it is abundantly clear that no such idea ever entered his mind. His device was conceived and based on an entirely different principle. As was said by Parker J. (afterward Lord Parmoor) in *Flour Oxydizing Co. Ltd.* v. *Carr & Co. Ltd.* (1):

> It is not enough to prove that the apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specification contains clear and unmistakable directions so to use it.

We are not mentioning these anterior publications for the purpose of negativing anticipation. Counsel for the appellant expressly declared he was not relying on anticipation. We are referring to these former patents (the only ones produced at the trial), in order to show the state of the art and the extent of the advance made by Pahlow, the inventor of the respondent's device. He eliminated the use of the fastening pin or of the tool operation or of the machine operation. Indeed, he did away with the method of manually connecting the parts of the handle. He devised an article which is useful, practical, of manifest ingenuity (*Pneumatic Tyre Company* v. *Casswell* (2)) and producing a beneficial result. Though simple, his device cannot be said to have been obvious. Raymond applied his mind to the same subject, and he never thought of the use to which the pliable material could be put as it was by Pahlow. Raymond's patent issued seven years before Pahlow's and yet Pahlow's idea never occurred to the skilled craftsmen working on these or similar handles, although the bendable tongue or finger had been suggested by Raymond.

(1) (1908) 25 R.P.C. 428, at 457. (2) (1896) 13 R.P.C. 375, at 380.

1934

ELECTROLIER MANUFACTURING CO. LTD. v. DOMINION MANUFACTURERS LTD.

Rinfret J.

The merit of Pahlow's patent is not so much in the means of carrying out the idea as in conceiving the idea itself (*Fawcett* v. *Homan* (1). He produced an improved thing as the result of the ingenious application of a known elastic material (*Gadd and Mason* v. *Mayor, etc., of Manchester* (2)); and, to our mind, there was just as much inventive ingenuity in his discovery as there was in the adoption of tubular wire braids in making bristles, held by the House of Lords to have been good subject-matter of a patent (*Thomson* v. *American Braided Wire Company* (3)), the result attained being a complete article, effective and capable of being assembled cheaply and expeditiously. The advance may have been slight—although, as pointed out by Fletcher Moulton on Patents (p. 22), "the general tendency of the mind is to minimize the difficulty of a discovery after it has been made" —but there was a real inventive step upon "what went before"; and the new result which obtained was of sufficient importance to make it a genuine invention. It follows that the patent should be held good and valid.

We also agree with the learned President that infringement has been established.

Infringement is a matter depending on the construction of the claims, for there it is that the inventor is required to state "the things or combinations * * * in which he claims an exclusive property and privilege" (*Patent Act*, s. 14 (1) (*c*)). The appellant's formation is the same as that disclosed in the patent in suit, with the exception that the pivoting means in the appellant's structure do not make use of the continuous bar extending across the semi-circular opening in the plate or base member as described in the specification. Instead of the pivot bar running right across the opening, there are two holes "about which the tongues in the sides of the grip rotate, when they are closed by raising the handle to bend the tongues."

It so happened that, in 1925, the patentee abandoned the pivot bar, in the manufacture of the base member, and replaced it by two holes in the lower wall for pivoting the grip. And the appellant copied exactly the device described in the patent including the modification brought about by the patentee in 1925. The appellant has made,

(1) (1896) 13 R.P.C. 398, at 410. (2) (1892) 9 R.P.C. 516, at 524.
(3) (1889) 6 R.P.C. 518.

constructed, used and vended the identical article turned out by the respondent since that date.

We would feel disposed to hold, as suggested by one of the expert witnesses, that the pivoting means now adopted by the patentee, and notwithstanding the modification, conform, strictly speaking, with the description of the specification. We hardly believe that, in the premises, even in respect of "the pivot bar extended across the opening", the slight change that was made may really be called a departure from the fair construction of the claims within the meaning of the patent law. But having indicated, as we have in the first part of this judgment, how we think Pahlow's claims ought to be construed, to wit: as disclosing an invention, not of a method of pivoting or locking, but of a noval construction or arrangement capable of being assembled automatically and of securing a permanent pivotal mounting by the mere raising of the grip,—the consequence follows that the particular pivot bar is not of the essence of the patented combination. Indeed, it was an old element of the prior art.

What the appellant did—and in that his infringement truly consists—was to take the idea which formed the real subject-matter of the invention. It does not matter whether he also adopted the substitution of the two holes for the bar in the pivoting means. The precise form of these means was immaterial. In the language of the patent, they could be changed "without departing from the spirit of the invention."

That is the essential distinction which must be made between this case and those of *The P. & M. Company* v. *Canada Machinery Corporation Limited* (1) and of *Gillette Safety Razor Company of Canada, Limited* v. *Pal Blade Corporation, Limited* (2) relied on by the appellant. In the *P. & M.* case (1), the appellant's invention was one of mechanical detail. It was held that the use of a different method not embodying the specified mechanical contrivance did not fall within the ambit of the claims. In the *Gillette* case (2), the patentee had claimed the blade as a subordinate invention in addition to the main or principal invention consisting in the complete safety razor. The subject-matter, if any, of the subordinate invention was found to consist in the particular form and position

(1) [1926] Can. S.C.R. 105. (2) [1933] Can. S.C.R. 142.

1934

ELECTROLIER MANUFACTURING CO. LTD. v. DOMINION MANUFACTURERS LTD.

Rinfret J.

of the holes in the blade; and it was held no infringement to have punched in a razor blade holes of a different form and in a different position. In such cases, so it was decided, the patentee must make plain the metes and bounds of his invention, and he will be held strictly to the thing in which he has claimed an exclusive property and privilege. In both cases, it was found there was no infringement because the alleged infringing article was not the precise mechanism claimed for by the patentee. In this case, the situation is entirely different. Assuming, but not admitting, that the pivoting means used by the appellant are not precisely and exactly covered by the claims of the patent, the article placed on the market by the appellant embodies the principle itself of Pahlow's invention. The appellant has taken that which constitutes the patentable article in Pahlow's disclosure. Both handles are in all material respects the same.

The appellant's counsel was able to point to only three differences:

(*a*) the substitution of the holes for the pivot bar, and that has already been discussed.

(*b*) the dependent lug on the bendable finger; and that is not mentioned in claim 1, so that, at all events, it would not affect the question of infringement.

(*c*) the shoulder or transverse rib on the top and near the upper end of the grip; and that is given only as optional in the specification. It is an immaterial part of the mechanism.

At best, the appellant has borrowed the essence of the patented structure with a small variation in its unimportant features or its non-essential elements; and we would say, as Lord Davey, in *Consolidated Car Heating Company* v. *Came* (1), that, according to any fair interpretation of the language of the specification, he has taken, in substance, the pith and marrow of the invention, with all its essential and characteristic features, except in details which could be varied without detriment to the successful working of it. There is no difference in the main elements of the two structures. There is no difference in the operation. Both perform the same function in the same way. Above all, "the spirit of the invention" was infringed.

(1) ([1903] A.C. 509, at 515, 517, 518.

1934

ELECTROLIER MANUFACTURING CO. LTD. v. DOMINION MANUFACTURERS LTD.

Rinfret J.

It does not matter, of course, that, by chance, the appellant failed to appreciate the full value of the invention and, in assembling the two parts of the infringing handle, he bent the finger by mechanical operation, instead of accomplishing the same object by the simple method of raising the grip. We are no more impressed than the trial judge by the contention that the mechanical operation, in this case, would make for more uniformity. It was the appellant's misfortune to have produced the identical article without having taken advantage of all the benefits of the patent.

If, however,—which we do not suppose—the appellant resorted to the more complicated or more cumbersome method of assembling and locking the handle for the purpose of escaping the possible consequences, we concur in the view of the learned President that the course followed by the appellant was "not sufficient to avoid infringement".

We are of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Ivey, Elliott & Gillanders.*

CANADIAN ALLIS-CHALMERS LIMITED (DEFENDANT) ..... } APPELLANT;

1933

*Nov. 3.

AND

1934

THE CITY OF LACHINE (PLAINTIFF) RESPONDENT.

*Mar. 28.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Municipal law—Taxes—Exemption—By-law imposing taxes passed within period of exemption—Collection roll adopted after its expiry—Cities and Towns Act, R.S.Q. 1925, c. 102, ss. 484, 518, 520, 521, 534, 538, 540, 542, 546, 548, 572, 589—Art. 1508 C.C.

The city respondent claimed from the respondent company municipal taxes due for the year 1927, payment of which was disputed on ground of exemption. On the 2nd of March, 1903, a resolution was adopted by a municipality later on annexed to the city respondent declaring the lands of the appellant company and all their existing and future buildings and machinery exempt from ordinary annual munici-

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Hughes JJ.

1934

CANADIAN ALLIS-CHALMERS LTD. v. CITY OF LACHINE.

pal and business taxes "during the twenty-five years which commenced to run on the first of September last, 1902," accordingly until the first of September, 1927. On the 11th August, 1927, the city respondent adopted a by-law which is captioned "By-law imposing a tax on the immoveable property of the City for the year 1927". After reciting the amount required for the purposes of the municipality for the "current year," the total valuation of all taxable immoveable property of the city subject to the general property tax, the amount of exemptions, and the balance required after taking into account the revenues derived from other sources, the by-law imposed a general property tax of $1^{36}/_{100}$ of 1% on all the taxable immoveables of the city of Lachine (une taxe est par le présent imposée et sera prélevée * * *) according to their real value as set forth on the valuation roll in force, "in order to provide for the general administration expenses of the city for the current year, and for the amortization of its funded debt". The by-law likewise provided that as soon as possible after the coming into force thereof the secretary-treasurer of the city shall prepare the collection roll of the general and special taxes imposed by the city and shall give public notice of its preparation and deposit as required by law. This by-law was published on the 12th day of August, 1927, and came into force on the 27th of the same month, at a time when the twenty-five year period of exemption, from September 1, 1902, had not yet expired. The collection roll under the said by-law however was not prepared and published until the 10th day of September, 1927, and the taxes became exigible on the 30th of September, 1927, after the expiry of the period of exemption. The city respondent urged that it was the collection roll which created the tax, while the appellant company alleged that it was the by-law imposing it.

Held, reversing the judgment of the Court of King's Bench (Q.R. 54 K.B. 414), that the appellant company was entitled to claim exemption from taxes so imposed. A municipal tax is formally created at the date the by-law imposing it is adopted and not at the time of the entry into force of the collection roll. The by-law of the 11th of August, 1927, imposing taxes for that year did not affect the property of the appellant company, as it had been adopted before the expiry of the exemption. Consequently the collection roll could not validly impose taxes which were unauthorized by the by-law; and the act of the secretary-treasurer in including in the collection roll the property of the appellant company as subject to taxation was therefore illegal and *ultra vires*.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Circuit Court, Montreal, Rivet J. (2) and maintaining the city respondent's action for the recovery of municipal taxes.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

(1) (1933) Q.R. K.B. 414.

(2) (1932) Q.R. 54 K.B. 414, at 415.

W. F. Chipman K.C. and *J. C. Macfarlane K.C.* for the appellant.

Chs. Laurendeau K.C. and *A. S. Pelletier K.C.* for the respondent.

The judgment of the Court was delivered by

RINFRET, J.—La cité de Lachine a réclamé de la compagnie appelante un certain montant de taxes municipales pour l'année 1927. La compagnie a admis qu'elle devait une partie de ce montant, et elle l'a payée. Pour le surplus, elle a invoqué une exemption octroyée par des résolutions en date des 16 août et 29 septembre 1900 et du 2 mars 1903.

Ces résolutions furent adoptées par une corporation municipale dont le territoire a été depuis annexé à la cité de Lachine; et, lors de l'annexion, la cité fut tenue de respecter cette exemption.

En plus, l'exemption fut originairement accordée à d'autres personnes que l'appelante; mais il est admis que cette dernière est leur ayant droit et qu'elle peut réclamer le bénéfice de l'exemption. Il est donc inutile de tenir compte des différences de personnes ou de municipalités au début de l'exemption. Pour les faits de la discussion, l'on peut envisager la situation comme si la cité de Lachine avait elle-même consenti l'exemption à la compagnie Allis-Chalmers. Nous adopterons cette ligne de conduite au cours du jugement pour plus de clarté et de simplicité. Il n'y a là-dessus qu'un point qu'il suffit de mentionner, c'est que l'exemption de taxes fut accordée en vertu du code municipal et que la cité de Lachine est régie par la *Loi des cités et villes* (1925, S.R.Q., c. 102); mais les parties sont d'accord pour admettre que cela n'affecte pas le litige.

Les données essentielles de la cause sont les suivantes:

Le 16 août 1900, une première résolution

exempte par les présentes du paiement des taxes municipales annuelles ordinaires, ainsi que du paiement des taxes d'affaires, pour une période de vingt-cinq ans, les terrains (en question), ainsi que les usines et machineries qui y seront construites le ou avant le premier jour de septembre 1902 (moyennant certaines conditions dont nous n'avons pas à nous occuper, parce qu'il est admis qu'elles ont été remplies). Cette exemption ne devra avoir effet qu'à dater du jour que ces manufactures ou usines seront en opération dans les conditions ci-dessus mentionnées.

Le 29 septembre 1900, une deuxième résolution annule et remplace la précédente. Il n'est pas nécessaire d'en citer

1934

CANADIAN ALLIS-CHALMERS LTD. v. CITY OF LACHINE.

Rinfret J.

le texte, dont la partie se référant à la question sous discussion est identique à celle de la résolution antérieure. Entre la raison d'être de cette nouvelle résolution et le présent litige il n'y a aucune relation.

Le 2 mars 1903, rapport est fait à la municipalité que, le 1er septembre 1902, les conditions exigées pour l'octroi de l'exemption avaient été remplies par la compagnie, et il est, en conséquence, résolu que le terrain et les usines ou manufactures et leurs dépendances (décrites dans la résolution et qui font l'objet du litige)

soient et sont déclarés par les présentes exempts des taxes municipales annuelles ordinaires et des taxes d'affaires pendant les vingt-cinq ans à commencer à courir le 1er septembre dernier 1902.

Il en résulte que les propriétés en question furent déclarées "exemptes du paiement des taxes", suivant le texte des deux premières résolutions, ou "exemptes des taxes", suivant le texte de la dernière résolution. Nous signalons cette divergence dans la phraséologie uniquement parce qu'il en a été fait état lors de l'audition, mais nous ne pensons pas qu'elle ait d'importance, étant donné le texte de l'article 943 du code municipal en vigueur lors de l'octroi de l'exemption. La version française de cet article emploie l'expression: "exempter des taxes municipales", tandis que la version anglaise se sert des mots "exempt from the payment of municipal taxes", ce qui semble indiquer que, dans l'esprit du législateur, les deux expressions sont équivalentes.

Ce qui est important, c'est que les propriétés doivent avoir le bénéfice de l'exemption "pendant les vingt-cinq ans qui ont commencé à courir le 1er septembre 1902"; et, par conséquent, jusqu'au 1er septembre 1927.

Or, voici maintenant ce qui a donné lieu aux difficultés entre la cité et la compagnie:

Le 11 août 1927, la cité a adopté un règlement (nº 443) imposant une taxe sur la propriété immobilière de la cité pour l'année 1927. Ce règlement a pour but de pourvoir aux "dépenses prévues au budget pour l'année fiscale courante encourues ou à encourir". Il mentionne le chiffre des dépenses ainsi prévues, de même que le chiffre des recettes pour l'année fiscale courante provenant des taxes spéciales prélevées sous l'autorité de différents règlements ou provenant de toutes autres sources "à l'exception de la taxe foncière générale". Il procède ensuite à déclarer que "l'éva-

luation de tous les biens immeubles imposables de la cité sujets à la taxe foncière générale est de $17,402,222.40". Il ajoute que pour couvrir la balance des dépenses prévues pour l'année courante il faudra prélever $236,670.27; puis il statue et ordonne:

Article 1. Une taxe de un et trente-six centièmes de un pour cent est par le présent imposée et sera prélevée sur tous les immeubles imposables de la cité de Lachine suivant leur valeur réelle, telle que portée au rôle d'évaluation en vigueur dans la cité pour pourvoir pour autant, aux dépenses générales d'administration de la cité pour l'année courante et à l'amortissement de sa dette fondée;

* * *

Article 4. Aussitôt après la mise en vigueur de ce règlement, le secrétaire-trésorier de la cité préparera un rôle de perception des taxes générales et spéciales imposées par la cité, et donnera l'avis public de sa préparation et de son dépôt tel que requis par la loi.

Il est admis que, après publication, ce règlement est entré en vigueur le 27 août 1927.

Le rôle général de perception fut complété et déposé au bureau du secrétaire-trésorier de la cité, et avis en fut donné le 10 septembre 1927.

Conformément à la loi, les personnes tenues au paiement de la somme mentionnée dans ce rôle étaient requises d'en payer le montant au bureau du secrétaire-trésorier dans les vingt jours qui suivaient la publication de cet avis (*Loi des cités et villes,* art. 540).

Le règlement imposant la taxe est donc venu en vigueur le 27 août, avant l'expiration de la période fixée pour l'exemption de taxes. Mais le rôle de perception n'a été publié que le 10 septembre et la taxe n'est devenue exigible que le 30 septembre 1927, soit, dans chaque cas, après l'expiration de la période d'exemption. D'où les prétentions respectives des parties.

La cité prétend que c'est le rôle de perception qui établit la taxe. Par suite, il en résulte, d'après elle, que la compagnie doit cette taxe qui serait postérieure à la date d'expiration de l'exemption.

La compagnie prétend, au contraire, que la taxe est créée, non pas par le rôle de perception, mais par le règlement qui impose la taxe et qui sert de base à ce rôle. D'où elle conclut que la taxe est antérieure à la date d'expiration de l'exemption et qu'elle ne la doit pas.

Dès l'abord, il faut distinguer, semble-t-il, entre l'obligation personnelle qui résulte de l'imposition de la taxe, et le caractère hypothécaire qui lui est attribué par la loi.

1934

CANADIAN ALLIS-CHALMERS LTD. v. CITY OF LACHINE.

Rinfret J.

Les taxes municipales imposées sur un terrain peuvent être réclamées aussi bien du locataire, de l'occupant, ou autre possesseur du terrain, que du propriétaire, lors même que tel locataire, occupant, possesseur ou acquéreur n'est pas inscrit sur le rôle d'évaluation (*Loi des cités et villes,* art. 534). Aussi, le paiement d'une taxe municipale peut-il être recouvré par voie de poursuite ordinaire devant les tribunaux compétents (*Loi des cités et villes,* art. 546; code de procédure, art. 48 et suiv.; *Galt* v. *Robert* (1).

Mais les taxes municipales et leurs intérêts constituent, en outre, une créance privilégiée exempte de la formalité de l'enregistrement (art. 518), c'est-à-dire que dès que l'obligation personnelle devient exigible, elle est revêtue par la loi du caractère d'un droit réel; et, en outre des méthodes spéciales de recouvrement prévues par les lois municipales (saisie et vente des meubles en vertu des articles 542 et suivants; ou vente des immeubles en vertu des articles 548 et suivants), il n'y a pas de doute que la municipalité peut se pourvoir par le moyen de l'action hypothécaire.

On a donc pu décider que l'acheteur d'un immeuble était, par rapport à son vendeur, le véritable débiteur de la taxe municipale inscrite sur un rôle de perception, dont avis de dépôt était publié après la vente, quoique le règlement imposant la taxe fut venu en vigueur avant la vente. Cette solution fut adoptée dans un grand nombre d'arrêts, dont on nous a cité quelques-uns: *Lunn* v. *Windsor Hotel* (2); *Thibault* v. *Robinson* (3); *Les Ecclésiastiques du Séminaire de Saint-Sulpice de Montréal* v. *Masson* (4); *Surprenant* v. *Brault* (5).

Ces décisions proviennent de l'application de l'article 1508 C.C., qui définit l'obligation de garantie du vendeur à raison de l'immeuble qui a fait l'objet de la vente. Il y a été jugé que la taxe ne constituait un "droit existant" ou une charge affectant l'immeuble qu'à dater du moment où le montant de la taxe était devenu certain et déterminé. Ce montant n'est définitivement fixé que par le rôle de perception et il n'est exigible que "dans les vingt jours qui suivent la publication" de l'avis de dépôt de ce rôle. Le

(1) [1933] S.C.R. 516.
(2) (1885) M.L.R. 1 S.C. 137.
(3) (1893) Q.R. 3 K.B.
(4) (1900) Q.R. 10 K.B. 570.
(5) (1921) Q.R. 32 K.B. 481.

privilège n'affecte donc l'immeuble que du moment où devient définitif le montant de la taxe qu'il garantit. Jusque-là, et, par conséquent, lors de la vente, il n'existait sur l'immeuble aucune charge l'affectant et dont le vendeur était obligé de garantir l'acheteur.

Mais cette solution, qui peut s'imposer entre vendeur et acheteur par application d'un article du code civil, ne saurait être adoptée dans la discussion des rapports entre une corporation municipale et son contribuable dans une cause de la nature de celle qui nous est soumise.

D'autre part, envisager l'octroi de l'exemption de taxes comme un contrat inviolable entre les parties, ainsi que l'a fait le tribunal de première instance, est évidemment une proposition dont les prémisses ne peuvent être discutées et que la Cour du Banc du Roi n'a pas un instant mis en doute. Mais cela ne nous rapproche pas de la solution qu'il faut chercher; car il reste toujours à définir la portée et l'intention de ce contrat.

Il se peut que l'intention des parties contractantes, en stipulant une exemption de taxes pour une période fixe d'années, soit que la personne exemptée ne sera pas appelée à contribuer aux dépenses de la corporation municipale qui seront faites pendant toute la durée de cette période d'années. Si le contrat est interprété de cette façon, la présente réclamation de la cité est contraire à l'esprit du contrat, puisque le montant de taxes pour lequel elle poursuit couvre des dépenses encourues pendant la période de l'exemption.

La cité répond que, par ailleurs, si l'on se reporte à la première année de la période fixée, c'est-à-dire l'année 1902, la compagnie n'aurait pu être appelée à payer une taxe répartie après le 1er septembre 1902, quoique cette taxe eût été prélevée pour pourvoir aux dépenses encourues depuis le 1er janvier 1902 et, par conséquent, à des dépenses faites antérieurement à la date de départ de l'exemption.

Mais ce raisonnement nous paraît tourner dans un cercle vicieux. En effet, il tient pour indiscutable, au commencement de l'exemption, un point qui est exactement semblable à celui qui est contesté à la fin de l'exemption. La question de savoir si la compagnie eût pu être appelée à payer une taxe répartie après le 1er septembre 1902 pour des dépenses antérieures à cette date dépend exactement

1934

CANADIAN ALLIS-CHALMERS LTD. v. CITY OF LACHINE.

Rinfret J.

de la même décision que celle de savoir si elle peut être appelée à payer une taxe répartie après le 1er septembre 1927 pour des dépenses encourues pendant la période d'exemption. Dans un cas comme dans l'autre, il faut décider si la taxe prend naissance lors de l'entrée en vigueur du règlement qui l'impose, ou simplement lors de l'avis de dépôt du rôle de perception. En plus, si le contrat réel est que la compagnie exemptée ne doit en aucune façon contribuer aux dépenses qui sont faites par la municipalité pendant toute la durée de l'exemption, le raisonnement doit être le même pour le début et pour la fin de l'exemption. De prime abord, comme l'exemption commence seulement le 1er septembre 1902, on ne voit pas pourquoi l'année 1902 toute entière serait comptée comme la première année de la période de vingt-cinq ans qui a été stipulée (voir: *La Communauté des Saints Noms de Jésus et Marie* v. *The Corporation of the village of Waterloo*) (1). En vertu de la loi, l'année financière de la municipalité commence le 1er janvier et se termine le 31 décembre de chaque année (*Loi des cités et villes,* art. 484). Ici, l'exemption ne concorde pas avec l'année fiscale, et les difficultés qui en résultent sont exactement les mêmes au commencement comme à l'expiration des vingt-cinq années convenues. Il est très sûr que la compagnie a droit au bénéfice intégral de ces vingt-cinq années d'exemption. Il est également certain qu'en principe la taxe foncière ordinaire n'est imposée qu'une fois par année et est prélevée, non pas exactement le 1er jour ou le dernier jour, mais au cours de l'année fiscale; et cette taxe est indivisible. Elle ne peut être calculée ni être payée jour par jour. Ainsi, du moins, l'a décidé la Cour du Banc du Roi de Québec, en 1884 (*Hogan* v. *Cité de Montréal*) (2), et cette décision ne paraît pas avoir jamais été depuis mise en question.

Dans cette cause-ci, nous n'avons même pas la ressource de nous en rapporter à la façon dont les parties ont exécuté leur contrat; car, par une curieuse coïncidence, aucune taxe n'a été imposée ou prélevée dans la municipalité en 1902; en sorte que l'occasion ne s'est pas présentée alors pour l'une et l'autre des parties de prendre position. Mais il en résulte au moins que l'on ne peut pas dire que la compagnie a, comme question de fait, été libérée de

(1) (1887) M.L.R. 4 Q.B. 20. (2) (1884) M.L.R. 1 Q.B. 60.

vingt-cinq taxes annuelles ou que sa prétention actuelle équivaut à demander d'être libérée d'une vingt-sixième taxe.

Toutes ces questions présentent, dans la pratique, des difficultés sérieuses, que nous mentionnons parce qu'elles ont été débattues devant nous et qu'elles font l'objet de la discussion dans les jugements qui nous sont soumis. Mais nous ne croyons pas nécessaire de les trancher pour la décision de la présente cause qui nous paraît dépendre du texte du règlement numéro 443 qui a imposé la taxe. En vertu de ce texte, "une taxe * * * est par le présent imposée et sera prélevée sur tous les biens imposables de la cité".

Il ne s'agit pas ici d'un règlement d'emprunt pourvoyant une fois pour toutes à l'imposition d'une taxe annuelle qui devra être prélevée d'année en année jusqu'à l'amortissement de l'emprunt. Il ne s'agit pas, non plus, de l'imposition d'une taxe spéciale pour améliorations locales et dont le paiement est réparti en versements périodiques annuels.

Il s'agit de la taxe foncière que le conseil pouvait imposer et prélever pour l'année 1927 suivant le rôle d'évaluation alors en vigueur en vertu de l'article 521 de la *Loi des cités et villes*. Sans doute, on peut prétendre que la taxe n'est pas rendue définitive—et peut-être n'est-elle pas complète —au moment où le règlement qui la décrète vient en vigueur et avant l'avis de dépôt du rôle de perception. Jusque-là on peut la décrire comme une taxe en marche, et l'on peut dire que l'imposition comprend à la fois l'adoption du règlement et la confection du rôle de perception qui a pour effet de fixer la dette individuelle de chaque contribuable. Il est de jurisprudence que cette taxe ne devient pas une créance privilégiée grevant l'immeuble qu'elle affecte tant que le rôle de perception n'a pas été déposé. Avant cela, "la taxe n'est pas spécialement imposée sur les immeubles des contribuables"; bien plus, elle n'est pas exigible, et il est certain que ces derniers ne doivent rien à la corporation municipale.

Mais il est non moins certain que le conseil ne peut imposer et prélever annuellement la taxe foncière autrement que par un règlement municipal. Cette taxe ne peut exister que suivant les données du règlement qui l'impose. Elle doit être le fait du conseil et non pas celui du secrétaire-trésorier. Le rôle de perception est surtout un mécanisme

1934

LTD. v. CITY OF LACHINE. CANADIAN ALLIS-CHALMERS

Rinfret J.

de recouvrement nécessairement basé sur le règlement. Il est avant tout une opération mathématique. Il constitue le calcul fait par le secrétaire-trésorier du montant proportionnel dû par chaque contribuable des taxes "alors imposées" (art. 538) et qui ont été décrétées par le conseil. Le secrétaire-trésorier n'a aucun pouvoir, sauf celui de faire ce calcul. Il ne peut résulter de son rôle aucune imposition qui ne trouverait déjà sa source et son autorisation dans le règlement du conseil. Il est évident que s'il répartissait la taxe sur un immeuble qui ne serait pas déjà visé par le règlement d'imposition, l'inscription de l'immeuble sur le rôle de perception serait radicalement nulle et aucune charge valide n'en pourrait résulter. Il s'ensuit qu'il faut donc avoir recours au règlement pour savoir quels sont les immeubles qui ont été imposés.

Or, le règlement qui nous est soumis en fait une imposition immédiate ("une taxe * * * est par le présent imposée"). Il ajoute: "et sera prélevée". C'est la partie qui concerne le secrétaire-trésorier et qui devra être mise à exécution au moyen du rôle de perception. Et l'imposition immédiate qui résulte du règlement est faite

> sur tous les immeubles imposables de la cité de Lachine suivant leur valeur réelle telle que portée au rôle d'évaluation en vigueur.

Cela veut dire: sur les immeubles imposables au moment de la confection du rôle d'évaluation; ou, à tout événement, au moment de l'adoption du règlement d'imposition.

Il n'y a pas dans la *Loi des cités et villes* de définition des "immeubles imposables". On n'y trouve qu'une énumération des biens déclarés non imposables en vertu de la loi (art. 520). Il ne faut pas oublier, d'ailleurs, que le droit d'octroyer des exemptions de taxes n'est plus autorisé par la loi générale. La seule exception est que le conseil peut, par une résolution, faire remise du paiement des taxes municipales aux personnes pauvres de la municipalité (art. 572).

Or, forcément, un immeuble exempt de taxes n'est pas un immeuble imposable pendant la durée de l'exemption. Cet immeuble ne peut entrer en ligne de compte dans l'évaluation municipale, ni par conséquent figurer sur le rôle d'évaluation pour former la valeur totale des propriétés sujettes à cotisation. Toute autre interprétation serait injuste pour les municipalités rurales dans la fixation de

leur contribution au conseil de comté. En outre, aux créanciers de la municipalité elle indiquerait de façon erronée la valeur de leur gage; et, surtout, elle représenterait faussement aux prêteurs le montant réel de leur garantie.

Lorsqu'il s'agit d'un emprunt projeté, la loi modifie le pouvoir d'emprunt suivant la valeur réelle de la propriété immobilière imposable (comme, par exemple, dans l'article 589). Il est évident qu'il s'agit là de la propriété immobilière imposable à la date du règlement d'emprunt, quoique la taxe nécessaire au paiement des intérêts et à la formation du fonds d'amortissement soit répartie sur un grand nombre d'années à venir. Et il est certain que, même dans ce cas, l'évaluation qui limite le pouvoir d'emprunt est l'évaluation alors en vigueur; et, dès lors, les biens imposables qui servent de base à cette évaluation sont les biens imposables à la date du règlement. Ils ne comprennent donc pas les immeubles exempts de taxe à cette date-là.

Les immeubles de la compagnie dont il s'agit dans cette cause-ci étaient certainement exempts de taxes à la date de l'adoption du règlement d'imposition. Ils n'entraient donc pas, à ce moment-là, dans la catégorie des immeubles imposables et ils ne sont pas compris parmi les immeubles sur lesquels la taxe a été imposée et sur lesquels le conseil a ordonné qu'elle serait prélevée.

Nous n'avons pas à nous demander si, en fait, ces immeubles figuraient sur le rôle d'évaluation de la cité alors en vigueur. Il est évident qu'en pareil cas le fait seul de leur inscription sur le rôle ne les rendait pas imposables à l'encontre des résolutions d'exemption et du contrat entre les parties. C'est une circonstance où le contribuable n'est pas privé de ses droits par suite du fait qu'il ne s'est pas pourvu dans les délais de contestation du rôle d'évaluation, et où il peut toujours faire valoir ses prétentions en réponse à une réclamation de la taxe (*Hogan* v. *Cité de Montréal* (1); *Shannon Realties Limited* v. *Ville de Saint-Michel*) (2).

La conséquence, c'est que le règlement d'imposition n'a pas frappé les immeubles de la compagnie; et il s'ensuit que le rôle de perception n'a pu valablement les affecter d'une taxe qui n'avait pas été imposée sur ces immeubles par le règlement du conseil. Tout acte du secrétaire-trésorier dans son rôle de perception allant à l'encontre ou au

(1) (1884) M.L.R. 1 Q.B. 60. (2) [1924] A.C. 185.

1934

CANADIAN ALLIS-CHALMERS LTD. v. CITY OF LACHINE.

Rinfret J.

delà du règlement d'imposition est fatalement illégal et *ultra vires*.

A ce point de vue, il importe peu que l'on traite le règlement comme imposant immédiatement la taxe ou comme ayant seulement autorisé à la prélever. Le texte du règlement, interprété suivant sa teneur, ne désigne que les biens immeubles imposables sujets à la taxe foncière générale et cette désignation, à cette date, ne frappe pas les immeubles de l'appelante. Une procédure qui n'atteignait pas ces immeubles au début, lors de l'adoption du règlement, n'a pu valablement les atteindre à la fin par l'acte du secrétaire-trésorier. Elle n'a pu, pour ainsi dire, les ramasser en route.

N'ayant pas été inclus parmi les immeubles frappés par le règlement, ils ne pouvaient faire partie des immeubles sur qui la taxe serait répartie; et le secrétaire-trésorier n'avait ni le droit, ni le pouvoir de les inscrire dans sa répartition.

La cause actuelle, nous l'avons vu, est une poursuite par voie d'action ordinaire en recouvrement de la taxe. Ce n'est pas une procédure pour faire déterminer la portée ou la durée de l'exemption. Pour que la poursuite soit maintenue, il faut que la taxe soit due. Elle ne peut être due que si elle a été imposée ou si elle l'a été valablement. Il ne suffit pas de dire que la compagnie était seulement exemptée de payer et, qu'en l'espèce, le montant n'étant devenu exigible qu'après l'expiration de l'exemption, la compagnie n'en est plus libérée. Si les immeubles ne sont pas sujets à cotisation en vertu du règlement, ils n'auraient pas dû figurer sur le rôle de perception et cela est décisif car, dès lors, il n'y a rien d'exigible.

D'ailleurs, nous ne voyons pas bien comment l'exemption de taxes pourrait fonctionner si elle consistait simplement à libérer du paiement. Cela impliquerait que, pour le reste, la propriété exemptée devrait figurer au rôle d'évaluation, dans les règlements d'imposition et dans les rôles de perception, comme toute autre propriété. L'exemption entrerait en jeu seulement au moment du paiement dont la personne exemptée serait dispensée. Il est évident qu'il n'en peut être ainsi. La taxe foncière est imposée pour rapporter une somme totale précise basée sur l'évaluation en vigueur. Et pour qu'elle rapporte cette somme, il faut

qu'elle soit répartie en entier dans le rôle de perception pour, ensuite, être perçue en entier de tous ceux qui sont tenus de la payer. Imposer et répartir une partie de cette somme sur une personne exemptée, qui ne serait pas tenue de la payer, laisserait un écart entre le montant requis, imposé, réparti et le montant qui serait exigible et percevable. Le but du règlement d'imposition ne serait pas atteint. En l'espèce, d'après la réclamation, l'écart serait de $9,320.42, à part les intérêts—ce qui n'est pas négligeable.

Pour ces raisons, nous sommes d'avis de faire droit à l'appel et de rétablir le jugement de première instance, avec dépens devant la Cour du Banc du Roi et devant cette Cour.

Appeal allowed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitor for the respondent: *A. S. Pelletier.*

FRANK L. BOONE (SUPPLIANT)..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1933
* Oct. 18, 19.
1934
* April 24.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Construction of ice pier for Crown—Alleged delay of contractor—Work and contractor's plant, etc., taken over by Crown for completion of work—Claim by contractor for damages—Proposed change in plan of work—Lack of instructions in writing—Alleged conduct of Crown's engineers as excuse for contractor's delay—Petition of Right—Parties—Non-joinder of co-contractor.

Appellant and one V. (who was not a party to the action) contracted with the Crown to build an ice pier, and did some of the work. In the foundation work, the contract required excavating the bottom to bed rock by dredging. Dredges chartered by appellant abandoned the work because of difficulties encountered, and appellant complained to the Crown's District Engineer that the dredging was impossible of performance. The District Engineer changed the plan of the work so as to eliminate the dredging and secure the foundation by other means, and directed appellant to proceed on the plan as changed. The District Engineer and appellant differed in their estimates of the nature of the change made and of the extra cost involved, and appellant asked for written instructions, which were not given. A

* PRESENT:—Rinfret, Lamont, Smith, Crocket and Hughes JJ.

1934

BOONE
v.
THE KING.

deadlock ensued and the time within which, under the contract, the work was to be completed, expired. The Crown's Chief Engineer gave notice to the contractors, in pursuance of a clause in the contract, to put an end to their "default and delay" and that, if within a certain time satisfactory progress was not made, the Crown would take the work out of their hands and complete it; and, the work not being proceeded with, the Crown, on further notice, and purporting to act under said clause, took over the work and appellant's materials and plant and proceeded to complete the work according to the plan as changed. Appellant sued (on petition of right) for damages.

Held, reversing judgment of Maclean J., President of the Exchequer Court, [1933] Ex. C.R. 33, Lamont and Hughes JJ. dissenting, that, upon all the facts and circumstances and the proper construction of the contract, the appellant was entitled to succeed.

Per curiam: The nature of the change made in the plan was such as required, under the contract, written instructions from the Chief Engineer; also, in the absence thereof, the Chief Engineer's said notice requiring satisfactory progress to be made, must be taken to mean to proceed under the original plan.

Per Rinfret and Crocket JJ.: Previous to the change of plan there was no delay of which the Crown could now complain; and the delay after the change of plan was directly attributable to the Crown itself, because, while its District Engineer (a recognized departmental representative and the real controlling spirit in all that pertained to the contract and its execution throughout) had directed to proceed on the new plan, it failed to give written instructions, in accordance with the contract, to do so; therefore the taking over by the Crown of the work and materials and plant was not justified (*Roberts* v. *Bury Improvement Commissioners,* 39 L.J.C.P. 129, *Lodder* v. *Slowey,* 73 L.J. P.C. 82, cited). Further, the Crown did not bring itself within the clause under which it purported to act, as that clause, fairly construed, contemplated that the contractors should be made aware of the specific default or delay with which the engineer was dissatisfied, and, to justify under it, the Crown must show that the contractors were guilty of some default or delay in diligently executing some part of the contract work to the engineer's satisfaction (the intention being that the engineer in the exercise of his judgment should act justly and reasonably); and the facts failed to discharge that onus and, further, absolutely negatived justification of the Crown's act. The case should be sent back to the Exchequer Court for assessment of damages, with right to appellant to join V. in the petition (though *quaere* whether this was necessary, in view of the terms of the partnership agreement between appellant and V. *Atkinson* v. *Laing,* 171 E.R. 901, referred to).

Per Smith J.: There was actually little delay on the contractors' part that counted, except what was caused by the miscalculation that it was practicable to do the dredging in the manner attempted. This was a miscalculation of the engineers that was relied on by the contractors, though they were not warranted in doing so by the terms of the contract. But, when the District Engineer directed the change of plan, the contractors were justified in insisting upon approval thereof by the Chief Engineer in writing before proceeding further. Although the notice by the Chief Engineer to proceed could mean only, in the absence of written instructions to the contrary, to proceed on

the original plan, yet, as the Crown subsequently proceeded on the changed plan, the latter was the one clearly contemplated, and there was never any intention of resorting to the original plan. The contractors were never in default as to the changes, and appellant should succeed on his claim. The case should be sent back for assessment of damages in the manner directed by Rinfret and Crocket JJ.

Per Lamont J. (dissenting): There was unreasonable delay by the contractors in engaging dredges. It was not established that the dredging was impossible of performance; on the evidence, it could have been done, though probably at considerable expense. Moreover, in view of provisions of the contract, appellant was not entitled to recover from the Crown his expense in connection with the attempt to operate the dredges on the footing of impossibility of performance. The contractors, with the contract before them, must be held to have known of the lack of authority to make the proposed change in the plan of the work in the absence of written instructions from the Chief Engineer. The trouble arose by reason of their failure to examine the bottom, though a certificate in their tender indicated they had done so. They should have known beforehand whether dredges such as were employed were sufficient for the work. The Crown could not be mulcted in damages for alterations made by an official who had no authority to make them. The judgment of the Exchequer Court should be affirmed, with the variation suggested by Hughes J.

Per Hughes J. (dissenting): The District Engineer had no power to make the proposed alteration in the work, and, in the absence of written instructions from the Chief Engineer, the contract, plan, and specifications remained as they were originally. The contractors must have been aware of said lack of power in the District Engineer. The contractors were in default on the date limit set by the contract for completion; and the difficulty in dredging was not a valid excuse for such default (*Thom* v. *The Mayor and Commonalty of London*, 1 App. Cas. 120, at 132; *Connolly* v. *City of Saint John*, 35 Can. S.C.R. 186, referred to). Under the terms of the contract the Crown was entitled to take over and use appellant's materials and plant to complete the work, even with changes in plan. The appeal should be dismissed, but the judgment should be without prejudice to any proceedings in proper form which appellant might, if so advised, subsequently take against the Crown for the return of, or damages in respect of, any materials or plant not used up by the Crown in accordance with the contract and improperly withheld.

APPEAL by the suppliant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that he was not entitled to the relief sought by his Petition of Right herein, in which he claimed damages from the Crown in respect of a contract for the construction of an ice pier at Barrington Passage, Nova Scotia, the Crown having, by reason of alleged default and delay in the work, taken the work out of the contractors' hands and taken possession of appellant's materials and plant

(1) [1933] Ex. C.R. 33.

1934

BOONE v. THE KING.

for purposes of completion of the work. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was allowed with costs and the judgment of the Exchequer Court was set aside and the case sent back to that court for the assessment of damages, with a reservation of the right of the suppliant, if deemed advisable, to join in the Petition one Voye, who had, with the suppliant, been a party to the said contract. Costs in the Exchequer Court were left in the discretion of that court. Lamont and Hughes JJ. dissented.

P. J. Hughes K.C. for the appellant.

A. N. Carter for the respondent.

The judgment of Rinfret and Crocket JJ. was delivered by

CROCKET J.—I find it impossible upon the evidence to avoid the conclusion that the real reason for the action of the Department of Public Works in terminating this contract and confiscating the contractors' material, plant and equipment was the impossible situation in which the contractors were placed by the failure of Locke, the supervising resident engineer, or the Chief Engineer himself to provide the necessary written confirmation of the radical change which the former had ordered in August, 1929, in the contract plans and specifications regarding the construction of the foundation for the pier, and not any default or delay on the part of the contractors before that time, as the Department is now contending.

Locke admitted that on August 13, 1929, after the powerful dredge *Leconsfield* had tried unsuccessfully to do the required dredging for the foundation of the pier, following the failure of the dredge *J. A. Gregory,* he told Boone that it was not feasible to excavate by a dredge to the rock, as required by the contract specification, and that he would make a change in the plans. He admitted that he did make a change in the original plan, for another foundation than that specified in the contract, which it was not denied affected not only the foundation itself but necessitated the reduction in the height of the crib, which the contractor at that time had built on the shore, all ready to float and place in position on the site as soon as the foundation was

prepared. He admitted that he delivered a copy of the changed plan to the contractor and another to Mr. McKay, the inspector, and that he notified Mr. Allison, an engineer also employed in his office and to whom much of the supervision of this contract work was entrusted. On August 28 he telegraphed Boone to start the bag concrete foundation on the changed plan. Boone wrote Locke the following day acknowledging this telegram and requesting, as he had previously personally done, to have the instructions concerning the proposed changes made in writing before commencing the new work. This letter Locke did not acknowledge and in his testimony, under questioning by the respondent's counsel, admitted that he deliberately waited until the expiration of the contract and then reported to the Chief Engineer of the Department at Ottawa and that the Chief Engineer then notified the appellant's firm of the expiry of the contract.

The Chief Engineer's notice appears under date of September 11, 1929, and recites the making of the contract on September 22, 1928, and that by the terms thereof the work should have been satisfactorily executed and completed within twelve months from the date of notification of the acceptance of the firm's tender, viz., on or before September 1, 1929, and then proceeds:

> And Whereas, you have made default and delay in diligently continuing to advance or execute the said works to the satisfaction of the undersigned;
>
> Therefore, the undersigned, in pursuance of Clause 19 of said contract, hereby requires you to put an end to said default and delay, and if within six days from the service hereof on you, satisfactory progress is not made with the said works, His Majesty the King, represented by the Minister of Public Works, intends to avail Himself of the provisions of said Clause and take the said works out of your hands and complete them.

To this notice the appellant's firm replied on September 18, giving, as my brother Smith states in his judgment, an accurate account of the situation which had developed in connection with the dredging, calling the Chief Engineer's attention to the fact that he had asked for written instructions covering the changes which had been made by the resident engineer in the plan and stating that as soon as the Department gave them these instructions they were prepared to deal with the work just as expeditiously as they reasonably could and asking that the written instructions

1934

BOONE v. THE KING.

Crocket J.

be given them without delay. This letter, it seems, was not acknowledged either. On September 25, after receiving a long telegram from Locke, which shews that the Chief Engineer had forwarded to him the contractors' letter of the 18th, and which telegram advised that the Department was fully justified in completing the work itself, the Chief Engineer on September 25 again wrote the appellant's firm that,

> as no satisfactory progress has been made since my notice has been served upon you it has been decided to take the work out of your hands, in pursuance of Clause 19 of [the contract],

and that "the materials, tools, equipment, etc., become the property of the Department." This letter stated that "the required instructions have been given Mr. District Engineer Thomas J. Locke," to whom the firm was referred for any further information.

The Department afterwards proceeded with the work itself under Mr. Locke's supervision and upon the changed plan which the latter had made, using the appellant's materials and equipment therefor.

The Chief Engineer's notice of September 11, 1929, was the first complaint made to the contractors by that official of any default or delay in diligently executing any part of the work to his satisfaction after the signing of the contract by the Deputy Minister on September 22, 1928. There is not a written line of any such complaint by any officer or representative of the Department in the whole record from the date of the signing of the contract until that notice was served. The only exhibit containing even so much as a suggestion that there had been any delay of any kind on the part of the contractors is Locke's letter of May 8, 1929. This is the letter in which Locke confirmed his conversation of the previous day regarding the creosoting of the timber for the crib after six weeks' seasoning instead of four months' seasoning which the creosoting plant usually insisted upon. "This concession," Locke stated in that letter, "was made you in order to expedite commencement of this work at the earliest possible date," and he added:

> I wish to emphasize the importance of your not neglecting any opportunity of procuring a suitable dredge quickly for the purpose of having the foundation excavated and work commenced June 1, 1929.

It is true that on the trial he said, in answer to questions by the respondent's counsel, that he was not satis-

fied with the progress the contractors had made up to May 7, and that he felt that they should have made arrangements the first part of September when they heard they had the contract—that was before the contract was signed—and it was the first of May when they were trying to procure dredges. In cross-examination, however, he admitted that he approved of the creosoted timber; that he did not expect any actual work to be commenced before spring; and that the earliest time he would expect the contractors to undertake the dredging would be between the middle of May and June 1. His letter of May 8 itself, it will be noted, made no complaint of any delay that had occurred in connection with the dredging, but merely impressed upon the contractors the importance of procuring a suitable dredge quickly in order that work might be commenced on June 1, 1929. As a matter of fact, the contractors had tried to secure a dredge some time before that from the Saint John Dredging Company, which was unwilling on account of the small quantity of material to be dredged to undertake the job, and Boone on the very day of the conversation mentioned, May 7, according to Locke's own testimony, negotiated with the manager of the Beacon Dredging Co. of Halifax to do the dredging, and informed him that the latter had agreed to do the work. It was May 27, however, before the formal charter was signed, whereby the Dredging Company agreed to send its dredge *J. A. Gregory* from Parrsboro, where it was, to the site within a week of that date with a tug boat and scows with three days' allowance to make the trip. On account of repairs which had to be made, this dredge did not arrive at the site until late in June and it did not make its unsuccessful attempt to do the dredging until July 2. No complaints were made by Locke or by the Chief Engineer or anybody else of the delay caused by the dredging company, and after its failure Locke himself made arrangements for the contractors with the manager of the Saint John Dry Dock Co. to send the *Leconsfield* into the site while on its way to Liverpool, N.S. McKay, the resident engineer's inspector, admitted that at the time Locke made the changes in the plan all that could reasonably be done on the crib had been done by the contractors, and it is obvious that no progress could be made with the

1934

BOONE
v.
THE KING.

Crocket J.

actual erection of the crib and pier until the foundation was prepared.

So far, therefore, as the Chief Engineer's notice of September 11 is concerned, although it recites the fact that the time for performance of the contract had then expired, it conclusively shews that this was not the reason for the contemplated action. The notice on its face carries with it an extension of time and commits the Department to the second preamble as its justification, viz., that the contractors had "made default and delay in diligently continuing to advance or execute the said works to the satisfaction of the undersigned." If this preamble refers to any default or delay in the execution of the work before the resident engineer changed the foundation plans, it is clear from what has already been stated that there is no evidence whatever that there was any default or delay of any kind on the part of the contractors before that time in diligently continuing to advance or execute the work to the satisfaction either of the Chief Engineer himself or of the resident engineer or of any other officer or representative of the Department. It must accordingly be taken as referring to the delay which took place afterwards. If there had been any delay of any kind previously it could only have been in relation to the contractors not having arranged immediately after being notified of the acceptance of their tender for the procuring of the timber for the crib and for the hiring of a dredge, notwithstanding that the dredging for the foundation was not expected by the resident engineer or the Department itself to be commenced before June 1. These were the only pretended grounds of previous delay suggested on the trial. If they were real or in any light fell within the terms of the contract they were clearly condoned, as clause 55 of the contract shews that any breach or default might be condoned, though providing that no such condonation shall operate as a waiver of any term of the contract if it is a breach or default "similar to that for which any action is taken or power exercised or forfeiture is claimed or enforced against the Contractor."

What then are the true facts as to the delay for which it must be taken, as already intimated, that the Depart-

ment's action was taken and the forfeiture of the contractors' materials, plant and equipment claimed?

The resident engineer finds the original foundation plans unfeasible, informs the contractors to that effect and that he is going to change them and substitute a new foundation, furnishes the contractors and his own inspector with copies of the changed plan, admits that the substituted plan involved the abandonment of ten feet of the crib the contractors already had constructed, new work in the rock talus and many other important items for which no provision was made in the original contract, telegraphs the contractors on August 28 to start work on the new plans, notifies his assistant supervising engineer, ignores the contractors' request for written confirmation covering the changes in accordance with the terms of the contract, deliberately waits until the date for completion expires, and then advises the Chief Engineer to take the work out of their hands. The Chief Engineer consequently directs the necessary notice to the contractors. The resident engineer's report which brought this notice to the contractors was not produced on the trial for some reason, but the notice to the contractors brought a letter from them to the Chief Engineer, which advised him of the true facts and that the contractors were awaiting the written confirmation to which they were entitled from him before proceeding to construct the new foundation which Locke had ordered them to do. The Chief Engineer, without acknowledging this letter or either confirming or repudiating Locke's order to the contractors to proceed on the changed plans, sends a copy of it to Locke. The latter replies on September 23 with a telegram of over 500 words. In his telegram he states that he instructed the contractors on August 13 to immediately proceed with the foundation work on the changed plan; that their complaint as to non-receipt of written confirmation did not bear on subject as his instructions were given in the presence of three witnesses and that the change was not a sufficient radical departure to justify their complaint, and then he proceeds to formulate complaints of previous delays on the part of the contractors in connection with the procuring of the dredge, alleging, quite contrary to the evidence adduced on the trial, that the contractors made no move to procure

1934

BOONE v. THE KING.

Crocket J.

a dredge until practically compelled by him to do so, and that their entire conduct had been unsatisfactory and unprogressive. Not content with this he went on to bolster up a case against the contractors by stating that he had learned from outside sources that Mr. Boone did not intend to move "until he received a letter from me promising much larger prices than he was getting"—a statement for which no justification whatever is to be found in the record, and concludes with the statement that he considers the Department fully justified in completing the work itself and "not trusting contractor who pursues such dilatory methods with the evident intention of forcing our hand if possible to receive a larger remuneration for work which he should have completed long ere this date" and an urgent recommendation "for early action" to this end. Then follows the final notice of September 25, from the Chief Engineer, taking the work out of the contractors' hands without any acknowledgment having been made of their letter of September 18, though a later note of September 20, referring to a claim received from the Beacon Dredging Co. for its futile attempt to do the dredging, was acknowledged on September 24 with the mere statement: "the contents of which have been noted."

That the Chief Engineer's notice of September 11 was directed to the contractors at the instance of the resident engineer cannot, in my opinion, be doubted. That the contractors had previously been advised by the resident engineer of material alterations he had made in the original plans and definitely ordered by him to proceed with their work under the altered plans and at the time they received the Chief Engineer's notice were awaiting the written confirmation of the resident engineer's directions, which they had requested of the latter, is also beyond question. That the Chief Engineer's notice can only be interpreted as a notice to proceed with the work under the original plans is self-evident. The learned President of the Exchequer Court so construed it, and held that, at the time the Chief Engineer gave notice, the original plans and specifications remained unaltered because of the failure of that official to approve the changes and instructions made and given to the contractors by the resident engineer.

The result of the whole situation is that we have the Department terminating the contract and declaring a forfeiture of the contractor's materials, plant and equipment because of the Department's own failure to approve the resident engineer's orders in accordance with the terms of the contract, and refusing to do so upon the representations and advice of the resident engineer himself, and then immediately proceeding to do the work itself, not upon the original contract plans and specifications, but upon the very plans, as altered by the resident engineer, which it had refused to confirm in writing for the contractors.

This seems to me, not only to constitute harsh treatment of the contractors and to have placed them in a most awkward position, as stated by my brother Smith, but to constitute on the part of the Department itself conduct which cannot be defended or justified under any of the very onerous and oppressive terms of the contract which the contractors were required to sign before entering upon their work. It surely ought not to be permitted to justify its harsh and arbitrary action by putting forward as a default or delay of the contractors "in diligently continuing to advance or execute the said works," a default or delay which is directly attributable to the Department itself. That the law precludes the Department from doing so is clearly shewn by *Roberts* v. *Bury Improvement Commissioners* (1), and *Lodder* v. *Slowey* (2). In the former case Blackburn, J., enunciated this principle in the following words at p. 136:—

for it is a principle very well established at common law that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself.

Kelly, C.B., in delivering the judgment of himself and Channell, B., in the same case, said:—

In this case we should have been content to have simply adopted the judgment of my brother Blackburn, in which we in substance concur, and observing that, inasmuch as it is admitted on the record that the alleged failure by the plaintiff to use such diligence and to make such progress as to enable him to complete the work by the day specified, was caused by the failure of the defendants and their architect to supply plans and set out the land necessary to enable the plaintiff to commence the work, the rule of law applies, which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party.

(1) (1870) 39 L.J.C.P. 129.
(2) (1904) 73 L.J.P.C. 82.

1934

BOONE v. THE KING.

Crocket J.

And again:

> Now, in considering this question, we agree that we are not to assume a jurisdiction which we do not possess, to mitigate the hardship upon contractors of clauses, however oppressive, which are sometimes, and indeed most commonly introduced into agreements of this nature; but we must take care also not to add to their severity, and to the injustice which they are often the means of inflicting upon a contractor, by imagining stipulations which are not to be found in the contract, and which the parties have never entered into or contemplated.

In *Lodder* v. *Slowey* (1), in delivering the judgment of the Judicial Committee of the Privy Council, Lord Davey pointed out that the jury had found that the corporation, meaning the borough council acting by their engineer, prior to the seizure of the works improperly prevented the respondent from proceeding with the works in the manner authorized by his contract and also prevented him from proceeding with the works with sufficient expedition, and said:—

> Their Lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent

—citing *Roberts* v. *Bury Improvement Commissioners* (2).

In this case the Chief Engineer and the resident engineer between them just as effectually held up the contractors as if they had directed them to suspend all work. One was ordering them to proceed with the foundation work on a new plan, while refusing to obtain for them the written confirmation which they demanded and to which they were entitled, and the other, knowing this fact, was notifying them to proceed on the original plan, while ignoring their specific request to him for written confirmation of the resident engineer's orders to such an extent that he would neither signify to them his approval or disapproval thereof.

Apart, however, from this feature of the case, I go further and hold that the Department did not bring itself within the terms of clause 19 of the contract, under which it pretended to act. I have already pointed out that the Chief Engineer's notice committed the Department to the second preamble as the justification for its action, and did not claim to exercise the power of re-entry and confiscating the contractors' property because of their failure to complete within the contract time, but in point of fact notified

(1) (1904) 73 L.J.P.C. 82. (2) (1870) 39 L.J.C.P. 129.

them to proceed with the work after the time fixed for completion had expired. The Department, therefore, was bound to justify under the following words of that clause:

> 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 * * * the Minister * * * may take all the work out of the Contractor's hands * * *

On a fair construction of this language it must, I think, be taken to pre-suppose the existence of some specific, definite default or delay on the part of the contractors in diligently executing any of the works or portions thereof to the satisfaction of the Engineer, of which complaint has been made to them; otherwise what effect can be given to the words of the notice "to put an end to *such* default or delay"? If by "the Engineer" is meant, as is contended, the Chief Engineer, he certainly had never apprized the contractors of any dissatisfaction on his part with the progress of the work in any manner or form, and there is no evidence of any complaint having been made by the resident engineer or any of his representatives other than that already pointed out of any default or delay prior to the time when the resident engineer recognized the unfeasibility of the provision in the original specifications requiring that the footing for the pier be excavated to the rock by means of a dredge. The words of clause 19, under which the Department purported to act, clearly contemplate that the contractor shall be made aware of the default or delay with which the Engineer is dissatisfied. Otherwise how could the contractor reasonably be expected to put an end to such default or delay within six days? The clause is a confiscatory clause and as such should be strictly construed against the party seeking to enforce its provisions. It was incumbent on the Department, in order to justify under it, to prove by a preponderance of testimony that the contractors were guilty of some default or delay in diligently executing some part of the contract work to the satisfaction of the Engineer, the intention of the clause, of course, being that the Engineer in the exercise of his judgment should act justly and reasonably. The undisputed and indisputable facts al-

1934

BOONE
v.
THE KING.

Crocket J.

ready pointed out not only fail, in my opinion, to discharge that onus, but absolutely negative the claim that the Department was justified in taking the contract work out of the contractors' hands and confiscating their material, plant and equipment.

Notwithstanding the one-sided character of the contract and the limitation prescribed in clause 37 of the specifications as to the power of the Department's supervising District Engineer in respect of it, I can find nothing in that clause or in any other clause of the contract or the specifications from beginning to end, by which it is provided that the action of the District Engineer or any other representative of the Chief Engineer or of the Department may not be relied upon by the contractors as an excuse for any default or delay which may be charged against them in the execution of the contract work, even though such action may not be approved in writing by the Chief Engineer. The question to be decided here is not whether the contractors are to receive compensation for work ordered by the District Engineer, without the written authority of the Chief Engineer, but whether they are to be debarred from claiming for the work which they performed under the original contract and specifications because they declined to proceed with their work on the foundation on the orders of the District Engineer under plans delivered to them which constituted a radical departure from their contract without the changed plans and the resident engineer's order to execute these changes first being approved in writing by the Chief Engineer in accordance with the terms of the contract. That the Department entrusted the whole supervision of the work to the District Engineer cannot be disputed, and I am not at all sure that, apart from the limitation prescribed in clause 37 of the specifications, the words "the Engineer" used in many other clauses of the contract should not be construed as the District Engineer. The definition of the term "Engineer" provides that it "shall extend to and include any of the officers or employees of the Department of Public Works acting under the instructions of the Chief Engineer or Chief Architect," while the introductory words of the interpretation clause provide that it is only where the context does not otherwise require,

that the definitions stated shall apply. It is a matter of common knowledge that the Chief Engineer himself does not personally witness the progress of any of these works, and that he necessarily relies entirely on the reports of the supervising district engineers throughout the country, and moreover, that these District Engineers are permanent and highly responsible representatives and agents of the Department in the supervision and direction of the execution of all such works. Indeed in the case at bar the evidence indicates that Locke's was really the controlling mind from the very inception to the termination of this contract. The original plan of August 7, 1928, bears his signature as having been checked by him as Supervising Resident Engineer. It was he who notified the contractors by telegram on September 1, 1928, that he had been advised directly by the Minister of the passage of the order in council accepting their tender, and of his anxiety to have the work commenced at the earliest possible date, as the Minister wished to make "important announcement in address Clarks Harbour his constituency Monday matter urgent." It is true that he denied on the trial that this message was dictated by his desire for political reasons to get something which could be seen on the ground, even before the contract was signed, but the message none the less shews to what an extent the Department relied upon him as its representative in the district, and the facts as above outlined as to what occurred in connection with the creosoting of the timber, the dredging, the changing of the plans, the giving of the notice terminating the contract, the appropriation by the Department of the contractors' materials, plant and equipment, its immediate approval after the termination of the contract of his change in the plan, and the prosecution of the work by the Department under the changed plan and under his supervision and direction, are, in my opinion, conclusive as to his being, not only a recognized representative and agent of the Department, but, as I have already said, the real controlling spirit in all that pertained to this contract and its execution from beginning to end.

As to the objection which was raised on the trial regarding the non-joinder of Voye as a suppliant, I am in-

1934

BOONE v. THE KING.

Crocket J.

clined to think, having regard to the terms of the partnership agreement between Boone and Voye whereby Boone was to supply without charge all plant, tools and equipment which he owned as well as all necessary funds for the completion of this and the two other contracts to which the partnership agreement was confined and that all moneys received by the partnership in respect of the three contracts were to be deposited in the name of Boone and that Voye's interest in the partnership was limited to his right to share only in the profits of the three contracts after payment of all moneys properly payable by the partnership, that Boone had a right to bring his petition in his own name. See *Atkinson* v. *Laing* (1). Whether I am justified in this view or not, it is clear that the mere failure to join Voye in the petition could have made no difference in the attitude of the Attorney General in granting his fiat and that the respondent was in no way prejudiced by such non-joinder on the trial of the cause. If, therefore, there should be any doubt upon this question of non-joinder, I have no doubt as to the right of the Exchequer Court to allow an amendment joining Voye in order that the petition should not be defeated upon that ground. The learned President of the Exchequer Court in his judgment expressed the same view, though, as he stated, not without some doubt, and granted leave to add Voye as a suppliant upon the condition that Boone indemnify Voye, if the latter so required, against any costs to which he might be subjected thereby. Apparently this suggestion was not accepted on the trial.

In my opinion this appeal should be allowed, the judgment of the Exchequer Court should be set aside and the case sent back to the said Court for the assessment of damages, with the reservation of the right of the suppliant, if deemed advisable, to join Voye in the petition.

I would therefore allow the appeal with costs and remit the case to the Exchequer Court for the purpose and with the reservation stated.

(1) (1822) 171 E.R. 901.

1934

BOONE v. THE KING.

Smith J.

SMITH J.—The appellant, having been the successful tenderer for the contract of Ice Pier No. 5 at Barrington Passage, Shelburne County, Nova Scotia, entered into a contract for its construction with the Department of Public Works.

The plan and specifications of the work, upon which the appellant tendered, required that the pier should be founded upon bed rock, necessitating the removal of an accumulated mass of what was called "sand, gravel and boulders," amounting to 975 cubic yards. The specification provides that the footing for the crib must be excavated by means of a dredge to the rock, and cleared off by a diver. A crib of the size of the proposed pier was to be built of 10" by 10" square creosoted timber, to be placed on the prepared foundation.

The contract was signed on 22nd September, 1928, and provided that the work was to be completed by 1st September, 1929.

The first question that arose was as to the timber. The appellant says that this timber could not be procured anywhere in a seasoned condition, and had to be cut from the woods, that the creosoting plant selected by the Department Engineer, pursuant to the terms of the contract, required that the timber should be seasoned for four months, and that this seasoning does not take place in winter, but commences about the 1st of April, so that the creosoting could not be commenced until the 1st of August, 1929. The appellant knew, or ought to have known, all about this at the time of entering into the contract.

The Resident Engineer, Mr. Locke, says that in his opinion seasoned timber could have been had, but at greater expense. This difficulty, however, has little bearing on the question, because it was surmounted by Mr. Locke persuading the creosoting plant that the seasoning referred to was not necessary, and the timber was on the site in time.

The real difficulty was in connection with the dredging. Mr. Locke says that the time he would expect Mr. Boone to do the dredging in this case would be from the middle of May to the first of June, and that he would not dredge any considerable time before being in a position to put the crib down. The reason for this, as I gather from the

1934

BOONE
v.
THE KING.

Smith J.

evidence, is that if the dredging were done much in advance of the time the crib could be placed, drift material would be lodged by the rapid current; and that it was therefore desirable to have the bottom cleared off and the foundation laid immediately after the completion of the dredging.

Mr. Locke had, after the appellant's tender was accepted, pointed out to him the need of having the work completed within the stipulated time. On the 7th May, 1929, the appellant was in Mr. Locke's office when the question of the creosoting was brought up, and finally disposed of in the manner I have already indicated. Mr. Locke made some complaints about delay, and reminded the appellant that he should make arrangements for a suitable dredge. Mr. Dunfield, of the Beacon Dredging Company, was present, and negotiations at once took place for a contract with his company; and he and Mr. Boone, as Mr. Locke says, went out with the intention of making a contract. A contract was entered into, dated 27th May, for doing the work with the dredge *Gregory,* which arrived at the site on the 2nd July, and utterly failed to do any work, owing to the dangerous current. Arrangements were then made, with the help of Mr. Locke, to get the dredge *Leconsfield* to do the work. This was the most powerful dredge available in the Maritime Provinces. This dredge attempted to do the work on 2nd August, and also found it impossible, owing to the nature of the material to be removed.

In the meantime, during the month of July, the crib had been built up to ten tiers, ready for floating, and all necessary material was on the ground.

Mr. Locke was notified of the failure of the *Leconsfield,* and decided to change the plans by having the material that he had intended to dredge remain, and by having the foundation built on this material after it had been properly cleared off.

The appellant went to Mr. Locke's office on the 13th August, when the latter told the appellant he did not think it feasible to have the dredging done, because to do this it would be necessary to bring a drill for the purpose of boring and blasting, and that he was substituting a change in the plan, and handed to the appellant a plan

on which the proposed change was indicated. A discussion took place as to what this change involved in the way of extra expense, Mr. Locke contending that it would increase the cost by $600, and the appellant contending that the increase would be $10,000. The latter asked for written instructions to proceed on the changed plan, which were not given, and on 28th August Locke telegraphed the appellant as follows:

> Kindly start bag concrete foundation for pier Barrington Passage Allison advises by wire to notify your representative at Barrington to this effect.

On the 29th August the appellant replied to this telegram, stating that in his opinion this change called for work quite outside the terms of the contract, that it was an entire change and a modification of the contract as to price and as to time for completion, and asking to have instructions concerning the proposed changes made in writing before commencing the work.

No further instructions were given, and Mr. Locke says he waited for the 1st September, when the time for completion of the work under the contract elapsed, and then recommended to the Chief Engineer that the work should be taken over by the Department, pursuant to the terms of the contract, owing to the delay. This recommendation does not appear to be printed in the records, but in pursuance of it the Chief Engineer of the Department wrote to the appellant reciting in part the terms of the contract, and stating that there was default and delay in diligently continuing to advance or execute the said works, and finally notifying the appellant that if within six days satisfactory progress was not made, the Minister intended to avail himself of the provisions of clause 19 of the contract and take the works out of the appellant's hands and complete them.

This brought a reply from the appellant, dated 18th September, in which he refers to the failure of the dredges, the change of plan made by Mr. Locke, his request for written instructions for such change, as required by the contract, and the failure to receive same; and promising, upon receipt of such instructions, to proceed with the work as expeditiously as possible.

On the 23rd September Mr. Locke sent a long telegram to the Chief Engineer, in which he stated that the appel-

1934

BOONE
v.
THE KING.

Smith J.

lant was instructed on August 13 to proceed with leveling the present foundation, as the material could not be moved by either dredge. He complains of the delay in obtaining the dredges, and says he was told from outside sources that the appellant did not intend to move until he received a letter promising larger prices; complains of delays and unsatisfactory actions of Boone in connection with the work; and concludes by saying that he considers the Department fully justified in completing the work itself rather than trust to the contractor, who pursues dilatory methods, with the evident intention of obtaining a larger remuneration for the work.

The result was that on the 25th September the Chief Engineer notified the appellant that it had been decided to take the works out of his hands pursuant to clause 19 of the contract, and that therefore the materials, tools, equipment, etc., had become the property of the Department.

The work was accordingly taken out of the hands of the appellant, and the Department proceeded to do the work by day labour, and has spent so far, apparently, $27,000, the original estimate by the Department being $17,000, and the contract price $18,190. The work was apparently still incomplete at the commencement of these proceedings in 1932.

It appears to me that the appellant has been somewhat harshly treated. In the first place, the Departmental engineers had come to the conclusion that the sand and boulders to be removed in order to place the foundation of the pier on solid rock could be removed by dredges without drilling and blasting. It was not contemplated that any drilling outfit would be required, as Mr. Locke himself helped to arrange for the two dredges that attempted to do the work. On the failure of these dredges, he told the appellant that the dredging was not feasible, and it is therefore quite idle to talk of the possibility of doing this work by drilling and blasting.

The specifications provided that the excavation was to be done by means of a dredge, and there is no suggestion of blasting the material. There was, no doubt, some delay on the part of the appellant in getting the first dredge on the scene, but this was by reason of the appellant

having been informed by the creosoting company that they would require the timber to be seasoned for four months, so that the crib, according to this, could not be ready to place on the foundation before 1st August. It is admitted that the dredging should be done so that this could be followed up at once by laying the foundation and placing the crib.

The creosoting difficulty being surmounted, by the intervention of Mr. Locke, as already stated, the dredging was arranged for, and would have been completed in June in time for the placing of the crib, had it not turned out that the dredge was unable to do the work, by reason of the unexpected nature of the material to be removed. This unforeseen occurrence involved the delay that occurred in getting the other dredge, and it was quite unexpected that that powerful dredge would also fail. From these failures, Mr. Locke decided that it was not feasible to do the dredging at all, and altered the plan.

Under the terms of the contract, the appellant was perfectly right in requiring written instructions before proceeding upon this altered plan, and, while he received instructions from Mr. Locke by telegram to proceed, these instructions were altogether insufficient because, as admitted, Mr. Locke had no authority to give the required instructions, and he absolutely refused to give them. He never advised the Chief Engineer of the change of plan that he proposed. Instead of doing this, he deliberately, as he says, waited for the expiration of the time limit, and then advised the Chief Engineer to take over the work.

The appellant, on being shown the changed plan, took the attitude already referred to as to extra cost and the effect on prices and time limitation. Mr Locke, no doubt because of this attitude, considered it necessary to be careful not to give any written instructions that would involve such a result. He was quite right in not giving any such instructions in writing himself, as he had no authority. He no doubt went beyond his authority in changing the plan and telegraphing to the contractor to proceed upon that changed plan, because the Chief Engineer alone had authority to do all this. The result was that the contractor was placed in a most awkward position. He was asked by

1934

BOONE v. THE KING.

Smith J.

the Resident Engineer to proceed with the work on the changed plan, and at the same time was refused the necessary written instructions that would enable him to do so with safety under the terms of the contract.

The Chief Engineer, without any notice of this situation, was recommended to take possession of the work because of delay, and, acting upon this recommendation, notified the contractor to proceed with the work within six days, without informing him upon which plan he was to proceed.

The first intimation that the Chief Engineer seems to have received as to the actual circumstances was from the letter of the appellant of the 18th September, which was in fact an accurate representation of the real circumstances, but which was counteracted largely by the telegram of Mr. Locke of the 23rd September, in which he tells of the delays and insincerity and lack of real effort upon the part of the contractor, founded in large part upon what he had been told from outside sources as to the appellant's intentions in order to secure larger remuneration.

When Mr. Locke found, on the 2nd August, by the failure of the large dredge that dredging was impracticable, and resolved to change the plan, his proper course was so to inform the Chief Engineer and request his approval and written instructions to the contractor to proceed on the changed plan. This he knew to be a necessity under the terms of the contract. Instead, he altered the plan and asked the appellant to proceed on his own authority, and thus wasted the precious time from 2nd August until 1st September. If he had followed the proper course that I have pointed out, the work would probably have been completed, not on 1st September, but probably later that fall.

There was actually little delay that counted on the part of the appellant except what was caused by the miscalculation that it was practicable to do the dredging in the manner attempted. This was a miscalculation of the engineers that was relied on by the contractor, though he was not warranted in doing so by the terms of the contract.

If, immediately after the 2nd August, the Chief Engineer had received from Mr. Locke the information and request mentioned above, it is very improbable that he

would have failed to act accordingly. The time for completion was allowed to expire, and then Mr. Locke recommended that the work be taken out of the appellant's hands, but on what precise representations does not appear. The result was, the letter from the Chief Engineer to proceed with the work within six days, which, by the lack of written instructions to the contrary, could mean only a request to proceed on the original plan, which the engineers had determined to abandon as impracticable, and which they did in fact abandon when they took over the work. The appellant was then in the position of having been furnished a changed plan, with a telegram from the Resident Engineer to proceed on that plan, and then a formal notification from the Chief Engineer to proceed, without any intimation as to the plan that he was to proceed with.

I think that it is quite clear that the Chief Engineer had decided to change the plan as Mr. Locke intended. The contractor was quite right in insisting upon the approval of the Chief Engineer in writing before proceeding further. The Chief Engineer does not say in his notice anything about it, but he clearly contemplated a change of plan because, after the notice, he proceeded on the changed plan and carried on the work according to it.

No doubt the contractor made some complaint about the change, but all that was provided for in the contract; and the final claim that he made was that he had a right to have the changes made by the Chief Engineer in writing. He never got these changes approved in writing by the Chief Engineer, and he was never in default as to these changes, and there was never any intention on the part of Mr. Locke or the Chief Engineer of resorting to the original plan.

I would allow the appeal with costs, and would send the case back to the Exchequer Court for the assessment of damages in the manner set out by Mr. Justice Crocket.

LAMONT J. (dissenting).—The material facts in this appeal and the relevant clauses of the contract entered into between the appellant (hereinafter called the "Contractor"), and His Majesty the King, represented by the Minister of Public Works, are set out in the judgment of my brother Hughes.

1934

BOONE v. THE KING.

Lamont J.

The contract, which was dated September 22, 1928, was for the construction of Ice Pier No. 5 at Barrington Passage, Shelburne County, N.S., according to the plans and specifications attached to the contract. The work was to be completed by September 1, 1929, and time was made of the essence of the contract.

The contract called for a crib built pier of a certain size and shape placed upon a level foundation. This foundation was to be secured by excavating the bottom to bed rock, a distance of some ten feet, by means of a dredge, clearing it off by a diver and then levelling it up with bags of cement. Clause 56 of the contract provided that it was made and entered into on the distinct understanding that the Contractor had, before execution, investigated and satisfied himself of everything and of every condition affecting the work to be executed, and the labour and material to be provided and that

> the execution of this contract by the Contractor is founded and based upon his own examination, knowledge, information and judgment, and not upon any statement, representation, or information * * * derived from any * * * tests, specifications, plans * * * furnished by His Majesty or any of His officers, employees or agents.

The tender of the Contractor contained the following:—

> (We) hereby certify that (we) have visited and examined the site of the proposed work, or have caused it to be visited and examined by a competent person on (our) behalf.

This certificate was not true. The Contractor, Boone, some years before, had gone through Barrington Passage in a boat, but the water where the pier was to be constructed was twenty-five feet deep, and he admits that he could not see the bottom. The bottom, according to a plan attached to the specifications, was shewn to consist of large and small boulders, gravel and sand, with the boulders covering the entire surface of the bottom. The contract further provided that if the Contractor should make default or delay in commencing or in diligently prosecuting the work, the Minister of Public Works, acting for His Majesty, might take the work out of the Contractor's hands and complete it himself.

On September 1, 1929, when the pier should have been completed, little work had been done beyond the building on shore of the frame work of the crib, the accumulation of materials for the construction of the pier, the blasting of a number of boulders on the bottom by a diver so that

the dredge would be able to operate, and the dredging of one hundred and twelve of the estimated nine hundred and seventy-five cubic yards. This one hundred and twelve cubic yards was dredged out on August 3, and was the only dredging which was done. In September the Minister took the work out of the Contractor's hands, and took over the materials he had on hand, and used his plant, equipment and tools for completing the work. After the work was taken out of his hands, the Contractor brought this action against His Majesty, claiming some $13,000 damages for being deprived, by the Minister, without just cause, of an opportunity to complete the contract. He alleged that if the work was delayed, the delay was due to a change in the plans made by the District Engineer, one Locke, and his refusal or neglect to give instructions to proceed with the work, according to the substituted plan, to which instructions he claimed to be entitled under the contract.

That there was an unreasonable delay on the part of the Contractor in engaging dredges to excavate the foundation is, I think, established beyond question. The evidence shews that to complete the pier would require in the neighbourhood of four months' work after the dredging had been done. Although the attention of the Contractor had been called by Locke during the fall of 1928 to the necessity of arranging for the dredge to start work early in May, 1929, the Contractor did not get his first dredge on the job until July 2. This dredge—the *Gregory*—did not attempt to do any excavating. When it arrived it found the current so strong that the crew were afraid to operate, so it turned and went away. No further attempt at dredging was made until August 2, when the *Leconsfield,* a large bucket dredge, was procured and commenced dredging. It took out one hundred and twelve yards when it quit. The reason for quiting, so far as the evidence discloses, was that the surface of the bottom was covered with large boulders which, owing to their weight and size, were doing damage to the buckets. No further attempt was made to secure a suitable dredge, but the Contractor reported to Locke, through one Allison, who was an engineer in Locke's office, that the dredging part of the contract was impossible of performance. Locke,

1934
BOONE
v.
THE KING.
Lamont J.

being anxious to get on with the pier, said he would see if he could make a change by which something else could be substituted for the dredging. On August 13 the Contractor came to Locke's office and Locke shewed him a plan of the work with changes on it marked in red ink. The suggested changes were that the dredging should be eliminated and that a level foundation upon which the pier could rest should be secured by levelling the bottom with bags of concrete, to the top of the boulders, and placing around this a talus, constructed also of bags of concrete. The Contractor and Locke had some discussion as to the cost of the suggested changes. Locke thought that the work, according to the plan as he had altered it, would cost about $600 more than the original work; the Contractor thought it would cost about $10,000 more, and that he should be given written instructions to proceed with the suggested alterations, as it entirely changed the contract, and he asked for written instructions. Locke told him to go down and start the work and he would get his instructions. The Contractor went away but he did not start the work. On August 24, Allison, who was making a tour of inspection, called at Barrington Passage and reported to Locke in these words:—

> Mr. Boone on the work and states he is waiting final instructions under a new scheme of foundation.

On August 28, Locke telegraphed the Contractor as follows:—

> Kindly start bag concrete foundation for pier Barrington Passage Allison advises by wire to notify your representative at Barrington to this effect.

On the following day the Contractor wrote to Locke as follows:—

> I received your wire yesterday *re* proposed changes in foundation. While I am willing and most anxious to do the work just as you wish it done, I wish to point out that in my opinion this change calls for work quite outside the provisions of the contract.
>
> By the terms of the contract it is provided that the footing of the crib must be excavated by means of a dredge to the rock. We had the largest and most powerful dredge available undertake to do this excavation, and it was found impossible to excavate because the material was such that a dredge could not remove it.
>
> The change now proposed is to meet the situation arising from the impossibility of using a dredge. I claim that this makes an entire change and a modification of the contract as to price and as to time for completion of the work should be made with us as a result.
>
> We have also been put to large expense in connection with the attempt made to operate the dredge which under the circumstances ought to be paid by the Department.

1934

BOONE v. THE KING.

Lamont J.

As already requested I would like to have the instructions concerning the proposed changes made in writing before commencing the work.

On September 11, the Chief Engineer, as required by the contract, gave the Contractor six days' notice to put an end to his default and delay and to make satisfactory progress, within that time, otherwise the work would be taken out of his hands. Nothing was done, so the Minister took the work away from the Contractor.

The position taken by the Contractor was that the alterations made an entire change in the character of the work to be done, and that the alterations should all be considered as work outside of the contract. The object of this is, I think, apparent: The Contractor, in his letter of August 29, said that he had been put to a large expense in connection with the attempt to operate the dredges for which he desired the Department to pay. He would only be entitled to this if the necessity for the alterations could be attributed to the fault of the Department. This he attempted to prove by claiming that the work as called for in the specifications was impossible of performance. In my opinion the Contractor is not entitled to succeed on that footing: first, because the Department has sufficiently protected His Majesty from an action of this nature by clause 56, above referred to, and clause 45, which negatives all implied covenants or agreements; and, secondly, because it is not established that the dredging was impossible of performance. The *Leconsfield* was able to take out one hundred and twelve cubic yards because a diver had been sent down to blast out a number of boulders so that the dredge could take hold. From the evidence I am satisfied that the rest of the surface could have been dealt with in the same way. No doubt blasting the surface with dynamite would have been expensive, but the Contractor had agreed to do the dredging. Furthermore there is evidence that this dredging could have been done by means of a dipper dredge.

The position taken by the Contractor raises the very important question of Locke's authority to alter the nature of the work to be done. Locke, as I gather from his evidence and communications, held the view that, as all the work was being paid for at unit prices, the alterations suggested were matters of detail and came within what

1934

BOONE v. THE KING.

Lamont J.

was described as "small things necessary to secure good work," which he had authority to make without referring the matter to the Chief Engineer, and did not come within the clause requiring written instructions to be given. The trial judge, however, held that the alterations made by Locke were decided variations in the plans and not something of a mere trifling nature, and with that view I agree.

The contract provides that the Engineer may, in writing, order any additional work not covered by the contract to be performed by the Contractor, but it also provides that, as a condition precedent to being paid for such extra work, the Contractor must obtain and produce the order of the Engineer in writing and shew that the work ordered had been done.

In the contract "Engineer" is defined as meaning the "Chief Engineer" for the time being having control over the work, and extends to and includes any of the officers or employees of the Department of Public Works acting under the instructions of the Chief Engineer, but all instructions, or directions, or certificates given, or decisions made by anyone acting for the Chief Engineer, shall be subject to the approval of the Chief Engineer. In the specifications which were made a part of the contract, clause 37, in part, reads:—

37. POWER OF THE DISTRICT ENGINEER.—The District Engineer will have no power to order extra work or changes which will entail an increase or decrease in cost without referring the matter to the Chief Engineer, and being authorized by him to order such changes. The Contractor will have no claims for compensation if such changes, though ordered by the District Engineer, have not been authorized, in writing, by the Chief Engineer. * * *

Under those provisions the onus, in my opinion, was upon the Contractor to establish that, notwithstanding clause 37, Locke had express instructions to make the alterations which he in fact did make, or that the Chief Engineer had approved of the same. This onus the Contractor did not discharge. So far as the evidence discloses, the Chief Engineer had no knowledge that any alterations had been made or suggested until after the date on which the contract was to be completed, nor did he authorize the same. The Contractor, whose duty it was to obtain and produce an order, in writing, from the Chief Engineer, did not communicate with him at all in respect of the same, until after he received the Engineer's

notice, which lends some plausibility to the opinion expressed by Locke, in his testimony, that the Contractor found himself with a disadvantageous contract on his hands and was looking for a way to get rid of it. Locke, in my opinion, went beyond his authority when he so materially altered the character of the work to be done, and the Contractor, with his contract before him, must be held to have known of his want of authority to make the alterations, or to give written instructions, without which the Contractor would not proceed. The trouble in this case arises by reason of the failure of the Contractor to examine the bottom for himself, as he certified he had done. He should have known, before he put in his tender, whether or not the current was too strong for the small dredge he first employed, and he also should have known whether a bucket dredge was sufficient to remove the boulders which were indicated as being on the surface of the bed. As I see it, the real question in this appeal is, whether His Majesty can be mulcted in damages for alterations made by an official who had no authority to make them? The answer to this question must be in the negative.

The appeal should be dismissed with costs, and the judgment of the Exchequer Court affirmed, but with the variation suggested by my brother Hughes.

HUGHES J. (dissenting).—This is an appeal by the suppliant from a judgment of the learned President of the Exchequer Court of Canada dated the 6th day of December, 1932, whereby it was held that the suppliant was not entitled to the relief sought in a Petition of Right, in which the suppliant claimed damages from the Crown in respect of a contract for the construction of an ice pier at Barrington Passage, Nova Scotia. The contract provided for the completion of the work on or before September 1, 1929. On September 25, 1929, the Crown notified the contractor that it had been decided to take over the work in pursuance of clause 19 of the contract, and this was done.

The following contentions were presented to this Court by the appellant:—

1. That there was no default on the part of the contractors.

1934

BOONE
v.
THE KING.

Hughes J.

2. That there was no order of the Minister of Public Works declaring the forfeiture.

3. That there was no justification for the forfeiture of the appellant's contract, goods and deposit.

4. That the respondent did not apply the appellant's goods and use the appellant's plant to complete the works mentioned in the contract, but for a new work substituted for the work called for under the contract and for other purposes.

The contract was between the appellant and one Alexander R. Voye, of the first part, and His Majesty the King, represented by the Minister of Public Works, of the second part, and was dated the 22nd day of September, 1928. Attached to the contract and made a part of it were specifications and a plan.

Borings, at and about the site of the pier proposed in the contract, had been made by the Department of Public Works in the year 1923. The plan attached to the contract was not lacking in information as to borings or the condition of the bottom, as it shewed a section on the line of the proposed ice piers, details of borings and materials above the surface of the rock, including information that large and small boulders covered the bottom. The contractors had examined the plan before tendering and had seen the references to the borings and to the condition of the bottom. They had also examined the specifications. The contractors, in their tender of August 25, 1928, certified that they had seen and examined the site of the proposed work or had caused it to be visited and examined by a competent person on their behalf, although, as a fact, they had not examined it or had it examined. The appellant had merely seen the site some time previously.

The contractors tendered for the total price of $18,190 as per the following unit prices:—

Dredging, 975 c.y. at $3.....	$ 2,925
Bag concrete, 66 c.y. at $24.....	1,584
Crib work, 14,500 c.f. at ·65.....	9,425
Concrete top, 133 c.y. at $32.....	4,256
	$18,190

On August 30, 1928, an Order in Council was passed accepting the above tender but the contract was not signed until September 22, 1928.

The crib was to be constructed of creosoted hardwood timber. Even before the contract was signed the District Engineer at Halifax, Thomas J. Locke, was asking the appellant about the timber and told the appellant that he, Thomas J. Locke, would like to get it to Barrington Passage that fall. The appellant told the District Engineer that it was impossible to get the timber to the creosoting plant for treatment that fall. The District Engineer thought the timber could be procured, and, as the appellant put it, was harping to get the timber down. The appellant testified, however, that he could not get the timber that fall, although he tried to do so. The contractors finally procured the timber and framed it and sent it to the creosoting plant about April 1, 1929. The appellant testified that there it had to be piled and stacked for seasoning purposes for at least four months before creosoting could be properly done. It must, therefore, have been fairly clear to the appellant before the contract was signed that the contractors could scarcely complete the work on or before September 1, 1929. On May 7, 1929, the District Engineer and the appellant had a conference and, on May 8, 1929, the District Engineer wrote the appellant that he would have the timber creosoted at the earliest possible moment, and emphasized the importance of procuring a suitable dredge for the purpose of having the foundation excavated and work commenced by June 1, 1929. As a result the timber had six weeks' treatment and was then delivered to Barrington Passage. The contractors then began to build the crib and ran it up ten courses, which was as high as it could usefully be built on land.

On May 27, 1929, the contractors entered into an agreement in writing whereby they hired the dredge *J. A. Gregory,* two dump scows and a steam tug to do the dredging. This dredge was a $1\frac{1}{2}$ yards, orange peel, bucket dredge. It proceeded to Barrington Passage and pulled over the site on July 3, 1929, but could do nothing because of the swift running of the tides and gave up. The contractors then procured the dredge *Leconsfield* which arrived at Barrington Passage on July 27, 1929. The *Leconsfield*

1934

BOONE
v.
THE KING.

Hughes J.

was a powerful dredge but it also was a bucket dredge, which, according to the appellant, was the only kind procurable. This dredge took out 68 yards of material and then the superintendent gave up as the buckets were being torn to pieces.

The appellant, on August 3, 1929, went to Halifax and saw the District Engineer. The appellant testified that they looked over the plans and the District Engineer said that he would make changes.

It is important at this stage to mention some of the provisions of the specifications and contract.

"Engineer" is defined in the specifications as the Chief Engineer of the Department of Public Works of Canada.

Clauses 14 and 15 of the General Conditions are as follows:—

14. ALTERATIONS.—The Engineer shall have the power and right to make from time to time and at any time, additions to or deductions from the dimensions shown on the drawings or specified herein and to add to, omit, change, modify, cancel or alter the works and materials herein specified, or shown on the drawings, without rendering void or in any way vitiating the contract. The value or cost of such additions, deductions, omissions, modifications, or alterations, shall be determined in accordance with the rates or prices stated in the tender which prices are assumed, and will be taken to cover the cost of materials and workmanship measured in the works, or as specified herein, and to include the cost and expense of all plant, labour, machinery, tools, temporary works, cartages, freight, patterns, moulds, superintendence and profit; but the Contractor is not to make any change or alteration in the works or in the dimensions and character of the materials to be used without the consent and permission, in writing, of the Engineer. In case such permission is not obtained, unless the Contractor can show good and sufficient reason for his action, payment for such works will be refused.

15. MEANING OF TERMS, ETC.—Alterations, deductions, omissions, modifications or deviation are to be understood as applying to decided variations in the plans or designs, such as a decrease in width, an increase in depth, the substitution of one class of material for another, the addition of works neither shown nor described, etc., and for these or similar matters alone, will any sum be allowed to the Contractor or deducted from the contract, and then only upon the written orders of the Engineer. All other alterations, etc., consequent upon a better disposal of materials an improved mode of construction adopted, repairs required, and such like, as long as the costliness of the materials, workmanship, etc., are of a trifling nature, which shall be judged of by the Engineer, shall be deemed to be included in the contract, and for such no extra sum or amount will, under any consideration be allowed to the Contractor.

Clause 32 of the General Conditions is as follows:—

32. CLAIMS.—No claims for extras will be entertained by the Department on account of unforeseen difficulties in the carrying out of the works herein specified.

Clause 37 of the General Conditions is as follows:—

37. POWER OF THE DISTRICT ENGINEER.—The District Engineer will have no power to order extra work or changes which will entail an increase or decrease in cost without referring the matter to the Chief Engineer, and being authorized by him to order such changes. The Contractor will have no claims for compensation if such changes, though ordered by the District Engineer, have not been authorized, in writing, by the Chief Engineer. The District Engineer will see that the work is carried out exactly in accordance with the plans and specification, and in matters of detail, or small changes necessary to secure good work, where the question of extra cost cannot come into consideration, he must use his best judgment in the interpretation of the specification, and must conduct the work and carry out the plans with the idea that the best results are to be obtained and the Contractor must abide by the decision.

He shall give clear and detailed instructions in writing to all Inspectors, who will have no power to allow or make any changes in the work.

It will not be his duty to take the responsibility of advising the Contractor as to the way or best method of conducting his operations, and the Contractor must have his own Engineer in this connection. However, if in his opinion, the methods employed by the Contractor are such that the progress of the work is not satisfactory, or that they may lead to bad results, it will be his duty to warn the Contractor to change these methods, and force him to take such steps as will ensure the completion of the works in strict accordance with the plans and specification.

The provision of the contract defining "Engineer" and his duties is as follows:—

"Engineer" shall mean the Chief Engineer or Chief Architect, as the case may be, of the Department of Public Works of Canada, for the time being having control over the work, and shall extend to and include any of the officers or employees of the Department of Public Works, acting under the instructions of the Chief Engineer or Chief Architect, and all instructions or directions, or certificates given, or decisions made by any one acting for the Chief Engineer or Chief Architect, shall be subject to the approval of the Chief Engineer, or the Chief Architect, and may be cancelled, altered, modified and changed as to the Chief Engineer or Chief Architect may see fit: Provided always and it is hereby understood and agreed that any act on the part of the Chief Engineer or the Chief Architect in connection with and in virtue of the present contract, and any instructions or directions or certificates given, or decisions made by the said Chief Engineer or the Chief Architect, or by any one acting for such Chief Engineer or the Chief Architect shall be subject to the approval of or modification or cancellation by the Minister of Public Works of Canada.

Clause 7 of the contract is as follows:—

7. The Engineer may, in writing, at any time before the final acceptance of the works, order any additional work, or materials or things, not covered by the contract, to be done or provided, or the whole or any portion of the works to be dispensed with, or any changes to be made which he may deem expedient, in, or in respect of the works hereby contracted for, or the plans, dimensions, character, quantity, quality, description, location or position of the works, or any portion or portions thereof, or in any materials or things connected therewith, or used or intended

1934

BOONE
v.
THE KING.

Hughes J.

to be used therein, or in any other thing connected therewith, or used or intended to be used therein, or in any other thing connected with the works, whether or not the effect of such orders is to increase or diminish the work to be done or the materials or things to be provided or the cost of doing or providing the same; and the Engineer may, in such order, or from time to time as he may see fit, specify the time or times within which each order shall, in whole or in part, be complied with. The Contractor shall comply with every such order of the Engineer. The decision of the Engineer as to whether the compliance with such order increases or diminishes the work to be done or the materials or things to be provided, or the cost of doing or providing the same, and as to the amount to be paid or deducted, as the case may be, in respect thereof, shall be final. As a condition precedent to the right of the Contractor to payment in respect of any such order of the Engineer, the Contractor shall obtain and produce the order, in writing, of the Engineer, and a certificate, in writing, of the Engineer, showing compliance with such order and fixing the amount to be paid or deducted in respect thereof.

The appellant saw the District Engineer on August 13, 1929, and received from the latter a copy of the plan with proposed amendments shewn in red ink. By these amendments it was proposed to eliminate the dredging, to take ten feet off the height of the timber portion of the crib, to level off the bottom with concrete and to build a talus of concrete. The appellant said that he asked for instructions in writing and for an extension in time, and he testified at the trial that the District Engineer said the instructions would follow. At the trial before the learned President the District Engineer, Thomas J. Locke, testified that on August 13, 1929, he did tell the appellant that he was substituting a change in the plan, which would involve a number of extras. He estimated a net difference of $600 in favour of the contractors, made up of the excess of extras over deductions.

The contractors, however, claimed that there was an entire change, and asked for a modification of the contract as to price and time for completion. On August 28, 1929, the District Engineer sent to the appellant a telegram reading as follows:—

Kindly start bag concrete foundation for pier Barrington Passage. Allison advises by wire to notify your representative at Barrington to this effect.

T. J. LOCKE.

Written instructions, however, were not forthcoming from the Chief Engineer and thus the date for completion came and went with matters in a deadlock. This was most unfortunate for the contractors.

I agree with the finding of the learned President that the District Engineer could not alter the contract and that, in the absence of written instructions from the Chief Engineer, the contract remained to be executed according to the original contract, plan and specifications; that the alterations proposed were such as could be authorized only by the Chief Engineer, and, as he did not authorize them in writing, they were as ineffective as if they had never been proposed at all, and, as a consequence, the contract, plan and specifications remained as they were.

It must have been clear to the contractors that the power of the District Engineer was restricted by General Condition 37 and that the District Engineer had no power to order extra work or changes which would entail an increase or decrease in cost without authorization in writing by the Chief Engineer. Nor was the difficulty in dredging any answer to the contention of the respondent that there was default on September 1, 1929. The appellant was not misled in any way by the respondent before he undertook the work. Clause 32 of the General Conditions was clear. Even if the dredging was difficult or impossible without blasting, the contractors would not be excused.

In *Thorn* v. *The Mayor and Commonalty of London* (1), Lord Chelmsford said:—

> [The builder] before he made his tender, ought to have informed himself of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification.

See also *Connolly* v. *The City of Saint John* (2). It must be held, therefore, that there was default on September 1, 1929, and that the first contention of the appellant fails.

It is convenient now to set out clauses 19 and 20 of the contract:—

> 19. 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

(1) (1876) 1 App. Cas. 120, at 132.

(2) (1904) 35 Can. S.C.R. 186.

1934

BOONE
v.
THE KING.

Hughes J.

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 of such cases, the Minister, for and on behalf of His 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 His Majesty's behalf, may see fit to complete the works, and in such case the Contractor shall have no claim for any further payment in respect of work performed, but shall be chargeable with, and shall remain liable for all loss and damage which may be suffered by His Majesty by reason of such default or delay, or the non-completion by the Contractor of the works, and no objection or claim shall be raised or made by the Contractor by reason, or on account of the ultimate cost of the works so taken over, for any reason proving greater than, in the opinion of the Contractor, it should have been; and all materials, articles and things whatsoever, and all horses, machinery, tools, plant and equipment, and all rights, proprietary or otherwise, licences, powers, and privileges, whether relating to or affecting real estate or personal property, acquired, possessed or provided by the Contractor for the purposes of the work, or by the Engineer under the provisions of this contract shall remain and be the property of His Majesty for all purposes incidental to the completion of the works, and may be used, exercised and enjoyed by His Majesty as fully to all intents and purposes connected with the works as they might therefor have been used, exercised and enjoyed by the Contractor; and the Minister may also, at his option, on behalf of His Majesty, sell or otherwise dispose of, at forced sale prices, or at public auction or private sale, or otherwise, the whole or any portion or number of such materials, articles, things, horses, machinery, tools, plant and equipment at such price or prices as he may see fit, and detain the proceeds of any such sale or disposition and all other amounts then or thereafter due by His Majesty to the Contractor on account of, or in part satisfaction of any loss or damage which His Majesty may sustain or have sustained by reason aforesaid.

20. Whenever in this contract power or authority is given to His Majesty, the Minister, the Engineer or any person on behalf of His Majesty, to take any action consequent upon the insolvency of the Contractor or upon the acts, defaults, neglects, delays, breaches, non-observance or non-performance by the Contractor in respect of the works or any portion or details thereof, such powers or authorities may be exercised from time to time, and not only in the event of the happening of such contingencies before the time limited in this contract for the completion of the works, but also in the event of the same happening after the time so limited in the case of the Contractor being permitted to further proceed with the execution of the works.

Provided always that after the expiration of the time limited for the completion of the works the Minister shall be sole judge as to what additional time, if any, may be allowed to the Contractor for such completion, and is decision as to the reasonableness or sufficiency thereof for the purpose of completion shall be final and binding upon the Contractor.

On September 11, 1929, the Engineer notified the Contractor in writing that if within six days satisfactory progress was not made, the work would be taken over and completed in pursuance of clause 19 of the contract.

On September 25, 1929, as apparently the Contractors had not complied with that notice, the Engineer wrote them and advised them that it had been decided to take over the work, and that the materials, tools and equipment would thenceforth be the property of the Department of Public Works.

At this time Alexander R. Voye wrote the appellant an informal letter of withdrawal from their partnership.

The respondent then went ahead and constructed a pier at a cost very considerably in excess of the contract price above mentioned.

As the Minister was empowered by clause 19, for and on behalf of His Majesty, to take the works out of the Contractor's hands with the consequent forfeiture provided in that clause, it must be assumed that the forfeiture was the act of the Minister. Moreover the Minister resisted the claim of the suppliant in the Exchequer Court of Canada and in this Court. It must, therefore, be held that the second contention of the appellant fails.

The forfeiture of the contract and goods have just been discussed in connection with clause 19. As there was default on the part of the Contractors, it must be held that the deposit was forfeited under clause 54 of the contract, and the third contention of the appellant, therefore, fails.

The appellant lastly contended that the respondent did not apply the appellant's goods, and use the appellant's plant to complete the works mentioned in the contract, but for a new work substituted for the work called for under the contract, and for other purposes.

It may be true that the respondent did not complete the pier strictly in accordance with the original contract, plan and specifications. But the respondent did build a pier at the place designated on the plan, and the General Conditions and contract provided for very wide latitude in changing the original plan and specifications. See clauses 14 and 15 of the General Conditions, and clauses 7, 8 and 9 of the contract. Clause 8 of the contract is particularly in point. It reads as follows:

> All the clauses of this contract shall apply to any changes, additions, deviations, or additional work, so ordered by the Engineer, in like manner, and to the same extent as to the works contracted for.

1934

BOONE v. THE KING.

Hughes J.

J. K. McKay, a civil engineer, testified before the learned President that the respondent took over the crib which the appellant had worked upon and launched it upon the proposed site, and built upon it. There is, moreover, no evidence in the record that the respondent refused to return to the appellant, before the Petition of Right was launched, any of the appellant's goods or any of the appellant's plant not used up by the respondent, in accordance with the provisions of the contract. *Clayton* v. *Le Roy* (1). Moreover, the appellant has not before this Court his partner, or former partner, Alexander R. Voye. The learned President gave leave to the appellant to join Alexander R. Voye, if possible, but the appellant has not taken advantage of that leave. Under the circumstances, however, this judgment will be without prejudice to any proceedings in proper form which the appellant may, if so advised, subsequently take against the respondent for the return of, or damages in respect of, any goods, tools or plant not used up by the respondent in accordance with the contract and improperly withheld.

With this variation the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *P. J. Hughes.*

Solicitor for the respondent: *H. A. Carr.*

1934

* Feb. 19
*March 6.

JOHNSTON & WARD (PLAINTIFFS).. APPELLANTS;

AND

T. P. McCARTNEY (DEFENDANT)... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Guarantee—Action against guarantor of account—Alleged extension of time by creditor to debtor—Alleged misdirection in charge to jury—Alleged insufficiency in direction, and in submission of questions, to jury—Failure to object at trial, as precluding objecting on appeal.

Appellants sued respondent as guarantor of an account of R. At trial, after answers by the jury to certain questions submitted, judgment was given dismissing the action (the ground being that appellants

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) [1911] 2 K.B. 1031.

1934

JOHNSTON & WARD v. MCCARTNEY.

had agreed with R. without respondent's consent to extend the time for payment), which was affirmed by the Supreme Court of Nova Scotia *en banc*, 7 M.P.R. 89. On appeal to this Court:

Held: The appeal should be dismissed.

On the evidence it could not be said that there was no reasonable basis for the jury's findings attacked by appellants.

Certain objections by appellants, claiming misdirection, insufficient presentation of their case, and failure to direct in certain respects, in the trial judge's charge to the jury, were held to be not justified.

Held, further, that, had there been any non-direction or insufficient direction, or if there should have been, as contended, a further question submitted to the jury, the appellants, having failed on the trial to make objection or to request the submission of any further question to the jury, were precluded in the circumstances of this case from raising objection on appeal. *Nevill* v. *Fine Art & General Ins. Co.*, [1897] A.C. 68, at 76, *Seaton* v. *Burnand*, [1900] A.C. 135, at 143, cited.

APPEAL by the plaintiffs from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing their appeal from the judgment of Mellish J. (dismissing their action, following the trial of the action with a special jury), and dismissing their alternative application for a new trial. In the action the plaintiffs claimed from the defendant the sum of $37,269.25 and interest, upon a guarantee by the defendant of an account of one Dr. Rankine with the plaintiffs. The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

L. A. Forsyth K.C. and *G. F. Osler* for the appellants.

C. B. Smith K.C. for the respondent

The judgment of the court was delivered by

CROCKET J.—The appellants brought this action to recover the sum of $37,269.25 alleged to be due them on a stock trading account which they were carrying in their Halifax stock brokerage office for one Dr. John Rankine, and which the respondent agreed in writing dated November 20, 1929, to guarantee.

The action was tried before Mr. Justice Mellish and a jury and dismissed on the ground that the appellants had agreed with the debtor without the consent of the respondent to extend the time for payment of the guaranteed account. This was the principal defence on which

(1) 7 M.P.R. 89; [1933] 3 D.L.R. 632.

1934

JOHNSTON & WARD v. MCCARTNEY.

Crocket J.

the respondent relied at the trial and in relation to which the learned judge left two questions to the jury, Nos. 3 and 4, as follows:—

3. Did plaintiffs through their manager agree with Dr. Rankine to extend the time for the payment of Dr. Rankine's account?

4. If so, was it part of the consideration for said agreement that the plaintiffs should obtain the insurance which they did obtain from Dr. Rankine for plaintiffs' benefit?

To both these questions the jury answered "yes."

On appeal to the Supreme Court of Nova Scotia *en banc* the appellants contended that these findings were not warranted by the evidence. They also challenged the trial judgment on the ground that the learned trial judge had misdirected the jury and that he did not sufficiently instruct the jury with respect to the subject-matter of these two questions and the evidence concerning them. This appeal was dismissed, Graham J. dissenting on the ground that the plaintiffs' case was not sufficiently presented to the jury by the learned trial judge. He agreed, however, that the jury's findings upon both questions could not be set aside as against evidence.

The same grounds are taken on this appeal.

We agree with the appeal judges that the findings on the two vital questions, 3 and 4, cannot well be set aside as not being reasonably warranted by the evidence. That an oral agreement was entered into between Dr. Rankine and Mr. White, manager of the appellants' Halifax branch, sometime during the fall of 1930, whereby the former promised to make regular payments of $400 a month for the carrying on of his account, is not disputed. The only substantial conflict between the two witnesses was as to whether Dr. Rankine agreed during this conversation or in a later conversation to procure and assign to the appellants life insurance to the amount of $20,000 or $24,000, and as to whether Dr. Rankine asked Mr. White if he kept on making these payments would he sell him out as soon as the appellants were clear or would they give him a chance in the event of the market coming back to get some of his own money back and the latter answered that he didn't think there would be the slightest question about that, that they would give him a chance or words to that effect. Mr. White testified when first examined that he had no recollection of any such statement but that he

1934

JOHNSTON & WARD v. MCCARTNEY.

Crocket J.

wouldn't deny it was made. Later, when recalled in rebuttal, he did deny it, as he did that there was any mention of insurance in connection with the $400 payments. That Dr. Rankine did obtain and assign to the appellants on January 13, 1931, a policy of $20,000 and a week later another policy of $4,000 is admitted, as is also the fact that he made his first monthly payment of $400 on December 1, 1930, and continued to make regular monthly payments of $400 as agreed down to the time of the trial. Dr. Rankine's evidence, in so far at least as it concerned the granting of an extension of time until his indebtedness was discharged, was corroborated by the following statement contained in a letter addressed under date of November 18, 1930, by Mr. White to the respondent at Belmont, Mass.:—

> We have made an arrangement to help you in the matter of Dr. Rankine's account, by having obtained an agreement from him whereby he undertakes to pay us a minimum of $400 per month, *these payments to be continued until his indebtedness is discharged.*

It is not shewn that the respondent ever received this letter but in any event it was never acknowledged.

In the light of this evidence it can hardly be said that there was no reasonable basis for the jury's findings that the appellants through their manager agreed to extend the time for payment of Dr. Rankine's account and that it was part of the consideration for such agreement that Dr. Rankine should provide the insurance policies which he admittedly assigned to the appellants a few weeks later.

As to misdirection, objection is taken to the learned trial judge in his summing up of the evidence bearing on questions 3 and 4 attributing to Dr. Rankine more definite statements than he had in fact made. One observation of His Lordship was particularly stressed as being calculated to leave the impression on the jury that Dr. Rankine had absolutely sworn in terms that in consideration of his promise to pay $400 a month and to provide the life insurance Mr. White had agreed to give him an extension of time. An examination of that portion of the charge in which this observation was made shews that His Lordship was referring to the letter which Mr. White had written to the respondent on November 18, containing the reference above quoted to the agreement he was reporting that he and Dr. Rankine had made, but reporting it—con-

1934

JOHNSTON & WARD v. MCCARTNEY.

Crocket J.

trary to the evidence of either himself or Dr. Rankine—as being subject to the depositing of further securities to the credit of the guaranteed account to properly margin it, and in this connection proposing that the respondent put up the required additional collateral and protect himself by means of insurance on Dr. Rankine's life. His Lordship immediately added to the statement complained of: "Now that is what I understand to be roughly what Dr. Rankine says. Mr. White wrote Mr. McCartney something different from that." The whole passage was clearly intended as an exposition of the effect of the two conflicting versions of the oral agreement which had been entered into,—first Dr. Rankine's and then Mr. White's as reported in the letter referred to. For my part I cannot see that it was in any way inappropriate or inaccurate. Moreover, His Lordship had very clearly stated to the jury that they had heard the evidence and that he might make some remarks about the evidence, as to what the evidence was, but that, unless what he stated conformed to their good judgment as to what the evidence was, they were to take their own view of it, and that if they had any doubt as to the evidence they could have any part of it they desired read by the stenographer. As a matter of fact he did on his own suggestion during the course of his charge have Dr. Rankine's cross-examination read by the stenographer, and he told the jury more than once that it was their sole duty to determine these questions of fact and that they were under no obligation to follow any views he might himself express of the evidence. Practically his last words to the jury were:

> If I have expressed any view as to the evidence that does not commend itself to your judgment, take your own view; don't take mine.

Probably the strongest statement excepted to as misdirection was the following:—

> Then the policies come on afterwards and they are made out, as I understand it, payable to assigns of Johnston & Ward. They hold the policies. So the agreement that did go through was an agreement that was made with Dr. Rankine, and the agreement did not go through of which McCartney was to be a partner. I want you to get a proper view of it,—Did the plaintiffs through their manager agree with Dr. Rankine to extend the time for the payment of Dr. Rankine's account? All I can say is, that they were to take $400 a month until it was liquidated and they were taking insurance on his life, so that they could get their money if he didn't live long enough to liquidate. It is pretty strong evidence that they agreed to extend the time. I leave that question with you.

It is objected that this was a definite direction that the agreement that did go through was an agreement that was made with Dr. Rankine and that the agreement did not go through of which McCartney was to be a partner. This is probably so, but can it properly be said to mean anything more than what the admitted facts established, viz.: that the appellants received and accepted the $400 regular monthly payments which Dr. Rankine testified he had promised to make, and did make right down to the time of the trial, and accepted as well insurance policies on his life, which Dr. Rankine testified he agreed to take out in response to Mr. White's proposal, and still held as valid subsisting policies at the time of the trial? It seems to me that it was an eminently proper consideration to put to a jury, who were called upon to decide whether the true version of the oral agreement was the one which Mr. White recorded in his letter to McCartney or the one to which Dr. Rankine had deposed on the trial, and that it amounted to no more than calling the jury's attention to the admitted facts and suggesting that the jury should determine which of the two conflicting versions best accorded with these indisputable facts.

After a careful examination of the relevant evidence and the judge's charge I can discover nothing which can justifiably be characterized as a misquotation of the evidence in any material particular or any misdirection either as to law or fact.

As to non-direction the substantial objection is that the learned trial judge insufficiently presented the appellants' case and that he failed to direct the jury that an agreement to extend time for payment was not binding unless there was consideration therefor or to explain what consideration meant. The use of the word consideration in question 4, it was argued, made this necessary.

For my part I should not have thought that the learned judge in framing question 4 meant anything more than to get the jury's finding as to whether Dr. Rankine had promised as part of the bargain to provide the life insurance as well as to make the monthly $400 payments. It was the duty of the learned judge himself to decide the question of the validity and binding character of the promise as a question of law; not the jury's. Manifestly no direction which His Lordship could have given as to

1934

JOHNSTON & WARD v. MCCARTNEY.

Crocket J.

the legal meaning of consideration could have made any difference to the jury's view of the evidence of what was said between the parties. And, the jury having accepted Dr. Rankine's statement that he promised to provide the life insurance as well as to make the monthly payments, there could, in my opinion, be no doubt that such a promise constituted a valid and binding consideration for an agreement on the part of the appellants to extend the time until "his (Rankine's) indebtedness was discharged," to use White's own words in recording his understanding of the agreement or "arrangement," as he described it in his letter to McCartney.

It was further contended that the learned trial judge should have submitted a question to the jury to ascertain whether the conversation regarding insurance took place at the time the arrangements for the $400 monthly payments were made.

Yet, notwithstanding the Nova Scotia *Judicature Act* expressly provides that the trial judge shall direct the jury to answer any question which counsel may require him to submit, counsel for the appellants on the trial made no request that he submit any other questions than those stated. Not only so, but he made no request for any direction upon the question of consideration, nor that His Lordship should call the jury's attention to any portion of Mr. White's or any other evidence bearing on questions 3 and 4 than that to which His Lordship had referred. Neither did he make any suggestion that His Lordship had misquoted any part of the testimony. Had there been any non-direction or insufficient direction, we think the appellants, having failed to make any objection at the proper time, are precluded in the circumstances of this case from raising the question on appeal. To quote the words of Lord Halsbury in *Nevill* v. *Fine Art & General Ins. Co.* (1):—

> Where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no court would ever have granted you a new trial.

See also *Seaton* v. *Burnand* (2).

We think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondent: *C. B. Smith.*

(1) [1897] A.C. 68, at 76.

(2) [1900] A.C. 135, at 143.

JULES DUGAL (DEFENDANT) ..... APPELLANT;

AND

J. E. MÉDÉRIC LEFEBVRE (PLAINTIFF) ..... RESPONDENT.

1933
*Nov. 9.
1934
*Mar. 6.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Habeas corpus—Minor child in care of third person—Action by parent to regain possession—Proper remedy—Child over 15 years of age—Right to choose where to live—Proper care by person in charge—Parent acting as if heedless or indifferent to child's future—Judicial discretion—Art. 1114 C.C.P.

The writ of habeas corpus is the proper remedy, as recognized by law and jurisprudence, of a parent who wishes to regain possession of a child alleged to be illegally kept or detained from him, as already decided in *Stevenson* v. *Florant* ([1925] S.C.R. 532). *Marshall* v. *Fournelle* ([1927] S.C.R. 48) and *Kivenko* v. *Yagod* ([1928] S.C.R. 421) also discussed and followed. The meaning of the expression "restrained of his liberty", in article 1114 C.C.P., has been extended so as to include the case of a young child being kept in the custody of a person other than the one legally possessing authority and control upon that child; but the main question to be decided in such cases is whether the child, according to the evidence, has been "confined or restrained of his liberty" within the meaning of that article.

The circumstances of this case are as follows: The child is almost 15½ years old; he possessed a sufficient degree of intelligence and gave expression to his wishes to stay with appellant in a "categorical manner" which the trial judge found "reasonable", in the light of the circumstances of the case. After the mother's death when the child was one month old, the respondent (the father) voluntarily placed him in the care of his maternal grandmother and of his aunt, his mother's sister (the appellant's wife), the latter bringing him up with her own resources and always taking care of him with true maternal love. On the other hand, the respondent acted as if he was heedless or indifferent to his child's welfare; although living in the same city, he never went to see him and it was the appellant's wife who had to bring the child to him so that he could see his father. The appellant, although wishing to keep the child, added in the pleadings that the latter remained with him of his own free will, that he was not deprived of his liberty and that he was free to go back to the respondent if he so desired.

Held that, in the circumstances of this case, this court ought not to interfere with the judicial discretion exercised by the trial judge in dismissing the writ of *habeas corpus;* although the child will always be free to go back to his father, the respondent, this court cannot declare that he is "confined" or "restrained of his liberty".

Per Cannon J.—The question to be decided is not simply whether the minor child is "confined or restrained of his liberty", but rather if his stay elsewhere than with his father or mother is contrary to

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Crocket JJ.

1934

DUGAL v. LEFEBVRE.

law. The existence of illegal detention must be declared when paternal authority, which exists mainly for the benefit of the child and not for the exclusive advantage of the father, is unduly interfered with. Therefore that authority must always be upheld whenever a change in his present conditions would obviously be advantageous to the child. On the other hand, when the child is old enough to be capable of a judicious choice and further, when the circumstances show that his moral, religious, intellectual and physical interests would be safeguarded by the ratification of his choice, the Court may find that there is no ground for the *habeas corpus*. But, in such a case, the legality of the child's stay elsewhere than with his parent must be established. It must be said, that in the light of all the circumstances, "parental" authority has to give way to the authority of the Court, representative of the Sovereign "parens patriae", whenever it is in the child's interest.

Judgment of the Court of King's Bench (Q.R. 54 K.B. 82) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, (1) reversing the judgment of the Superior Court, Patterson J., and maintaining a writ of *habeas corpus*, issued at the request of the respondent, the father, to recover the custody of his minor child.

The circumstances of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Aimé Geoffrion K.C. and *Antoine Garneau* for the appellant.

Gustave Monette K.C. for the respondent.

The judgment of the majority of the Court (Duff C.J. and Rinfret, Lamont and Crocket JJ.) was delivered by

RINFRET, J.—L'intimé, père et tuteur de Léo Lefebvre, alléguant que ce dernier était actuellement détenu à la maison de l'appelant "contre le gré, la volonté et le consentement de votre requérant" (i.e. de l'intimé), a demandé l'émission d'un bref adressé à l'appelant et lui enjoignant de conduire Léo Lefebvre devant la cour pour

faire voir la cause de cette détention et à ce qu'à défaut par ledit Jules Dugal de justifier telle détention, ledit Léo Lefebvre soit mis en liberté et remis à votre requérant.

Pour éviter tout ambiguïté au cours de ce jugement, nous allons désigner le père sous le nom de requérant, et l'appelant sous le nom de défendeur.

Sur le rapport du bref, le défendeur déclarait

détenir l'enfant parce que le père dudit enfant est indigne de sa garde.

(1) (1932) Q.R. 54 K.B. 82.

Mais, à la suite de plaidoires écrites produites de part et d'autre, il fut procédé devant le juge à une longue enquête sur le débat engagé entre les parties dans leur contestation.

Cette contestation soulevait trois points principaux:

1. L'enfant, il est vrai, était chez le défendeur "mais de son plein gré et nullement contre le consentement dudit enfant". L'enfant "n'est pas privé de sa liberté"; il a "le droit d'en jouir selon son bon plaisir, il est libre d'aller chez le requérant s'il le désire".

2. Le requérant, à cause de sa "conduite irrégulière", est indigne de la garde de son enfant.

3. Il est de l'intérêt physique, moral et intellectuel de l'enfant de demeurer avec le défendeur et son épouse.

La conclusion de la plaidoirie écrite du défendeur était qu'il soit dit et déclaré que ledit enfant, Louis-Léo Lefebvre, n'est pas privé de sa liberté et que le défendeur en cette cause ne le détient pas illégalement ni d'aucune façon, et qu'il est de l'intérêt de l'enfant de continuer de vivre avec le défendeur (appelant devant cette cour).

Devant la Cour Supérieure, le bref d'*habeas corpus* fut annulé. Le juge de première instance trouva le requérant indigne de la garde de son enfant. Il jugea, en outre, qu'il était de l'intérêt de l'enfant de rester chez le défendeur; et, sur la question de détention—c'est le point sur lequel nous voulons insister—il décida comme suit:

> Considérant que ledit enfant n'est pas retenu contre son gré chez ledit intimé et qu'il a déclaré, devant cette Cour, vouloir vivre avec ses parents adoptifs, plutôt qu'avec son père, et que ce désir exprimé d'une façon catégorique est raisonnable, vu les circonstances du procès;
>
> * * *
>
> Considérant que pour les raisons ci-dessus le père est indigne de la garde de son enfant, étant de l'intérêt de celui-ci de rester dans le milieu où il se trouve aujourd'hui, et qu'il n'existe aucune contrainte, ni de fait ni de droit, pour l'enlever du milieu où il désire demeurer pour le transporter dans un milieu où il refuse à bon droit d'aller;

Or, le jugement de la Cour du Banc du Roi, par lequel celui de la Cour Supérieure est infirmé, ne réfère en aucune façon à cette question de contrainte. Le cour différa du juge de première instance dans l'appréciation des faits relatifs à l'indignité du père, elle trouva qu'il n'était pas suffisamment démontré que l'intérêt de l'enfant ne serait pas sauvegardé s'il retournait chez son père; et elle fut d'avis, dès lors, qu'il ne subsistait aucun motif d'intervenir dans l'exercice de l'autorité paternelle. Il faut pour cela

1934
DUGAL
v.
LEFEBVRE.
Rinfret J.

—comme elle le dit à bon droit—des raisons sérieuses et exceptionnelles; et l'on ne saurait faire prévaloir à l'encontre le simple désir de l'enfant. Ce principe nous paraît inattaquable. Mais le jugement ne se prononce nullement sur la question de savoir si, en l'espèce, il y avait contrainte et si l'enfant pouvait être considéré comme "détenu" et "privé de sa liberté".

C'est là la principale question qui a été soulevée par le défendeur lors de l'audition devant cette cour.

Il ne saurait faire de doute que le requérant s'est adressé au tribunal en vertu de l'article 1114 du code de procédure civile. Une requête de ce genre est autorisée par cet article

dans tous les cas où une personne est emprisonnée ou privée de sa liberté, autrement qu'en vertu d'une ordonnance en matière civile rendue par un tribunal ou un juge compétent, ou que pour une matière criminelle ou supposée criminelle.

Cette requête est

aux fins d'obtenir un bref adressé à la personne sous la garde de laquelle elle se trouve emprisonnée ou détenue, lui enjoignant de la conduire sans délai devant le juge qui a décerné le bref, ou devant tout autre juge du même tribunal et de faire valoir la cause de détention afin de faire constater si elle est justifiable.

Par extension, l'on a assimilé à une privation de sa liberté le fait pour un enfant en bas âge d'être sous la garde d'une personne autre que celle à qui la loi confère cette autorité et ce contrôle. C'est la conclusion à laquelle nous en sommes arrivés dans le jugement de *Stevenson* v. *Florant* (1), qu'il faut lire naturellement avec les précisions apportées par le Conseil Privé (2).

Cette cause soulevait même une question spéciale: le conflit entre les droits d'une mère et ceux d'un tuteur sur la personne d'une fille mineure. Nous n'y avons vu aucune objection à trancher ce débat accessoire dans une espèce où les parties avaient eu l'opportunité de faire valoir tous leurs moyens et où la méthode adoptée n'avait pu causer le moindre préjudice (pp. 538 et 539); et ce point de vue fut partagé par le Conseil Privé (p. 216).

Mais le débat principal consistait évidemment à discuter si l'enfant se trouvait "emprisonnée ou détenue", tel qu'il est pourvu à l'article 1114 C.P.C. Le tuteur, qui avait sous sa garde l'enfant âgée de neuf ans, prétendit que le bref d'*habeas corpus* n'était pas recevable pour décider la

(1) [1925] S.C.R. 532. (2) [1927] A.C. 211.

question de la détention des enfants mineurs, que l'article 1114 C.P.C. ne s'appliquait pas en pareil cas, et qu'il fallait recourir à l'action ordinaire au moyen d'un bref de sommation (voir R.J.Q. 38 B.R., au bas de la page 316, et toute la discussion devant cette cour, depuis la page 539).

Il nous a donc fallu décider le point de droit ainsi soulevé par le tuteur. Nous avons alors fait remarquer que le bref d'*habeas corpus* était essentiellement un bref d'enquête ayant "pour but d'examiner les causes de détention et de constater s'il y a contrainte" (p. 544). Après avoir signalé "qu'il faut éviter de confondre entre la recevabilité du bref et la question de savoir s'il devra être maintenu" après l'enquête du juge, nous avons conclu que l'*habeas corpus* était l'instrument approprié pour décider

s'il y avait, au sens où l'on entend ces mots pour les enfants mineurs, privation de leur liberté.

Dans la cause de *Stevenson* (1), il s'agissait d'une enfant de neuf ans; et, comme l'a fait justement observer M. le juge Rivard, *re Marshall* v. *Fournelle* (2):

la garde d'un mineur, sans contrainte réelle exercée sur sa liberté, ne peut être assimilée au cas de détention forcée que lorsque l'enfant n'est pas d'âge à faire un choix judicieux, ou qu'il ne sait pas juger sainement de son propre intérêt; on peut alors justement présumer que l'option, inconsciente ou non, de l'enfant est due à l'influence de celui qui le garde sans droit, et dire qu'il y a une sorte de contrainte morale ou de détention. La jurisprudence, et spécialement l'arrêt ci-dessus cité de la Cour Suprême (*Stevenson* v. *Florant* (1)), ne me paraissent pas aller plus loin.

Pour Gertrude Stevenson, toutes les cours ont considéré que le cas était assimilable à une contrainte, à une privation de liberté. Mais il ne faut pas perdre de vue le but essentiel du bref d'*habeas corpus* et que le tribunal demeure obligé de s'assurer que la contrainte existe, s'inspirant, comme nous le disions,

d'une discrétion restreinte, basée sur certaines conditions d'âge et d'intelligence de l'enfant, en tenant compte des circonstances spéciales à chaque cas particulier (p. 544).

Nous croyons ce principe désormais établi. Il fut réaffirmé de façon très précise dans la cause de *Marshall* v. *Fournelle* (2) déjà citée). Catherine Marshall devait avoir quinze ans dans les quelques jours qui suivaient le jugement de la Cour du Banc du Roi. Le tribunal de première instance était arrivé à la conclusion que, par son âge et son intelligence, elle était dans les conditions voulues

(1) [1925] S.C.R. 532.

(2) (1926) Q.R. 40 K.B, 391, at 396 and 397.

1934
DUGAL
v.
LEFEBVRE.
Rinfret J.

pour bien comprendre ce qu'elle faisait; et qu'en persistant à vouloir demeurer là où elle était, elle ne paraissait pas "agir par caprice mais par un sentiment que l'on peut estimer légitime". Il avait, en conséquence, refusé "d'intervenir dans le choix qu'elle a fait de demeurer chez l'intimé"; et il avait rejeté la requête pour bref d'*habeas corpus*.

M. le juge Tellier, maintenant juge-en-chef de la province de Québec, après avoir fait observer

que le bref d'*habeas corpus* ne peut être utilisé pour contraindre un enfant de 14 ans, s'il jouit de ses facultés, à suivre son père ou sa mère,

conclut que, dans ce cas, c'était avec raison que le bref obtenu par la demanderesse avait été cassé et annulé par la Cour Supérieure. Ce jugement fut confirmé par cette cour (1). On pourrait en rapprocher ce qui a été dit de nouveau par la Cour du Banc du Roi *re Kivenko* v. *Yagod* (2), également confirmé par cette cour (3).

Nous ajouterions, d'ailleurs, que cette conséquence résulte forcément de la nature même de la procédure. Il ne s'agit pas d'une action intentée par le père contre son enfant pour le forcer à reconnaître son autorité paternelle contradictoirement avec lui et pour le contraindre à réintégrer le domicile. Dans ce cas, il y aurait lieu de se demander s'il ne faudrait pas nommer à l'enfant un tuteur *ad hoc* pour représenter ses intérêts devant le tribunal. Dans l'*habeas corpus*, en principe, c'est la personne privée de sa liberté qui, elle-même, s'adresse au juge pour faire constater si la cause de sa détention est justifiable. Le code permet cependant qu'un autre le fasse pour elle; mais, alors, la requête est présentée pour le compte de cette personne et le véritable débat s'établit entre cette dernière et le prétendu détenteur. La fonction du bref est de permettre au juge de faire enquête sur la question de savoir s'il y a détention, d'examiner la vérité des faits allégués et d'adjuger en conséquence (Art. 1119 C.P.C.). A cette fin, le tribunal doit s'entourer de tous les renseignements qui lui paraissent utiles pour s'éclairer; et les plaidoiries écrites dont il ordonne la production, ainsi que l'instruction à laquelle il est subséquemment procédé, ont principalement pour but de l'aider à décider s'il y a lieu d'intervenir et d'ordonner

(1) [1927] S.C.R. 48. (2) (1928) Q.R. 44 K.B. 330.
(3) [1928] S.C.R. 421.

ce que de droit. La décision qu'il s'agit de rendre est souvent fort délicate et dépend dans une large mesure de l'exercice d'une sage discrétion—discrétion judiciaire, bien entendu, mais que le juge de première instance est mieux placé pour exercer, parce qu'il a l'avantage de voir les personnes et qu'il est mêlé de plus près aux circonstances spéciales de chaque cause. C'est ce qu'a reconnu d'ailleurs M. le juge Hall, qui a prononcé, en la présente cause, le jugement auquel s'est ralliée la majorité de la cour. Mais, alors qu'il admet que ce serait là le motif qui a inspiré la Cour du Banc du Roi dans la cause de *Marshall* v. *Fournelle* (1), nous ne nous expliquons pas pourquoi la même ligne de conduite n'a pas été suivie dans la cause actuelle, où le juge de première instance a également usé de sa discrétion pour rejeter le bref d'*habeas corpus* et où la différence d'âge et des autres circonstances environnantes n'est pas suffisamment marquée pour entraîner un résultat contraire.

Ici, l'enfant dont il est question a maintenant tout près de quinze ans et demi. Il nous paraît démontré qu'il a toute l'intelligence requise pour que l'on doive tenir compte de ses sentiments. Il les a exprimés "d'une façon catégorique" et que le juge de première instance a trouvée raisonnable, vu les circonstances du procès". Ils ne sont pas le fruit d'un caprice ou d'une fantaisie, mais ils semblent appuyés sur les motifs les plus judicieux.

Immédiatement après la mort de sa mère, alors que l'enfant avait un mois, son père l'a volontairement confié à sa grand'mère maternelle et à sa tante, la sœur de sa mère. La grand'mère était sans moyens et vivait aux crochets de cette dernière. C'est sa tante, qui est maintenant l'épouse du défendeur, qui en a toujours eu soin et qui l'a élevé de ses propres ressources. La preuve est unanime à déclarer qu'elle a tenu à son égard une conduite "admirable". Elle a eu pour lui les attentions les plus suivies. Elle l'a entouré d'un amour vraiment maternel. Suivant l'expression de l'un des juges d'appel: Elle "a bien précieusement conservé le dépôt qui lui a été fait".

Pendant ce temps, le requérant s'est complètement désintéressé de son enfant. Il demeurait dans la même

(1) (1926) Q.R. 40 K.B. 391.

1934

DUGAL v. LEFEBVRE.

Rinfret J.

ville et—si nous ne nous trompons—dans la même localité; et cependant il n'est jamais allé le voir. L'enfant lui-même fait la remarque qu'il n'a rencontré son père que "une fois ou deux par année". Chaque fois, c'était Mme Dugal qui était "allée le conduire pour que l'enfant voit son père". Le requérant a agi comme s'il était indifférent et insouciant du sort de son enfant. Il ne paraît pas s'être jamais occupé—pour ne pas dire: préoccupé—de sa santé, de son bien-être, de son éducation, de son instruction. Sur la question de savoir s'il a contribué à sa subsistance, la preuve est restée pour le moins indécise. Les fils du requérant disent qu'ils ont eu connaissance de certains paiements. Mme Dugal affirme qu'il n'a jamais payé pour la pension. Elle assure n'avoir reçu en tout que la somme de cinquante dollars, qu'elle a déposée en banque au nom de l'enfant. Ni la Cour Supérieure, ni la Cour du Banc du Roi n'ont tranché ce point de fait. Le requérant aurait pu l'élucider, mais il a jugé à propos de ne pas rendre témoignage. Sur cette question, comme sur toutes les autres, il a laissé le tribunal dans l'ignorance de tout ce qu'il connaissait, de tout ce qu'il pouvait avoir fait et de tout ce qu'il entendait faire pour l'enfant. Il ne saurait se plaindre maintenant si son abstention l'a placé sous un jour défavorable. Sans chercher à accabler le requérant, dont il faut, par ailleurs, reconnaître les nombreux mérites et qui évidemment a fort bien élevé ses autres enfants, il est malheureusement difficile (parce que c'est notre devoir) de lui éviter le reproche qu'il paraît avoir négligé et abandonné l'enfant qui est en cause. L'autorité paternelle n'accorde pas seulement des droits, elle comporte aussi des devoirs. Ils sont inscrits dans le code. Et si les parents désirent que les tribunaux les aident à conserver l'affection et l'attachement de leurs enfants, il faut au moins qu'eux-mêmes s'y intéressent. Sans entrer dans la discussion des faits d'inconduite—sur lesquels nous sommes disposés à donner au requérant le bénéfice de l'opinion de la Cour du Banc du Roi—le dossier révèle qu'il a été fort peu soucieux de ses devoirs envers son enfant, et il a laissé clore l'enquête sans en fournir la moindre explication personnelle. Il était strictement dans l'ordre que son silence fût interprété contre lui. Et il y a eu lieu de se demander s'il a conscience de

s'être montré digne de l'exercice de l'autorité paternelle dont il revendique si tardivement les droits.

Quant à l'attitude du défendeur, elle est exprimée dans sa plaidoirie écrite, que le juge saisi du bref l'a autorisé à produire et qui explique la réponse contenue dans le rapport. Il désire garder l'enfant, qu'il a adopté comme son enfant et dont il entend faire son héritier; mais celui-ci est "très volontiers de rester" chez lui. L'enfant est là de son plein gré et nullement contre son consentement; il n'est pas privé de sa liberté et il est libre d'aller chez le requérant s'il le désire. L'enfant, qui a été trouvé dans les conditions requises d'âge et d'intelligence, corrobore les déclarations du défendeur. A notre humble avis, il n'y a pas lieu ici, pas plus qu'il n'y avait lieu dans la cause de *Marshall* v. *Fournelle* (1), d'intervenir dans la discrétion exercée par le juge de première instance. En cela, nous croyons faire une application exacte des principes posés dans cette cause ainsi que dans l'arrêt de *Stevenson* v. *Florant* (2), réitérés depuis dans celui plus récent de *Kivenko* v. *Yagod* (3). Nous endossons les observations si justes faites dans ces causes par les juges de la Cour du Banc du Roi, et notamment celles de M. le juge-en-chef Tellier et celles de M. le juge Rivard, sur le principe de l'autorité paternelle. Mais, comme eux, nous ne voyons pas comment, dans les circonstances de la présente cause, et sur une requête qui, d'après la loi, est faite au nom et pour le compte de l'enfant, nous pouvons mettre de côté le jugement de la Cour Supérieure.

Il doit être bien compris que l'enfant reste libre de retourner chez son père; mais nous ne pouvons décider qu'il est "détenu" et que le défendeur le "prive de sa liberté", ni, par conséquent, qu'il y a lieu de maintenir le bref d'*habeas corpus*; et nous devons faire droit à l'appel en rétablissant le jugement de la Cour Supérieure. Cependant, comme nous ne donnons raison au défendeur que sur l'un des points soulevés par sa contestation et que l'enquête a porté sur un grand nombre d'autres faits, nous croyons faire justice en décidant que chaque partie devra supporter ses frais d'enquête, mais le requérant devra payer les autres frais en Cour Supérieure, ainsi que les frais devant la Cour du Banc du Roi et devant cette Cour.

(1) (1926) Q.R. 40 K.B. 391. (2) [1925] S.C.R. 532.
(3) [1928] S.C.R. 421.

1934

DUGAL v. LEFEBVRE.

CANNON, J.—Après avoir étudié soigneusement la jurisprudence de cette cour dans les causes analogues: *Stevenson* v. *Florant* (1); confirmé par le Conseil Privé (2); *Marshall* v. *Fournelle* (3); et *Kivenko* v. *Yagod* (4), je crois devoir dire que l'interprétation de *Stevenson* v. *Florant* (1) par la Cour du Banc du Roi dans les deux autres causes me semble avoir restreint la portée de cette décision. Il ne s'agit pas simplement de décider si le mineur est emprisonné ou privé de sa liberté, mais bien plutôt si son séjour ailleurs que chez son père ou sa mère est contraire à la loi. A mon avis, il y a détention illégale si l'autorité paternelle, qui existe surtout pour le bénéfice de l'enfant, et non pour l'avantage exclusif du père, est indûment entravée. Il faut donc dans chaque cas seconder cette autorité si elle peut s'exercer pour l'avantage évident de l'enfant en changeant sa situation actuelle. Si, d'un autre côté, l'enfant est d'âge à faire un choix judicieux, si, de plus, les circonstances démontrent que son intérêt moral, religieux, intellectuel et physique est sauvegardé en ratifiant son choix, la cour peut déclarer que le recours par *habeas corpus* est mal fondé. Mais, dans ce cas, il faut pouvoir conclure à la légalité du séjour de l'enfant ailleurs que chez son parent. Il faut pouvoir dire que, eu égard à toutes les circonstances, l'autorité "parentale" doit céder à l'autorité du tribunal représentant le souverain *parens patriæ,* quand l'intérêt de l'enfant l'exige. Je crois qu'il est maintenant admis par la doctrine que les droits et pouvoirs du père et de la mère sur la personne des enfants mineurs ne leur sont accordés que comme conséquence des lourds devoirs qu'ils ont à remplir et n'ont d'autre but que de leur rendre possible l'entretien et l'éducation de l'enfant. C'est pour la protection de l'enfant que l'autorité "parentale" existe. La cour peut donc, en certains cas exceptionnels, dans l'intérêt évident de l'enfant, refuser de contraindre ce dernier, malgré sa volonté librement exprimée, à retourner à son domicile légal, s'il est raisonnable de croire que la demeure actuelle procurera au moins les mêmes avantages de la part de personnes bénévoles que la loi n'oblige pas à pourvoir à son logement et à ses autres besoins.

(1) [1925] S.C.R. 532.
(2) [1927] A.C. 216.
(3) [1927] S.C.R. 48.
(4) [1928] S.C.R. 421.

Dans l'espèce, le juge de première instance a décidé en faveur de la résidence chez l'appelant. Le père ne s'est pas fait entendre et semble avoir compté sur la lettre de la loi, sans prendre la peine de démontrer au tribunal qu'il était en mesure d'assurer ou d'améliorer le sort de son enfant en le reprenant chez lui, même contre son gré. L'esprit de la loi—et le requérant l'a oublié—n'est pas favorable à l'exercice arbitraire de son autorité quand les circonstances exigent de fortes raisons pour bouleverser la situation faite au mineur par l'acte même du père en le confiant, dès son bas âge, à des parents de sa défunte femme. En présence du témoignage de cet enfant ayant dépassé l'âge de discrétion, le silence du père n'est pas assez convaincant pour nous faire mettre de côté le jugement de la Cour Supérieure. La Cour du Banc du Roi a passé outre en refusant à l'intimé le droit de contester l'autorité du père. On a semblé oublier que c'est le requérant qui a amené l'appelant devant le tribunal pour expliquer la présence chez lui de cet enfant. Dès le rapport du bref, le juge devait faire son enquête pour décider si la plainte faite par le père pour le fils en vertu de l'autorité "parentale" était bien dans l'intérêt de ce dernier. L'on a démontré à la satisfaction du premier juge qu'il n'y avait pas détention contraire à l'esprit de la loi, que l'exercice de l'autorité du requérant, dans les circonstances, allait, non seulement à l'encontre du libre choix, mais était aussi contre l'intérêt de l'enfant. Comme dans la cause de *Marshall* v. *Fournelle* (1), l'on peut considérer ici que ce jeune homme ne paraît pas agir par caprice, mais par un sentiment que l'on peut estimer être légitime, et aussi qu'il n'y a pas lieu, dans l'intérêt même du mineur, d'intervenir dans le choix qu'il a fait de demeurer chez l'appelant et qu'en conséquence la requête pour *habeas corpus* était mal fondée en fait et en droit.

Le jugement du Conseil Privé dans *Stevenson* v. *Florant* (2) m'oblige à conclure que, dans certains cas, l'autorité "parentale" doit céder quand l'intérêt de l'enfant l'exige —bien que je fusse d'abord plutôt porté à appliquer, dans sa rigueur, l'article 243 du code civil. Rien n'empêche le père ou le fils, si les circonstances changent, de s'adresser de

(1) [1927] S.C.R. 48. (2) [1927] A.C. 211.

1934

DUGAL v. LEFEBVRE.

Cannon J.

nouveau à la Cour Supérieure, pour obtenir, sur requête alléguant des faits nouveaux, un autre bref d'*habeas corpus* pour une enquête au sujet de sa situation nouvelle, si, par exemple, Dugal manquait à la promesse contenue dans son plaidoyer de continuer à nourrir, élever et entretenir l'enfant à l'avenir comme par le passé.

Je crois donc, comme mon collègue, l'honorable juge Rinfret, que nous devons faire droit à l'appel en rétablissant le dispositif de la Cour Supérieure; et j'adopterais aussi sa décision quant aux frais.

Appeal allowed with costs.

Solicitors for the appellant: *Bertrand, Guérin, Goudrault & Garneau.*

Solicitors for the respondent: *Patenaude, Monette, Filion & Patenaude.*

1934

* Mar. 6
* Mar. 28.

WILFRID BOURGEAU (DEFENDANT).. APPELLANT;

AND

ROSE DE LIMA BOURGEAU (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Will—Whole estate left by mother to children as universal legatees—Clause providing for the case of decease of legatee without children—Whether fiduciary or vulgar substitution created.—Arts 610, 868, 893, 900, 901, 904, 925, 926, C.C.

The mother of both appellant and respondent died on the 7th of December, 1912, leaving a will made in notarial form on the 13th of September, 1905, by which she left all her property, subject to certain conditions, to her six children therein named, as universal legatees, namely: Emma Bourgeau, Louisa Bourgeau, Rose de Lima Bourgeau, Lea Bourgeau, Joseph Bourgeau and Wilfrid Bourgeau. Emma (who was a sick person and could not have children) died unmarried, in 1930. Louisa died without children, in 1925, leaving all her property to her two sisters, Rose de Lima and Lea, with substitution as to the share of Lea in favour of Rose de Lima. Joseph also died in 1925, but his estate is not involved in the present case. Lea died unmarried in 1930, leaving all her property to Rose de Lima. The only children of the testatrix living at the time of the institution of this action were the appellant and the respondent. The latter claimed that, under the will, she was entitled to the whole of the

* PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Hughes JJ.

interests of both Louisa and Lea in the estate of her mother, including what both had received from Emma's share. The appellant, on the other hand, claimed that the will created a compendious substitution i.e., both vulgar and fiduciary (Arts. 925-926 C.C.) in favour of the surviving children of the testatrix when one of these children died after the testatrix, without leaving any children, and that accordingly he was entitled to share equally with the respondent in the shares of Louisa and Lea. The material clauses of the will are quoted in the judgment; but the clause, which is to be interpreted and upon which the appellant mainly relied, was in the following words: "dans le cas de décès sans enfants, la part du décédé accroîtra à mes autres légataires universels survivants" (in case of decease without children the share of the deceased will be added to the shares of my other universal legatees surviving). The respondent's claim was maintained by the trial judge, whose judgment was unanimously affirmed by the appellate court.

Held: That the respondent, was alone entitled to the whole of the interests of her sisters Louisa and Lea in the estate of her mother, including what both had received from Emma's share, thus affirming the decisions of the trial and the appellate courts, and that the above quoted clause did not create a fiduciary substitution as claimed by the appellant.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, P. Demers J. and maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

L. E. Beaulieu K.C. and *J. Emile Billette K.C.* for the appellant.

Aimé Geoffrion K.C. for the respondent.

The judgment of the Court was delivered by

CANNON, J.—Appel d'un jugement de la Cour du Banc du Roi confirmant à l'unanimité celui rendu en Cour Supérieure par l'honorable juge Philippe Demers accueillant les conclusions de l'intimée et la déclarant propriétaire des parts de feu Louise Bourgeau et de feu Léa Bourgeau dans la succession de feu Sophie Noël, y compris ce qu'elles ont recueilli de la part d'Emma Bourgeau dans cette succession.

L'appelant, Wilfrid Bourgeau, nous demande de mettre de côté ces arrêts par une déclaration que les biens en question étaient substitués dans les circonstances et que, par

1934

BOURGEAU v. BOURGEAU

Cannon J.

conséquent, ils appartiennent pour moitié à l'intimée et pour moitié à l'appelant.

Le mémoire que les parties ont soumis conjointement à la Cour Supérieure, suivant les dispositions de l'article 509 du Code de Procédure Civile, est le suivant:

1° Dame Sophie Noël de la ville d'Aylmer, district de Hull, veuve de feu Alexandre Bourgeau, en son vivant bourgeois du même lieu, est morte le 7 novembre 1912, laissant un testament dont copie est produite au soutien des présentes et qui contient entre autres les clauses suivantes auxquelles cependant la cour n'est pas limitée pour décider des droits des parties:

"Je donne et lègue à mes enfants ci-après nommés, savoir: Emma Bourgeau, Louisa Bourgeau, Rose de Lima Bourgeau, Léa Bourgeau, Joseph Bourgeau et Wilfrid Bourgeau tous et chacun les biens meubles et immeubles que je délaisserai à mon décès, quelle qu'en soit la désignation, la nature ou la valeur, sujets cependant aux legs ci-dessus, les instituant mes légataires universels.

"Le principe de la représentation de mes légataires universels décédés par leurs propres enfants, pour recueillir les legs à eux faits, sera reconnu ainsi que mon linge et hardes de corps. Mais tel enfant ou enfants ne pourront recevoir tel legs ou sa part de tel legs qu'à son âge de vingt-cinq ans. Sur les intérêts de tel legs ou part de legs respectivement, mes exécuteurs testamentaires paieront cependant à qui de droit, chaque année, une somme suffisante à l'entretien du ou des bénéficiaires de tel legs ou partie de legs. La balance restera entre les mains de mes exécuteurs s'augmentant des intérêts, pour lui être remis à son âge de vingt-cinq ans. *Mais, dans le cas de décès sans enfants, la part du décédé accroîtra à mes autres légataires universels survivants.*

"Dans le cas de décès avant d'avoir atteint l'âge de vingt-cinq ans sans enfants d'un de mes petits-enfants héritiers d'un legs ou de partie d'un legs par représentation de son père ou de sa mère décédé, sa part appartiendra à ses frères et sœurs par égale part. S'il n'a ni frère ni sœur, alors sa part appartiendra à mes légataires universels alors survivants. Aucun de mes biens n'entrera dans la communauté légale d'un de mes légataires et son conjoint mais restera propre à mon légataire, tant pour les meubles que les immeubles, les fruit et revenus.

"Je charge spécialement ma fille Léa Bourgeau du soin et de l'entretien de ma fille Emma sa vie durant, et de l'administration de ses biens, avec droit d'en disposer à titre onéreux comme bon lui semblera, sans autorisation de justice ou autrement, et la représenter en tous actes quelconques concernant directement ou indirectement les biens de ma succession, et à cet effet de prendre sur son legs à elle (Emma) tous les argents nécessaires pour tel soin et entretien; aussi tenir maison à ma résidence actuelle et pourvoir à son entretien sans être tenue de rendre aucun compte de sa gérance et administration, et au décès de ma fille ce qui restera de son legs et de tous accroissements par le décès d'autres légataires ou autrement, d'après les livres tenus par ladite Léa Bourgeau, sera partagé également entre mes légataires universels survivants."

2° Les six enfants de la testatrice lui ont survécu.

3° Emma est morte célibataire en 1913; Louise est morte sans enfants en 1925, léguant tous ses biens à ses sœurs Rose de Lima, et Léa, avec substitution quant à la part de Léa en faveur de Rose de Lima. Joseph

est mort la même année, mais sa succession n'est pas en question. Léa est morte célibataire en 1930, laissant tous ses biens à Rose de Lima.

4° Rose de Lima et Wilfrid, les parties à ce mémoire conjoint, seuls survivent.

5° Rose de Lima prétend qu'en vertu du testament ci-dessus, elle a droit à la totalité des intérêts dans la succession de Sophie Noël, et de Louise et de Léa, y compris ce qu'elles ont toutes deux recueilli de la part d'Emma.

6° Wilfrid Bourgeau, de son côté, prétend que le testament en question crée une substitution en faveur des survivants des enfants de la testatrice, Dame Sophie Noël, lorsqu'un de ces enfants meurt après la testatrice sans enfants et que, par conséquent, il a le droit de partager également avec Rose de Lima dans les parts de Louise et de Léa.

Les parties ont, de plus, admis qu'Emma Bourgeau était malade et ne devait pas avoir d'enfants.

Le juge de première instance et les parties ont cité, pour interpréter ce testament, une affaire célèbre. La Marquise de Pompadour fit son testament le 15 novembre 1757. Après différents legs particuliers, elle s'exprimait ainsi:

Quant au surplus de mes biens meubles et immeubles, de quelque nature et en quelque lieu qu'ils soient situés, je les donne et lègue à M. le Marquis de Marigny, mon frère, que je fais et institue mon légataire universel; et, en cas de décès de mon frère *sans enfants,* je mets *en son lieu et place* M. Poisson de Malvoisin, maréchal-des-logis de l'armée, et ses enfants.

Il fut décidé, le 2 juillet 1766, que ni le sieur de Malvoisin, ni ses enfants, n'étaient substitués fidéicommissairement, quoique la testatrice les eût mis à la place de son légataire universel, au cas de décès de celui-ci sans postérité. Merlin, *Répertoire de jurisprudence,* vo. *Substitution fidéicommissaire,* vol. 32, page 151, met en doute l'exactitude de cette décision. Il se demande s'il est bien vrai que les termes *"au cas de décès"*, joints à ceux-ci: *"je mets à la place"*, ne marquent pas le trait de temps, ou l'ordre successif, c'est-à-dire qu'ils appellent le substitué en second ordre et après que l'institué ou légataire immédiat aura recueilli. Ne peut-on pas aussi bien référer au cas de décès *après avoir recueilli* qu'au cas de décès *sans avoir recueilli* la condition éventuelle qu'ils expriment?

Thevenot d'Essaule, "Traité des substitutions", chapitre XXIII, §4, ne pense pas autrement:

441. Ainsi, quoiqu'il y ait simplement, *j'institue un tel, et à son décès, ou après sa mort, je substitue un tel* il y a substitution compendieuse.

Non oportet, dit Pérégrinus, *tempus mortis adjicere per distributivum quandocumque sed sufficiet conditionem mortis heredis gravati adscribere.*

442. La raison en est claire. Les mots *à son décès* ou *après sa mort,* étant indéfinis, embrassent visiblement les deux cas de la vulgaire et de la fidéicommissaire.

1934

BOURGEAU
v.
BOURGEAU

Cannon J.

Le substituant n'ayant pas dit, *en cas de mort sans avoir recueilli,* et n'ayant pas dit non plus, *en cas de mort après avoir recueilli,* on ne peut pas limiter sa disposition à l'un des deux cas.

Quand il a dit généralement et indistinctement, *à son décès* ou *après sa mort,* c'est la même chose que s'il eût dit, *en quelque temps qu'il décède.*

C'est la judicieuse remarque de Pérégrinus: *Quicumque mortis casus, comprehenditur sub verbis, et ex defuncti voluntate est.*

Merlin note que l'arrêt du 2 juillet 1766, qui était contraire à cette doctrine, a été mis de côté, sur requête civile, après la mort du Marquis de Marigny sans enfants en mai 1781. Un arrêt du 21 mars 1782, sur les conclusions de l'avocat général d'Aguesseau, a déclaré que la substitution était ouverte suivant les termes du testament en faveur des enfants du sieur de Malvoisin. Les héritiers du Marquis de Marigny avaient prétendu qu'il n'avait pas été grevé de substitution au profit de la famille de Malvoisin; que Mme de Pompadour n'avait appelé le sieur de Malvoisin et ne l'avait mis *au lieu et place* du Marquis de Marigny que dans le cas où il mourrait avant elle sans enfants; que sa volonté était de faire son frère légataire universel pur et simple, et qu'elle ne s'était occupée que d'avoir un autre légataire universel au cas que son frère mourrait avant elle; et l'on fondait ce système sur la nécessité où l'on était de supposer dans la disposition de Mme de Pompadour ces mots *avant moi* comme ajoutés à ceux-ci: *"Au cas de décès de mon frère sans enfants".* Mais M. l'avocat général d'Aguesseau argua, et la Cour dit avec lui, qu'il n'est pas permis d'ajouter ainsi aux dispositions des testateurs; et celles de Mme de Pompadour, claires et absolues par elles-mêmes, n'ont besoin d'aucune interprétation forcée. Le cas de la mort du Marquis de Marigny sans enfants est la seule condition de la vocation de la famille de Malvoisin. Dans quelque temps que la condition arrive, le droit est assuré.

Il a été jugé bien clairement dans cet arrêt de 1782 que les termes "je mets à la place" forment un fidéicommis lorsqu'ils sont joints à "au cas de décès". Mais, nous dit Merlin, s'ils étaient isolés, ils n'auraient pas le même effet parce que alors ils n'apporteraient pas le trait de temps. Et cet auteur ajoute:

Les termes, *en cas de décès,* ont-ils en cette matière, le même effet que ceux à *son décès,* c'est-à-dire, rendent-ils fidéicommissaire la substitution à laquelle ils se rapportent?

Il semblerait qu'il y eût entre les uns et les autres une certaine différence. Quand je dis, *j'institue un tel, et à son décès je mets un tel à sa*

place, je suppose visiblement que l'institué recueillera ma succession et en jouira jusqu'à sa mort. Mais en disant *j'institue un tel, et en cas de décès, je mets un tel à sa place,* il semble que je ne prévois qu'*un seul cas,* celui où *l'institué viendrait à mourir sans profiter de mon institution*; et si cela est, point de *trait de temps,* ni, par conséquent, de substitution fidéicommissaire.

Dans l'espèce qui nous est soumise, la testatrice, après deux legs particuliers, donne et lègue à ses enfants, qu'elle nomme ses légataires universels, tous et chacun les biens meubles et immeubles qu'elle délaissera à son décès, sans exception, *sujet cependant aux legs ci-dessus.* C'est la seule restriction imposée aux droits des légataires.

Pour cette institution d'héritiers, à sa mort, elle adopte, par la clause suivante, dans le cas des légataires universels décédés, le principe de la représentation par leurs propres enfants pour recueillir les legs à eux faits.

Mais

(dit-elle avant de finir cette clause)

dans le cas de décès sans enfants, la part du décédé accroîtra à mes autres légataires universels survivants.

L'appelant prétend que cette phrase contient une substitution compendieuse, c'est-à-dire à la fois la vulgaire et la fidéicommissaire. Art. 925-926 C.C.

L'appelant nous expose qu'en vertu de la loi, il peut y avoir accroissement, non seulement par la caducité d'un legs (art. 868 C.C.), ou si celui en faveur de qui la disposition est faite n'a pas survécu au testateur (art. 900 C.C.), ou si le légataire décède avant l'accomplissement de la condition (art. 901 C.C.), ou lorsque le légataire le répudie ou se trouve incapable de le recueillir (art. 904 C.C.), mais aussi pour des causes postérieures à la saisine légale ou après que le légataire a recueilli et possédé plus ou moins longtemps après le décès du *de cujus* et il cite à l'appui les articles 610 et suiv. et 893 C.C. Il n'y a rien dans la loi qui empêcherait l'accroissement si la testatrice avait disposé de cette façon. L'appelant a le fardeau de nous convaincre que la part de chacun des légataires ayant recueilli est grevée de cette condition résolutoire en faveur des colégataires. La disposition et l'institution d'héritier ne mentionnent que les enfants et n'expriment que les restrictions contenues dans les deux legs particuliers qui précèdent. C'est là une différence importante avec le testament de la Marquise de Pompadour. Puis vient la clause dont le dernier membre pourvoit en faveur des colégataires à

1934
BOURGEAU
v.
BOURGEAU
Cannon J.

accroissement de la part du légataire décédé sans enfants. La testatrice a-t-elle simplement répété la loi (art. 868 C.C.), ou y a-t-elle ajouté pour stipuler accroissement en cas de mort sans enfants après la mort de la testatrice?

D'après les autorités que j'ai citées plus haut, l'appelant pourrait mieux soutenir son interprétation si, au lieu d'employer les mots: *dans le cas de décès sans enfants,* on trouvait dans le testament les mots: *à son décès sans enfants,* avec l'autre élément requis, savoir: "Je substitue" ou "je mets à la place". Là où elle se trouve, la clause telle que rédigée pourvoit au cas où un des institués viendrait à mourir, sans profiter de l'institution, avec ou sans enfants; et dans les deux alternatives, pas de *trait de temps,* et, par conséquent, substitution vulgaire.

L'on ne trouve pas ici de termes indiquant clairement l'intention de la testatrice de substituer ses autres légataires universels survivants à l'un d'eux qui décéderait sans enfants, après avoir, à la mort de la testatrice, reçu sa part. Il n'y aurait donc dans l'espèce qu'une substitution vulgaire et cette clause du testament, dans son ensemble, ne règle que les conditions requises pour recueillir à la mort de la testatrice, à l'ouverture de la succession. Le légataire universel décédé à cette date sera remplacé par ses propres enfants; mais à la même date, dans le cas de décès sans enfants, la part du décédé accroîtra aux légataires universels survivants. C'est là le sens naturel de la clause et l'ensemble de l'acte et l'intention qui s'y trouve suffisamment manifestée nous ont convaincus, comme tous les juges qui ont pesé les termes du testament, que la clause en question ne crée pas une substitution fidéicommissaire, c'est-à-dire que la testatrice n'a pas chargé celui de ses enfants qui aurait reçu à son décès de rendre la chose aux autres légataires, si lui-même mourait sans postérité. Comme on l'a fait remarquer, lorsqu'il s'est agi de créer une substitution fidéicommissaire au cas où l'un des petits-enfants, après avoir recueilli, mourrait avant d'avoir atteint l'âge de vingt-cinq ans, ou lorsqu'il s'est agi du résidu du legs d'Emma, la testatrice a bien su se servir des termes appropriés; et, par ailleurs, cette clause concernant le legs d'Emma aurait été inutile si une substitution avait déjà été créée dans le même testament sous condition de sa mort sans enfants après avoir recueilli. Les biens recueillis par Louise et Léa Bour-

1934

BOURGEAU v. BOURGEAU

Cannon J.

geau n'étaient donc pas grevés de substitution et elles avaient le droit d'en disposer comme elles l'ont fait, y compris ce qu'elles ont recueilli de la part d'Emma, en faveur de l'intimée.

Pour ces motifs, nous adoptons les conclusions des deux cours inférieures et renvoyons l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Billette & Brodeur.*

Solicitors for the respondent: *Geoffrion & Prud'homme.*

1934

* Apr. 26
* May 7.

MOÏSE CHESNEL ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

THEOPHILE DAIGLE ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Criminal law—Smuggling—When offence completed—Whether the master of a vessel had an opportunity of complying with the provisions of the law—Customs Act, R.S.C., 1927, c. 42, s. 11, s. 203 (4) and s. 262.

Section 203, paragraph 4, of the *Customs Act*, which applies only to vessels arriving within three miles of the coast of Canada and section 11 of the same Act, which impliedly allows the master of a vessel opportunity of complying with its conditions before being deemed to have committed the offence of smuggling, have no application under the following circumstances of this case: a vessel, on board of which were both appellants, having cleared from Lévis, opposite Quebec, for Gaspé, stopped somewhere below Rimouski to take over from a schooner a cargo of liquor and then turned back to try and land these smuggled goods at some point on the shores of the St. Lawrence, and then, to avoid capture by the Government patrol, the vessel was deliberately stranded and abandoned by its crew on the shores of Beaumont, within the limits of the harbour of Quebec, several hundred miles inland.

There is no conflict between the judgment appealed from and the decision in *Rex* v. *Langille* (57 Can. Cr. Cas. 151).

Judgment of the Court of King's Bench (Q.R. 56 K.B. 88) aff.

* PRESENT:—Rinfret, Lamont, Cannon, Crocket and Hughes.

1934

CHESNEL v. THE KING.

DAIGLE v. THE KING.

APPEALS from the judgments of the Court of King's Bench, appeal side, province of Quebec (1), upon leave to appeal granted by Crocket J., Justice of the Supreme Court of Canada, said judgments sustaining the conviction of both appellants, on their trial before H. Fortier, J.S.P. on a charge of smuggling.

Pierre Devarennes for the appellants.

Laetare Roy K.C. and *Henri Bernier K.C.* for the respondent.

The judgment of the Court was delivered by

CANNON J.—The appellants were convicted before the Court of Sessions of the Peace for the district of Quebec on an indictment which is translated as follows by the parties:

To have, on or about the 18th of May in the year 1932, *in the waters of the St. Lawrence River,* and particularly *near the shores of Beaumont,* in the district of Quebec, assisted or otherwise been concerned in the unshipping, the landing or removing and the importing of goods illegally imported in Canada and upon which the exigible legitimate duties had not been paid, *by having under his control and his possession,* on board a yacht named *Mariner's Joy,* an approximate quantity of 860 gallons of alcohol fraudulently imported in Canada and upon which the exigible legitimate duties had not been paid, said alcohol having an approximate value of $860, contrary to R.S.C., c. 42, s. 193, ss. 3.

A penalty of $300 or four months imprisonment was imposed on both appellants. The Court of King's Bench of the province of Quebec dismissed their appeal. They obtained special leave to appeal to this court, under section 1025 of the Criminal Code, because the decision of the Court of King's Bench for the province of Quebec, it was alleged, conflicted with the judgment in a like case of the Supreme Court of Nova Scotia *re Rex* v. *Langille* (1). The facts in the latter case are as follows:

On June 18, 1928, at eight o'clock in the evening, the captain of one of the Canadian patrol boats came out of Ketch Harbour, Halifax County, and sighted a motor boat a mile off Ketch Harbour Head making towards land; the motor boat was stopped and found to contain a considerable quantity of rum in kegs. Langille was in charge of the motor boat. The motor and cargo were seized and brought to Halifax Harbour and Langille was charged of

(1) (1933) Q.R. 56 K.B. 88.

(1) (1932) 57 Can. Cr. Cas. 151.

unlawfully smuggling into Canada goods subject to duty. The judgment of the Nova Scotia court was to the effect that despite s. 203, par. 4, of the *Customs Act* (s. 21 of c. 50 of the statutes of Canada passed in 1927), which declares

> that the offence of smuggling should be deemed to be completely committed whenever any vessel containing goods not reported pursuant to section 11 of the Act arrives within three miles of the coast of Canada,

the offence is not complete until the master of the vessel has had an opportunity of complying with the conditions laid down in s. 11, i.e.,

> of reporting to the Customs House after the vessel is anchored or moored.

Mr. Justice Ross dissented from the above judgment.

After careful consideration of the case, we find that the *Langille* case (1) differed from the present ones. It must be noted that subsection 4 applies when any vessel *arrives* within three miles of the coast or shores of Canada, i.e., enters the territorial waters of this country. This evidently covered the Nova Scotia case, as the vessel there involved was approaching from the ocean the coast or shores of Canada, was arriving and was still moving towards her destination. In the present case, the vessel was deliberately stranded by its crew, to avoid capture by the Government patrol, on the shores of Beaumont, within the limits of the harbour of Quebec, several hundred miles inland, on the river St. Lawrence. Certainly it was not then arriving within three miles of the coasts of Canada.

Moreover, by wilful stranding and the abandonment of their boat on the shore, the appellants have placed themselves in such a position that it was utterly impossible for them to *arrive,* anchor or moor in the harbour of Quebec and comply with the requirements of section 11. That circumstance, of their own making, cannot help them. They could not be first given the opportunity of declaring on arrival, as required by the Nova Scotia decision, because, of their own accord, they had "arrived" and landed on the Beaumont beach. It is admitted that both appellants were on board the boat and that the dutiable goods which had admittedly been smuggled or clandestinely introduced into Canada by another vessel were in

(1) (1933) Q.R. 56 K.B. 88.

1934

CHESNEL v. THE KING. — DAIGLE v. THE KING.

Cannon J.

their possession. Under section 262 of the *Customs Act*, this possession once proven or admitted placed on the appellants the burden of proof of all facts relating to the origin, the importation or the payment of duty or the compliance with the requirements of the Act with regard to the entry of any such goods.

Mr. Justice Dorion (1), with whom concurred Howard, Rivard and Bond JJ., in his reasons for judgment, says:

> Je crois que les présomptions créées par la loi contre les accusés ont précisément pour but d'empêcher ce manège nonobstant *Rex* v. *Langille* (2), cité par l'appelant.

And Mr. Justice St. Jacques says, at page 94 (1):

> Ces deux causes se distinguent nettement de celle qui a été jugée par la cour suprême de la Nouvelle-Ecosse, *Rex* v *Langille*. (2)
>
> Les faits révélés par la preuve sont bien différents; et en rejetant l'appel, cette cour ne donne pas à la loi des douanes une interprétation différente de celle que lui a donnée la cour suprême de la Nouvelle-Ecosse.

The attitude of Mr. Justice Dorion and of the majority of his colleagues disclosed an apparent conflict with *Rex* v. *Langille* (2) sufficient to grant leave to appeal under 1025 Cr. C. After considering the facts of the case, however, we agree with Mr. Justice St. Jacques that there is no real conflict between the two courts of appeal, as section 203, p. 4, of the *Customs Act* applies only to vessels arriving within three miles of the coast of Canada and could have no possible application to a vessel which, having cleared from Lévis for Gaspé, stopped somewhere below Rimouski to take over from a schooner a cargo of liquor and then turned back to try and land these smuggled goods at some point on the shores of the St. Lawrence under the very inculpating circumstances disclosed by the record.

We are, therefore, unanimously of opinion that these appeals fail and should be dismissed.

Appeal dismissed.

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(1) (1933) Q.R. 56 K.B. 88, at 93. (2) (1932) 57 Can. Cr. Cas. 151

HIS MAJESTY THE KING (PLAINTIFF) ..... APPELLANT;

AND

H. J. CRABBS (DEFENDANT)..... RESPONDENT.

1934

* Apr. 30
May 1
* May 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Revenue—Special War Revenue Act—Sale of stock or bonds by broker—Omission to affix revenue stamps—Whether broker liable in action for debt—R.S.C., c. 179, ss. 58, 59, 61, 63, 108.

Under the *Special War Revenue Act*, R.S.C., 1927, c. 179, the omission to affix the revenue stamps required by section 58 of Part VII to be affixed on stocks or bonds on a sale or transfer thereof does not, when a sale is made by a broker as an agent, render him liable to pay the money value of such stamps as a debt due to the Dominion of Canada.

Persons falling within the incidence of the prohibition enacted by section 58 are, by reason of the penalty created by section 63, affected by a motive of considerable weight not to disregard the prohibition; in other words, to see that the documents mentioned in section 58 are duly stamped. It does not follow, however, that the statute creates a civil obligation on the part of such persons to pay the value of the necessary stamps, or indeed, any sum, to the Crown. These sections do not profess to create such an obligation. They enact a prohibition and impose a penalty upon the person who acts in contravention of the prohibition. Nor does the statute in terms penalize the failure to purchase or pay for stamps. The settled principles, as indicated in the passages, quoted in the judgment, of the highest courts touching the interpretation of taxing statutes, do not permit this Court to read those sections as constituting such an obligation.

Judgment of the Court of Appeal (47 B.C. Rep. 293) aff.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Ellis C.C.J., and dismissing the appellant's action to recover $499.48 due under the *Special War Revenue Act* for stamp tax on sale or transfer of stocks and shares.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

F. P. Varcoe K.C. for the appellant.

W. B. Farris K.C. for the respondent.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes.

(1) (1933) 47 B.C. Rep. 293; [1933] 3 W.W.R. 379.

1934

THE KING v. CRABBS.

The judgment of the Court was delivered by

HUGHES J.—This action was brought against the respondent for the recovery of $499.48 alleged to be due as a debt for stamp taxes payable on sales of shares of stock under the *Special War Revenue Act.*

Section 58 of Part VII of the statute provides that no person shall sell or transfer the stock or shares of any association, company or corporation, or any bond other than a bond of the Dominion of Canada or of any province of Canada, unless there is affixed to or impressed upon the document evidencing ownership or a document shewing the transfer thereof stamps of certain values as in the statute provided.

Section 59, subsection 1, provides among other things that where the evidence of sale or transfer is shewn only by the books of the company, the stamp shall be placed or impressed upon such books. Section 59, subsection 3, is as follows:

> In case of an agreement to sell or where the transfer is by delivery of the certificate or bond assigned in blank, or bond payable to bearer, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale or transfer to which the stamp shall be affixed or impressed.

Section 63 provides that any person who violates any of the provisions of that part of the statute shall be liable to a penalty not exceeding five hundred dollars.

The action, however, as above stated, was not for the recovery of penalties, but was an action for the stamp taxes. The provision relied upon is section 108, Part XIV, of the Act which reads in part as follows:

> All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of His Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by His Majesty, in the Exchequer Court or in any other court of competent jurisdiction.

The respondent admitted that during the period in question, he was a stock broker carrying on business as a member of the Vancouver Stock Exchange. He admitted that during that period he had sold or transferred stock or shares on which the taxes would have been the amount claimed by the appellant; but he testified, and there was no evidence to the contrary, that none of the shares was his own property and that he sold only as agent or

broker for various clients and customers, receiving as his remuneration a commission on each transaction. The respondent therefore contended that there was no debt due by him or right enforceable against him by His Majesty within section 108.

In *Partington* v. *Attorney-General* (1), Lord Cairns, at page 122, stated the rule of interpretation of fiscal legislation as follows:

I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called equitable construction, certainly such a construction is not admissible in a taxing statute where you simply adhere to the words of the statute.

And again in *Pryce* v. *Monmouthshire Canal and Railway Companies* (1), as follows:

My Lords, the cases which have decided that Taxing Acts are to be construed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any à priori liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever might be the consequence.

In *Oriental Bank Corporation* v. *Wright* (2), Lord Blackburn, delivering the opinion of the Judicial Committee of the Privy Council, said at page 856:

Their lordships, therefore, having regard to the rule that the intention to impose a charge on the subject must be shown by clear and unambiguous language, are unable to say that the obligation of the bank to make the return applied for, and its consequent liability to pay duty on the notes put in circulation by its Kimberly branch, are so clearly and explicitly imposed by the present Act as to satisfy this rule.

In *Tennant* v. *Smith* (1), Lord Halsbury stated the rule as follows, page 154:

This is an Income Tax Act, and what is intended to be taxed is income. And when I say "what is intended to be taxed," I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intenton, any

(1) (1869) L.R. 4 H.L. 100.
(1) (1878) 4 A.C. 197 at 202, 203
(2) (1880) 5 App. Cas. 842.
(1) [1892] A.C. 150.

1934

THE KING v. CRABBS.

Hughes J.

governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said *in re Micklethwait* (2): "It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words."

In *Attorney-General* v. *Milne* (3), Viscount Haldane, Lord Chancellor, said at page 771:

It may be that, if probabilities, apart from the words used, are to be looked at, there is, on the construction which the Court of Appeal have put on the statute, a casus omissus which the Legislature was unlikely to have contemplated. But, my Lords, all we are permitted to look at is the language used. If it has a natural meaning we cannot depart from that meaning unless, reading the statute as a whole, the context directs us to do so. Speculation as to a different construction having been contemplated by those who framed the Act is inadmissible, above all in a statute which imposes taxation.

In *Lumsden* v. *Commissioners of Inland Revenue* (1), Viscount Haldane, Lord Chancellor, at pages 896 and 897 said:

My Lords, I said at the beginning that the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation.

In the *Matter of the Finance Act*, 1894, and in the *Matter of the Estate of the Rev. George Studdert* (2), the rule of interpretation applicable to a taxing Act was stated thus by Fitzgibbon L.J.:

If it be doubtful or difficult of interpretation, which I do not think it is, the Finance Act is subject to the rule that no tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject.

Referring now to the provisions we have to construe, it is quite clear that persons falling within the incidence of the prohibition enacted by section 58 are, by reason of the penalty created by section 63, affected by a motive of considerable weight not to disregard the prohibition;

(2) (1855) 11 Ex. 452 at 456.
(3) [1914] A.C. 765.
(1) [1914] A.C. 877.
(2) (1900) 2 I.R. 400, at 410.

in other words, to see that the documents mentioned in section 58 are duly stamped. It does not follow, however, that the statute creates a civil obligation on the part of such persons to pay the value of the necessary stamps, or indeed, any sum, to the Crown. These sections do not profess to create such an obligation. They enact a prohibition and impose a penalty upon the person who acts in contravention of the prohibition. Nor does the statute in terms penalize the failure to purchase or pay for stamps. The settled principles, as indicated in the passages quoted above from the judgments of the highest courts touching the interpretation of taxing statutes, do not permit us to read these sections as constituting such an obligation.

Counsel for the Crown relies upon section 61, which refers to "the tax imposed by this Part." This, it is said, is a statutory construction of Part VII; and necessarily implies that the persons affected by the prohibition created by section 58 are directly charged with a civil obligation to pay to the Crown, in respect of the transactions falling within section 58, the cost of the stamps required for conformity with the provisions of the section. It appears to us that there is no such necessary implication.

There could, we think, be no impropriety in speaking of sections 58 and 63 as in a practical sense imposing a tax; but they do not necessarily imply an intention to create a civil obligation to pay any sum of money to the Crown.

Section 108, Part XIV, it should be observed, presupposes the existence of a tax or sum "payable under this Act," the existence, that is to say, of a legal duty, imposed by the statute upon the person from whom the "debt" is alleged to be "due" or the "right enforceable" to pay to the Crown the sum sued for.

Leave to appeal was granted in this case upon terms that the appellant should pay the costs of the respondent as between solicitor and client. The result is that the appeal should be dismissed with costs as between solicitor and client.

Appeal dismissed with costs as between solicitor and client.

Solicitor for the appellant: *W. H. S. Dixon.*
Solicitors for the respondent: *Grossman, Holland & Co.*

1934

*Mar. 5, 6.
*Mar. 28.

DUPRÉ QUARRIES LTD. (DEFENDANT)..APPELLANT;

AND

ARTHUR DUPRÉ (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contract—Sale—Quarry—Stipulation that vendor be hired for 10 years as superintendent of the business sold—Right of the purchaser to dismiss vendor before the expiration of that period—Misconduct of the vendor—Claim by the latter for salary after dismissal—Proper remedy is claim for damages—No case for specific performance—Purchaser not bound to first ask the courts to resiliate contract before dismissal of vendor—Whether sale annulled with the annulment of the contract of hire—Arts. 1065, 1670 C.C.

The respondent, by a notarial deed passed November 6, 1929, sold to the appellant, as a going concern, all the business carried by him as a quarry operator for the sum of $55,000; and it was stipulated in the deed that "in consideration of the present sale, the purchaser has presently engaged the vendor as superintendent of the quarry purchased by the purchaser from the vendor, for ten years from the first day of October, 1929, at a salary of five hundred dollars ($500) a month, but it is clearly understood that the vendor will give his time, energy and capacity to the service of the said purchaser to run the said quarry." On the 10th of April, 1930, the appellant, not being satisfied with the services rendered by the respondent, dismissed him and paid his salary up to the 15th of April. The respondent then brought the present action for $250, balance of his salary for that month, reserving his rights to claim the balance of his salary for the balance of the ten years.

Held that, on the facts, outside of the questions of law raised by the respondent, the record contains evidence of grave misconduct which gave ample justification for the dismissal of the respondent.

Held, also that the respondent's recourse, if he had been as a fact dismissed without cause or valid reason, could only have been a claim for damages and he could not ask the court for an order compelling the appellant company to keep him in its employ. The contract of lease or hire of personal service, owing to the personal character of the obligations which it contains, is not susceptible of a condemnation for specific performance: the appellant cannot physically be forced to keep the respondent in its employ, nor could the respondent be physically constrained to remain in the appellant's service.

Held, further, that the appellant was not bound to take legal proceedings before the courts to obtain the resiliation of the contract of hire before dismissing the respondent.

On the ground raised by the respondent that the contract of the 10th of October, 1929, was a single one and not susceptible of partial resiliation, i.e., that if the contract of hire was rescinded the sale also should be annulled, *held* that the agreement between the parties did not con-

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Hughes JJ.

stitute an indivisible thing, each contract in the deed having its distinct individuality, and, therefore, the appellant had the right to resiliate the contract of hire without affecting the sale made in the same document.

APPEAL by special leave from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, P. Demers J., and maintaining the respondent's claim for salary.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

Aimé Geoffrion K.C. and *Antonio Perrault K.C.* for the appellant.

J. L. Penverne for the respondent.

The judgment of the Court was delivered by

RINFRET J.—Le 10 octobre 1929, l'intimé a passé devant notaire un contrat avec James Franceschini, de Toronto. Dans ce contrat, Franceschini avait déclaré son intention d'organiser une compagnie sous le nom de Dupré Quarries Limited, à qui il transférerait tous les biens et tous les droits qui en faisaient l'objet. Effectivement, le 6 novembre 1929, la compagnie ayant été incorporée dans l'intervalle, il fit à cette dernière le transfert qui avait été prévu. L'intimé intervint à l'acte de cession et y donna son consentement. Pour les fins de ce litige, on peut donc considérer Dupré Quarries Limited, l'appelante, et l'intimé comme les deux parties contractantes.

Le contrat comprend d'abord la vente "as a going concern" de l'entreprise de l'intimé dans l'exploitation d'une carrière au Sault-au-Récollet, y compris les bâtisses, constructions, machines et outils, meubles, chevaux et camions y attachés, pour la somme de $55,000. Il comprend ensuite l'engagement de l'intimé comme surintendent de la carrière achetée de lui pour une période de dix années, à compter du 1er octobre 1929, à un salaire de $500 par mois, et un autre engagement pour son fils, Emilien Dupré. Nous n'avons pas à nous occuper de ce dernier, dont les droits ne sont pas en discussion.

Le 10 avril 1930, l'intimé a été congédié par l'appelante, qui lui a alors payé son salaire jusqu'à la date du 15 avril.

1934

DUPRÉ QUARRIES LTD. v. DUPRÉ

Rinfret J.

Il a nié à l'appelante le droit de le destituer; et, demandant acte du fait qu'il se tenait à la disposition de l'appelante et qu'il était toujours prêt à lui donner tout son temps, de même que sous réserve de son droit de lui réclamer son salaire au fur et à mesure qu'il deviendra dû, ainsi que de toute réclamation en dommages-intérêts, il a intenté cette action pour recouvrer la somme de $250 représentant la balance de son salaire pour le mois d'avril.

L'appelante a plaidé qu'elle avait congédié l'intimé pour cause, à savoir parce que celui-ci ne remplissait pas les conditions de son engagement. La Cour Supérieure lui a donné raison; mais la majorité des juges de la Cour du Banc du Roi (avec le dissentiment de monsieur le Juge-en-chef Tellier) a infirmé ce jugement et a maintenu l'action de l'intimé.

L'appelante a obtenu de la Cour du Banc du Roi la permission spéciale de se pourvoir en appel devant la Cour Suprême du Canada.

Une première question se soulève, relative à la situation juridique des parties. L'engagement de l'intimé comme surintendant de la carrière constitue un louage de service. Comme cet engagement était pour un temps défini, l'intimé prétend que l'appelante n'avait pas le droit de le congédier, même pour cause, et qu'elle devait nécessairement s'adresser aux tribunaux pour obtenir la résiliation du contrat. Il ajoute, en plus, qu'il s'agit d'un contrat complexe, où l'engagement de l'intimé faisait partie de la considération de la vente, et que la résiliation, si elle pouvait être prononcée, devait embrasser le contrat tout entier, et non pas seulement la partie de ce contrat qui concernait de louage de service.

Quelles que soient, dans les notes des juges de la Cour du Banc du Roi, les expressions d'opinion sur les moyens ainsi plaidés par l'intimé, il paraît certain que la cour a refusé de les accepter; et l'unique motif du jugement en appel est

> que les faits reprochés à (Dupré), eu égard à la nature et à l'importance du contrat du 10 octobre 1929, n'étaient pas assez graves pour motiver contre lui la résolution immédiate de ce contrat.

En effet, les droits et obligations résultant du bail de service personnel sont assujettis aux règles communes aux contrats (Art. 1670 C.C.). Comme dans tout contrat synallagmatique, le louage de service comporte des obligations

réciproques, dont la sanction se trouve dans l'article 1065 du code civil. Dans ce genre de contrats, toute contravention rend le débiteur passible de dommages intérêts dans tous les cas. Le créancier peut aussi, dans les cas qui le permettent, demander l'exécution de l'obligation même, ou l'autorisation de la faire exécuter aux dépens du débiteur. Le créancier peut toujours demander la résolution du contrat d'où naît l'obligation.

En l'espèce, il n'y a pas de doute que l'appelante a congédié l'intimé et qu'elle a donc répudié son obligation de le garder à son service. Si elle l'a fait sans cause légale, il y a contravention de sa part, et elle doit à l'intimé des dommages-intérêts. Mais le contrat de louage de service, à cause du caractère personnel des obligations qu'il comporte, ne se prête pas à une condamnation à l'exécution spécifique. Il n'entre pas "dans les cas qui le permettent" et où "le créancier peut aussi demander l'exécution de l'obligation même." L'appelante ne pouvait être physiquement contrainte à garder l'intimé à son service; pas plus que l'intimé ne pouvait être physiquement contraint à rester au service de l'appelante. Il y a là une question de volonté et de liberté humaines contre lesquelles l'exécution directe est impuissante (16 Laurent, 3e éd. p. 258, n° 198; voir aussi les observations des juges de la Cour du Banc du Roi dans la cause de *Pitre* v. *L'Association Athlétique d'Amateurs Nationale*) (1). Le recours de l'intimé, s'il a été congédié sans droit, consistait donc dans une réclamation pour les dommages-intérêts qui en résultaient. Il ne pouvait demander à la cour de contraindre l'appelante à le garder à son service. C'était là une sanction impossible (Guillouard, 2 Contrat de Louage-n° 727; 4 Pothier, Ed. Bugnet, n° 174).

La prétention de l'intimé que l'appelante ne pouvait, par sa seule volonté, résilier le contrat d'engagement, mais qu'elle devait en demander la résolution à la cour, peut donc présenter un intérêt académique, mais elle n'a aucun côté pratique. L'appelante a démis l'intimé de ces fonctions et elle a mis fin au louage de ses services. Si elle l'a fait sans raison valable, l'unique sanction efficace de sa contravention est la condamnation aux dommages-intérêts.

(1) (1910) 11 R. de P. 336.

1934

DUPRÉ QUARRIES LTD. v. DUPRÉ

Rinfret J.

Si elle l'a fait pour cause suffisante, et c'est-à-dire: avec justification légale, la cour n'a qu'à se prononcer là-dessus dès que l'affaire vient devant elle. C'est la solution logique et raisonnable. C'est celle qui est adoptée par Laurent (vol. 25, n° 517):

> 517. Nous avons supposé jusqu'ici que le patron congédiait le commis sans qu'il y eût aucune faute à reprocher à celui-ci. Si l'employé ne remplit pas ses devoirs, il y a une cause légale de révocation; c'est le cas de la condition résolutoire tacite de l'article 1184. Mais pour que la révocation soit légale, il faut qu'elle soit prononcée par le juge. Dans l'opinion générale, consacrée par la jurisprudence, on n'exige pas une action judiciaire; mais si l'on admet que l'employé, congédié sans motif légitime, a droit à une indemnité, la question sera en définitive soumise au tribunal appelé à décider s'il y a lieu d'accorder une indemnité. (Rouen, 9 février 1859, Dalloz, 1860.2.52.)

Cette doctrine conduit au même résultat que celle de MM. Planiol & Rupert (Traité Pratique de Droit Civil—vol. 11—p. 90):

> L'application stricte du droit commun conduirait à décider que le contrat subsiste jusqu'au jugement de résolution, et que, par conséquent, le travail doit continuer et le salaire doit être payé pendant l'instance. Cette situation serait pleine d'inconvénients; le contrat de travail supposant des rapports personnels entre les parties dans son exécution, ces rapports pourraient être fort pénibles, et entraîner même quelque trouble dans l'établissement où l'employé travaille. La pratique a donc imaginé un palliatif. En fait, l'employé coupable est immédiatement mis à pied, sans décision judiciaire. Le patron à qui des dommages-intérêts seraient réclamés pour avoir ainsi rompu le contrat de sa propre autorité a un moyen de défense qui le couvre; il objecte que l'autre partie a commis une faute qui rendait indispensable une rupture immédiate. Le tribunal peut être saisi pour vérifier le bien fondé de cette allégation, et s'il l'estime exacte, il ne met aucune indemnité à la charge du patron pour une rupture qu'il reconnaît justifiée. (Civ. 26 févr. 1896, S.97.1.187; Civ. 15 juin 1914, D.1918.1.32.—Cf. Demogue, *Rev. trimestrielle,* 1919, p. 129.V. aussi notre Traité, VI, n° 428). La même solution doit être donnée au profit d'un employé qui aurait lieu de se plaindre gravement de son patron.

Le principe

> qu'il n'est pas nécessaire, dans ce cas, de faire résilier l'engagement de l'employé par les tribunaux avant de le congédier

a d'ailleurs, depuis longtemps été introduit dans la jurisprudence de la province de Québec. Dès 1881, dans la cause de *MacDougall* v. *MacDougall* (1), la Cour du Banc de la Reine (Sir A. A. Dorion J.-en-C., Ramsay, Tessier, Cross & Baby JJ.) en faisait l'application au cas où un propriétaire d'usines avait renvoyé de son service, avant l'expiration de son terme d'engagement, le gérant de ces usines qui s'était

(1) (1881) 11 R.L. 203.

engagé, sans le consentement du propriétaire, dans une industrie rivale de la sienne et de nature à nuire au commerce de cette dernière. Le rapport de cet arrêt pouvait citer plusieurs décisions antérieurement rendues dans le même sens, et faisait la distinction nécessaire avec le jugement dans la cause de *Reid* v. *Smith* (2), que l'intimé a cité à l'appui de sa prétention.

En plus, nous sommes d'accord avec le juge-en-chef de la province de Québec pour dire que

du moment que l'appelante avait le droit de mettre fin à l'engagement, si le demandeur manquait à ses obligations, elle n'était pas tenue, pour repousser la présente action, de demander la résolution du contrat. Il lui suffisait de démontrer que les causes du renvoi étaient valables.

Il reste naturellement aux tribunaux à apprécier souverainement si les motifs allégués suffisent à entraîner la résolution du contrat.

C'est ce que nous verrons, dans le présent cas, après avoir examiné l'autre point soulevé par l'intimé, et qui est: Qu'il s'agit, en l'espèce, d'un contrat complexe non susceptible de résiliation partielle. En d'autres termes, l'intimé dit que le contrat du 10 octobre 1929 était avant tout une vente dont le louage de services était en partie la considération, et que l'un ne pouvait être mis de côté sans l'autre: le louage ne pouvait être rescindé sans que la vente le fût aussi. S'il doit y avoir résiliation, il faut que ce soit de la convention toute entière (*Latreille* v. *Gouin*) (3).

Il arrive dans les contrats complexes, "s'il est impossible de diviser l'opération" (Planiol & Ripert, *Droit civil,* tome 10, n° 35), que les juges sont obligés d'apprécier la coloration prédominante du contrat et de lui attribuer le caractère de l'opération principale. Mais la convention de l'appelante et de l'intimé ne s'analyse pas de cette façon. Elle ne forme pas un ensemble indivisible. Chaque contrat a, dans l'acte même, son sens distinct et son individualité propre.

Il y a eu entre les parties un contrat de vente dont la cause et l'objet étaient la carrière et ses accessoires pour un prix de $55,000. Il y a eu, en outre, un contrat de louage dont la cause et l'objet étaient les services de l'intimé pendant une période de dix ans, moyennant un salaire de $500 par mois. Naturellement l'intimé a fait grand état de ce que la convention s'exprime ainsi:

(2) (1872) 6 Q.L.R. 367.

(3) (1926) S.C.R. 558 at 562.

1934

DUPRÉ QUARRIES LTD. v. DUPRÉ

Rinfret J.

> And in consideration of the present sale, the purchaser has presently engaged the vendor as superintendent of the quarry purchased by the purchaser from the vendor, etc.

Cette phrase n'a pas la portée que l'intimé veut lui attribuer. Elle ne signifie pas que, comme partie du prix de vente, l'appelante sera tenue, pendant dix ans, de garder l'intimé à son service, au salaire stipulé, et que l'intimé demeurera irrévocablement son employé pendant la période de temps convenue. Ce que cette clause veut dire, c'est que, en considération de la vente, l'appelante est tenue de consentir à l'intimé un contrat d'engagement suivant les conditions fixées. Ce contrat d'engagement a été consenti par l'appelante, ainsi que le dit fort bien le juge de première instance (Philippe Demers J.): "Ce contrat d'engagement constituait un avantage que le demandeur a réellement obtenu."

Mais la convention n'écartait pas les règles du louage de service pour l'engagement de l'intimé. Dès qu'il a été consenti (si l'on veut: en considération de la vente), il s'est trouvé subordonné à la loi qui régit le louage de services et à toutes les conditions résolutoires que cette loi impose, sauf, bien entendu, celles auxquelles la convention aurait expressément dérogé. Or, la convention que nous étudions ne déroge à aucune des conditions ordinaires, ni à aucune des règles du louage de service, telles qu'elles sont exprimées dans le code, en vertu duquel

> les droits et obligations résultant du bail de service personnel sont assujettis aux règles communes aux contrats. (Art. 1670 C.C.).

Sans que cela fût nécessaire, parce que, en somme, c'est une condition implicite de tout louage de service, le contrat entre les parties a cependant expressément stipulé:

> But it is clearly understood that the vendor will give all his time, energy and capacity to the service of the said purchaser to run the said quarry, etc.

Et, plus loin, après avoir pourvu à l'engagement du fils de l'intimé, le contrat revient sur le sujet d'une façon encore plus énergique:

> Moreover, it is clearly understood between the vendor and the purchaser, and *this is essential to the present agreement,* that the vendor, as well as his son, Emilien Dupré, will not take any interest whatever in any other quarry during the time of their services to the purchaser, but they will both give all their time and energy to promote the interests of the purchaser or his representatives.

Nous n'hésitons pas à dire que, dans les circonstances, si l'intimé négligeait ses devoirs et manquait de remplir

les obligations que lui imposaient à la fois le texte de sa convention et la loi générale des contrats de louage de service, sa contravention entraînait les sanctions prévues à l'article 1065 du code civil: l'appelante avait le droit de résiliation, et ce droit pouvait être limité au contrat d'engagement, sans affecter la vente effectuée simultanément (*Bélanger* v. *Bélanger* (1).)

C'est, d'ailleurs, la conclusion à laquelle en est également arrivée la Cour du Banc du Roi; et elle a infirmé le jugement de la Cour Supérieure pour l'unique raison que, dans son appréciation,

> les faits reprochés à l'appelant * * * n'étaient pas assez graves pour motiver * * * la résolution immédiate du contrat.

Elle ajoute, il est vrai, "eu égard à la nature et à l'importance de ce contrat." Et il ressort des notes des juges qui ont formé la majorité que les causes de renvoi alléguées et prouvées eussent été suffisantes pour justifier le congé d'un employé ordinaire, mais qu'elles ne l'étaient pas dans le cas de l'intimé.

Nous ne croyons pas cependant que la majorité de la Cour du Banc du Roi ait voulu, par là, établir la proposition juridique que les causes de résiliation d'un contrat de louage de service sont différentes dans le cas d'un employé ordinaire et dans le cas d'un surintendant. Nous comprenons plutôt qu'il s'agit seulement d'une appréciation de la preuve, et que le "Considérant" de la cour veut simplement dire que, dans un contrat de la nature et de l'importance de celui qui est sous considération, les tribunaux se montreront plus difficiles et plus hésitants pour justifier les causes de renvoi.

Cependant l'on ne saurait dire que, dans l'occurrence, l'appelante a agi à la légère ou que les faits d'inconduite qui ont donné lieu au renvoi n'étaient pas de la plus sérieuse gravité. Nous ne nous attacherons pas à chaque reproche séparé que la preuve a mis en évidence plus particulière. Nous croyons qu'il faut envisager plutôt l'ensemble de la conduite de l'intimé depuis son entrée en service jusqu'au moment de sa démission.

Il avait une position de responsabilité; et nous pensons que, loin d'atténuer la gravité des faits qu'on lui a reprochés, sa situation leur donnait, au contraire, plus de relief et de conséquence.

(1) (1895) 24 Can. S.C.R. 678.

1934

DUPRÉ QUARRIES LTD. v. DUPRÉ

Rinfret J.

Tout d'abord, l'enquête a dévoilé que l'intimé était adonné à l'usage habituel des boissons enivrantes. C'est une chose que Franceschini et l'appelante ignoraient lorsqu'ils ont consenti à le prendre à leur emploi, et qui n'est donc couverte, de leur part, par aucun acquiescement.

A raison de ses excès de boisson, non-seulement, comme le fait remarquer le juge de première instance, l'intimé, dans trois circonstances, au moins, s'est mis dans l'impossibilité d'exécuter ses obligations et a été pendant plusieurs jours incapable de vaquer à ses occupations, mais il s'est présenté à la carrière, il s'est rendu dans les bureaux de la compagnie, assez fréquemment après avoir fait un trop grand usage de boisson, et, dans certains cas, dans un état d'ébriété avancée et qui, au témoignage des employés qui ont alors eu à s'adresser à lui, le rendait tout à fait incapable de remplir ses devoirs, sans tenir compte de l'exemple néfaste que cela était de nature à créer autour de lui, non plus que—comme l'on est en droit de le supposer—de l'impression défavorable que cette conduite devait produire sur les clients et les autres personnes qui avaient affaire à la compagnie.

En plus, il appert que, dans ses relations avec la clientèle, l'intimé avait l'autorisation de se servir de la signature de la compagnie. Or, au cours de ses excès de boisson, il a signé plusieurs chèques personnels sans se rendre compte de ce qu'il faisait, et que le gérant de l'appelante a dû s'employer à intercepter, à la demande de l'épouse de l'intimé. Dans un cas particulier, le 24 mars 1930, l'intimé a écrit lui-même une lettre à un bureau d'avocats, qui lui réclamait le paiement d'un chèque de ce genre, et a donné pour excuse que celui qui avait obtenu le chèque de lui

came to my house and while I was in an intoxicated condition, I signed a blank cheque in his favour, which has been returned N.S.F. in view of the fact that, when I realized my mistake, I immediately stopped payment of the cheque.

Le gérant de la compagnie était personellement au fait de ces incidents et les avait portés à la connaissance des officiers de la compagnie; et l'on peut concevoir les craintes de ces derniers en songeant aux risques auxquelles ils étaient exposés par une personne qui était autorisée à se servir de la signature de la compagnie et qui se conduisait de pareille façon.

La compagnie fut patiente. L'intimé fut averti, tant verbalement que par écrit, qu'en persistant dans ces actes répréhensibles, il s'exposait à perdre sa position; et sa destitution lui est arrivée lorsque la compagnie eût atteint la limite de la tolérance.

Le juge de première instance a donc été d'avis que le renvoi du demandeur était justifiable. Sa décision est à l'effet que, dans les circonstances, la compagnie avait réussi à démontrer que l'intimé n'était pas apte à remplir la position qu'il occupait, ni qualifié pour exercer les pouvoirs qu'elle lui conférait.

Comme l'honorable juge-en-chef de la province de Québec, dissident en Cour du Banc du Roi, nous croyons que le juge de première instance a eu raison, et nous partageons son opinion. Mais, surtout, il nous paraît difficile d'arriver à la conclusion que son jugement, sur ce point, devait être infirmé. Il nous semble que c'est là un des cas où le juge du procès avait un avantage considérable sur les juges d'appel pour envisager la situation établie devant lui et dont la solution dépendait éminemment de son appréciation des faits. Même si l'impression qui nous est restée de la preuve eût été différente, nous eussions beaucoup hésité à substituer notre point de vue sur cette question de fait à celui du juge de première instance.

Nous sommes d'avis que l'appel doit être maintenu et que le jugement de la Cour Supérieure doit être rétabli avec dépens en Cour du Banc du Roi et en Cour Suprême.

Appeal allowed with costs.

Solicitor for the appellant: *Antonio Perrault.*

Solicitors for the respondent: *Penverne & Duckett.*

1934

* Apr. 24, 25.
* June 15.

IN THE MATTER OF A REFERENCE CONCERNING THE JURISDICTION OF THE TARIFF BOARD OF CANADA.

Crown—Tariff Board—Authority to determine questions of law—Authority as to orders of the Minister of National Revenue—Whether its decisions, as to the value of goods for duty purposes, are subject to the approval of the Minister—British Preferential Tariff—Customs Act, R.S.C. 1927, c. 42, ss. 3, 4, 6, 35, 36, 37, 38, 41, 42, 43, 46, 47, 48, 54—Customs Act, s. 43 as enacted by c. 2 of 1930, 2nd session, 21 Geo. V; subs. (1) of s. 43 as substituted by 23-24 Geo. V, c. 7 of 1932-33—Tariff Board Act, 21-22 Geo. V, c. 55.

The Tariff Board, as constituted under chapter 55 of the statutes of 1931, has no authority to determine questions of law as distinct from questions of fact.

The Tariff Board has no authority under that Act to determine that the orders of the Minister of National Revenue, fixing the values for duty of goods, under the authority of s. 3 of the Customs Act (c. 2 of 1930, 2nd sess.), prior to the enactment of c. 7 of 1932-33, were annulled and ceased to be effective from the date of the last mentioned enactment in respect of goods entitled to entry under the British Preferential Tariff.

The decisions of the Tariff Board, when acting under the provisions of part II of its constitutory Act, as to the value of goods for duty purposes, are subject to the approval of the Minister of National Revenue.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, for hearing and consideration, pursuant to the authority conferred by s. 55 of the *Supreme Court Act*, R.S.C., 1927, c. 35. The questions and the pertinent sections of the *Customs Act* and of the *Tariff Board Act* are set out in the judgment now reported.

Glynn Osler K.C. and *F. P. Varcoe K.C.* for the Attorney-General of Canada.

R. S. Robertson K.C. for Doon Twines Limited.

Aimé Geoffrion K.C. for Thomas Bonar & Co. (Canada) Ltd.

O. M. Biggar K.C. for Kruger Ltd

Ls. St. Laurent K.C. for Lancashire Felt Co. of Canada

The judgment of the Court was delivered by

* PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

RINFRET, J.—By Order in Council dated 20th March, 1934, certain questions have been referred to this Court for hearing and consideration, pursuant to s. 55 of the *Supreme Court Act*, as follows:

1. Has the Tariff Board as constituted under chapter 55 of the statutes of 1931 authority to determine questions of law as distinct from questions of fact?

2. Has the Tariff Board authority under said Act to determine that the orders of the Minister of National Revenue, fixing the values for duty of goods, under the authority of section 43 of the *Customs Act* as enacted by chapter 2 of the statutes of 1930 (second session), prior to the enactment of chapter 7 of the statutes of 1932-33, were annulled and ceased to be effective from the date of the last mentioned enactment in respect of goods entitled to entry under the British Preferential Tariff?

3. When the Tariff Board acts under the provisions of part II of the said Act, are its decisions as to the value of goods for duty purposes subject to the approval of the Minister of National Revenue?

The Order in Council recites section 43 of the *Customs Act*, as enacted by c. 2 of 1930 (second session, 21 Geo. V), which provides as follows:

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind are being imported into Canada, either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

(2) Every order of the Governor in Council authorizing the Minister to fix the value for duty of any class or kind of such goods, and the value thereof so fixed by the Minister by virtue of such authority, shall be published in the next following issues of the *Canada Gazette*.

This section came into force on the 22nd September, 1930. Between that date and the 25th November, 1932, the Governor in Council, by appropriate action thereunder, authorized the Minister of National Revenue to fix the value for duty of several classes or kinds of goods and, pursuant to the authorization so given, the Minister fixed the value for duty of such goods. The Orders in Council and the orders of the Minister were duly published in the *Canada Gazette*.

On the 25th November, 1932, c. 7 of the statutes of 1932-33 (23-24 Geo. V) became law, which Act substituted the following subsection (1) of s. 43 for that enacted in 1930:

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind *not entitled to entry under the British Preferential tariff or any lower tariff* are being imported into Canada either on sale or on consignment, under

1934

REFERENCE CONCERNING THE JURISDICTION OF THE TARIFF BOARD OF CANADA.

Rinfret J.

such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

The only modification in the new subsection was effected by the insertion of the words:

not entitled to entry under the British Preferential tariff or any lower tariff.

Since the enactment of this subsection in 1932, certain importers of goods entitled to entry under the British Preferential tariff, of classes or kinds of goods falling within the Orders in Council and the orders of the Minister of National Revenue fixing the value for duties, have made application to the Tariff Board for a declaration that the orders of the Minister fixing the value for duty were annulled by c. 7 of the statutes of 1932-33 aforesaid, in so far as they applied to such goods. It was contended that the value for duty should be the appraised value at the time of importation and in the principal markets of the country whence the same had been imported into Canada (s. 35). The applicants alleged that these goods should be dealt with by the Tariff Board under the jurisdiction conferred upon it by part II of the *Tariff Board Act*. The Tariff Board heard the applications and decided that the orders of the Minister fixing the values for duty of such goods were annulled by the new legislation.

In one of these cases, an appeal was taken to the Governor in Council by a Canadian manufacturer. It was contended, on behalf of such manufacturer, that the Tariff Board had exceeded its jurisdiction in deciding that the orders of the Minister of National Revenue fixing the value for duty of such goods were annulled by c. 7 of the statutes of 1932-33 in so far as they applied to goods entitled to entry under the British Preferential tariff; and it was further contended that if the Board had jurisdiction to decide the question, the decision of the Board that the orders of the Minister fixing the value for duty of such goods were so annulled was erroneous in law.

The Governor in Council considered these matters were of great public importance and thought, pending any decision of the matter, the opinion of the Supreme Court of Canada should be obtained.

For that purpose, the above questions have been referred to the Court.

Copies of the decisions of the Board upon the concrete cases mentioned in the Order in Council, and also of the reasons for judgment in one of these cases were submitted to the Court; but they were placed before us only for the purpose of illustration; and, by the questions put, the Court is not asked to say if these decisions were right or wrong. It was made clear at the argument that in our answers we are to limit ourselves to the abstract questions referred to us.

We will therefore proceed to give our opinion upon each question with the reasons for each answer.

The Act to provide for the appointment of a Tariff Board, known as the *Tariff Board Act* (c. 55 of 21-22 Geo. V), came into force on the 3rd of August, 1931. It is divided into two parts.

Part I provides for the constitution of a Board to be called the Tariff Board, consisting of three members appointed by the Governor in Council, and defines the duties of the Board. At the request of the Minister of Finance, the Board shall make inquiries as to several matters therein enumerated in respect to goods produced in or imported into Canada. It may also be empowered by the Governor in Council to hold other inquiries or to make investigations in other matters stated in the Act.

In connection with these inquiries or investigations, the Board is given the power of summoning witnesses and of taking evidence. It holds its sessions in the city of Ottawa, or in any other place in Canada, or, with the consent of the Minister of Finance, in any place outside of Canada. It conducts its proceedings in such manner as may seem to it most convenient for the speedy and efficient discharge of its duties.

In the exercise of its powers of inquiry and investigation as so provided by the Act, the Board is a court of record and has an official seal.

The other provisions of part I relate to the appointment of a secretary, and to his duties, to the appointment of other officers, clerks and employees of the Board, of persons having technical or special knowledge of any of the matters into which inquiry may be made to assist the Board in

1934

REFERENCE CONCERNING THE JURISDICTION OF THE TARIFF BOARD OF CANADA.

Rinfret J.

making such inquiries; and they also relate to the salaries, the pensions and the residence of the members of the Board and the other officials.

Then comes part II, which deals with a different subject altogether. Under that part, the powers, functions and duties of the Board of Customs are assigned to the Tariff Board and shall be transacted by that Board after a date to be fixed by the Governor in Council. Whenever in any Act of the Parliament of Canada, or in any regulation or order made thereunder, the Board of Customs is mentioned or referred to, the Tariff Board shall in each and every case be substituted therefor. Section 3 of the *Customs Act* (c. 42 of R.S.C. 1927) shall be deemed to be repealed from and after the date fixed by the Governor in Council "for the transfer of the duties and powers of the Customs Board to the Tariff Board." The section of the *Customs Act* so deemed to be repealed is that which provides for the constitution of the Board of Customs.

The only other provisions to be found in part II of the Tariff Board Act deal with the right of appeal from decisions of the Tariff Board (the former right of appeal from decisions of the Board of Customs is to continue as provided by the Customs Act), when transacting business under this part, and with the right of access to documents and records and to information from any officer, clerk or employee of the public service. There is a further provision for the publication of the decisions of the Board; and finally it is enacted that the Governor in Council may make regulations not inconsistent with this part, or any Act of the Parliament of Canada, as may be deemed necessary for carrying out the provisions of this part; and also that the Board shall have such powers and perform such duties under this part as are assigned to it by any Act of the Parliament of Canada or by the Governor in Council.

The questions and matters submitted to this Court have reference only to the powers of the Tariff Board under part II of the *Tariff Board Act;* and, in the course of these reasons, it should therefore be borne in mind that we are dealing only with that part of the Act.

As will have been perceived by the analysis just made, when the Tariff Board acts under the provisions of part II, it exercises the powers and functions and duties of the

former Board of Customs, no less and no more. The Tariff Board is substituted for the Board of Customs, the duties and powers whereof have been "transferred" to it. We are not speaking, of course, of such other powers and duties which may later be assigned to the Board by any Act of the Parliament of Canada or by the Governor in Council (subs. 4 of s. 11). To all intents and purposes under part II, the Tariff Board takes the place of the Board of Customs to such an extent that under the Act

> wherever in any Act of the Parliament of Canada, or in any regulation or order made thereunder, the Board of Customs is mentioned or referred to, the Tariff Board shall in each and every case be substituted therefor.

It should be emphasized that, for the purposes of transferring the powers and duties from one board to the other under part II, the legislation proceeds by the mere insertion of the words "Tariff Board" in lieu of the words "Board of Customs" in the Acts of Parliament, or in the regulations and in the orders made thereunder.

It follows that, if we are to ascertain the powers, functions and duties of the Tariff Board under part II, we are compelled to look to the powers, functions and duties of the former Board of Customs. They are to be found in the *Customs Act* (c. 42 of R.S.C. 1927 and amendments); but in order fully to comprehend the matter, a brief reference must be made to the whole scheme of the customs administration in Canada.

Under Canadian legislation, the control, regulation, management and supervision of the collection of the duties of customs and of matters incident thereto are assigned to the Minister of National Revenue. The Act (c. 137, R.S.C. 1927) provides for a Department of National Revenue over which the Minister presides and of which he has the management and direction. The Act also provides for the appointment of three officers, who are the chief officers of the department, and who are designated as follows: The Commissioner of Customs; the Commissioner of Excise; and the Commissioner of Income Tax. It further provides for the appointment of an Assistant Commissioner of Customs.

The Minister has the power, after such examination as he may prescribe, to select and nominate suitable persons

1934

REFERENCE CONCERNING THE JURISDICTION OF THE TARIFF BOARD OF CANADA.

Rinfret J.

for appointment by the Civil Service Commission as customs appraisers of all classes, whether serving at the various ports and places of entry or as Dominion appraisers, or as officers in the customs and excise preventive service or as officers assigned to duties as investigators of values and claims for drawbacks.

They are, of course, all of them, officers of the Department of National Revenue. Dominion appraisers and customs appraisers are defined in s. 4 of the *Customs Act*. The Dominion appraisers are those who hold "jurisdiction at all ports and places in Canada." The customs appraisers are those who hold "jurisdiction at such ports and places in Canada as are designated in an order in council in that behalf." Every appraiser is deemed an officer of customs (sec. 6, *Customs Act*). The Board of Customs, as constituted under sec. 3 of the *Customs Act*

> consists of the Commissioner of Customs, or any officer for the time being acting as such, who shall be the Chairman of the Board, the Commissioner of Excise, the Commissioner of Income Tax, the Assistant Commissioner of Customs, and such other duly qualified officer of Customs as the Governor in Council from time to time appoints.

And it is a branch of the Department of National Revenue.

Customs duties are either *ad valorem* or specific duties. In the case of *ad valorem* duties, they are computed by reference to the value of the goods. This value is called the value for duty (*Customs Act*, s. 35), and is the "fair market value," as determined by the methods provided for by the Act. The true and fair market value is ascertained by the appraisers; and, in this respect, subject to the limits of their territorial jurisdiction, the functions of the Dominion appraiser and of the customs appraiser are the same.

But, pursuant to certain provisions of the Customs Act, the Minister of National Revenue may determine the value of goods; and the value so determined, until otherwise provided, is the value upon which duty is to be computed and levied under regulations prescribed by the Minister (ss. 35-4, 36-2, 37, 41, 42, 43, 47, &c.) If there has been a determination or fixing of value properly made by the Minister, the provisions with regard to "fair market value" do not apply. When they apply, as already mentioned, the appraisers

> shall, by all reasonable ways and means in * * * their power, ascertain, estimate and appraise the true and fair market value (s. 38).

(N.B. It is sufficient to note here that the Collector of Customs, at a certain port or place, may sometimes act as appraiser.)

Their decision is subject to review

as to the principal markets of the country, or as to the fair market value of goods for duty purposes (s. 38-4).

The power of review was formally vested in the Board of Customs, and is now vested in the Tariff Board. It is limited to the two particular purposes just stated. The decision of the Board in the exercise of this power is expressly made final and conclusive only "when approved by the Minister" (except as otherwise provided by the Act).

The Board of Customs, therefore, as it formerly existed (now the Tariff Board under part II of the *Tariff Board Act*), and subject to what may be said later with regard to ss. 48 and 54 of the *Customs Act,* simply enters into the scheme devised by Parliament for the control and management of the collection of the duties of customs and of matters incidental thereto, primarily put by the Act respecting the Department of National Revenue under the direction, the regulation and the supervision of the Minister who presides over that Department.

The Board of Customs was, and the Tariff Board is, in no sense, a court. By force of the provisions of the *Customs Act,* it is not a judicial body but an administrative body. Its functions were and are purely departmental. Its duties as set forth in the Act are all in respect to questions of fact; and there is nothing in the Customs Act which purports to exclude from the jurisdiction of the ordinary courts any question of law, either with regard to the validity of the Minister's acts or otherwise, nor is any such jurisdiction conferred on the Board of Customs (now the Tariff Board, part II). It follows that in the performance of its duties under part II the Board must give effect to the orders of the Minister of National Revenue; and moreover that its decisions are subject to the approval of the Minister, by whose orders the Board is bound as the responsible Head of the Department.

Incidentally, we would say, in connection with s. 43 of the *Customs Act,* that the question whether a particular case comes or not under that section is left to the Governor

1934

REFERENCE CONCERNING THE JURISDICTION OF THE TARIFF BOARD OF CANADA.

Rinfret J.

in Council, and not to the Tariff Board. The point, as it presents itself, is really not so much whether the orders of the Minister were repealed or cancelled by the Act c. 7 of 23-24 Geo. V, but rather: whether the orders in council, by virtue of which the Minister's orders were issued, were themselves annulled by the coming into force of the Act. We find nothing in the *Customs Act* giving to the Board of Customs (now the Tariff Board) jurisdiction to determine a question of that character. In the present state of the legislation, the determination of that question is undoubtedly vested in the Exchequer Court of Canada.

It remains to consider the sections 48 and 54 of the *Customs Act,* upon which counsel heard in favour of the Tariff Board's jurisdiction laid particular stress.

In our view, s. 54 does not really come within the purview of the questions referred to the Court, and we do not consider that the subject-matter of those questions calls for the interpretation of that section. Moreover, the decisions of the Tariff Board which led to the present reference have no apparent connection with s. 54. That section deals with the rate of duty. The matters involved in the decisions of the Tariff Board referred to had to do with the appraisal of values for duty. The section provides that

> Whenever any difference arises or whenever any doubt exists as to whether any or what rate of duty is payable on any class of goods, and there is no previous decision upon the question by any competent tribunal, (N.B. Evidently meaning: any court of justice) binding throughout Canada, the Board of Customs (now the Tariff Board under part II) may declare the rate of duty payable on the class of goods in question, or that such goods are exempt from duty.

In each case, the declaration of the Board is subject to an appeal within sixty days from its date by any person interested to the Governor in Council. Any such declaration of the Board, *when approved by the Minister,* after the expiration of sixty days from the date thereof, or

> any such declaration when made by any order in council upon appeal, shall have force and effect as if the same had been sanctioned by statute.

The power given by this section is self-explanatory and does not require any comment. It is entirely distinct and separate from the powers and functions relating to the valuations for duty. We are not considering the effect of that special section in the answers given in this reference.

It need only be noted that s. 54 calls for a declaration with regard to rate in specially defined cases, that it is subject to appeal to the Governor General in Council; and that it requires either the approval of the Minister or the approval by Order in Council (in case where there was an appeal) in order to have force and effect.

As for section 48, so as to grasp its exact meaning, it ought to be read in full:

> 48. If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised, or allowed entry at an erroneous valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation, and may direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any, on such goods, or a refund of a part of the duty paid, as the case requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for.

The main observation to be made about this section is that it deals essentially with a pure matter of appraisement. The sections applies when

> it appears to any Dominion appraiser or to the Board * * * that any goods have been erroneously appraised or allowed entry at an erroneous valuation by any appraiser.

The section also applies when it appears to the Dominion appraiser or to the Board that "any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with." And it was on that part of the section that the contention was most strenuously advanced that the Board had, of necessity, the power to determine questions of law, in order properly to fulfil the functions therein conferred on it.

Let us see however what it is that the Board is authorized to do under that section. It is nothing more than to "make a fresh appraisement or valuation." Of course, it may also direct an amended entry and payment of additional duty, if any, or a refund of a part of the duty paid. But that is only consequential upon the new "valuation or appraisement so made." There is no doubt that before the Dominion appraiser or the Board may proceed to make the fresh appraisement or valuation, it must appear to them that there has previously been an erroneous appraise-

1933

REFERENCE CONCERNING THE JURISDICTION OF THE TARIFF BOARD OF CANADA.

Rinfret J.

ment made by the local appraiser or collector; and it stands to reason that, in order to come to that conclusion, the Dominion appraiser or the Board must, in a sense, form an opinion as to the proper method of appraisal which ought to be followed under the *Customs Act*; and either of them must act upon the view so formed. But that is vastly different from the suggestion that, in the exercise of its jurisdiction under s. 48, the Dominion appraiser or the Board may determine questions of law as distinguished from the question of fact involved in the fresh appraisement or valuation which either of them is called upon to make.

It was argued that every decision of the Board, and more particularly a decision under s. 48 implies: 1—a decision as to value; and 2—a decision as to the rate of duty applicable under the law. And it was contended that, as a necessary consequence, the Board must determine the questions of law which such decisions call for.

It is obvious, however, that the same remark may equally be made of the local appraisers or of the collectors, when they are called upon to ascertain, estimate and appraise the true and fair market value of goods. In that connection, the local appraisers, when giving their decision, are exactly on a par with the Dominion appraiser or the Board. They also, before making their appraisement, must form an opinion as to the relevant law. But, whatever incidental conclusions the appraisers or the Board must come to in order to arrive at a decision on the proper appraisement to be made, the decision of each or either of them is nothing but the finding of a fact in the particular case (*Girls Public Day School Trust Ltd.* v. *Ereaut* (1)).

The circumstance that it may appear to a Dominion appraiser or to the Board that an erroneous valuation was made by the local appraiser affords the occasion and is the condition required for the exercise by the Dominion appraiser, or by the Board, of the power to act under section 48. The result, however,—and the only result—is merely that the Dominion appraiser, or the Board, is empowered to "make a fresh appraisement or valuation," and nothing more. The enactment does not intend to con-

(1) [1931] A.C. 12.

fer jurisdiction to deal with anything but physical values and facts. Of course, in so doing, the Dominion appraiser, or the Board, must be guided by a certain view of the law; but, in so far as they are concerned, the law includes the Orders in Council and the orders of the Minister. In no way are they authorized to dispute the validity of those orders and far less to determine the conditions of that validity or to pronounce upon any other question of law which, in case of conflict between the Crown and the importer, are left to the determination of the courts of justice. To put it in plain words: the Dominion appraiser, or the Board, acting under s. 48, is empowered to make appraisals, and not rulings.

Besides, it must be pointed out that, under s. 48, the Dominion appraisers are given exactly the same powers as the Board; and it seems to us that Parliament cannot have intended by that section to confer jurisdiction on a Dominion appraiser to determine questions of law, or to determine the validity or invalidity of the orders of the Minister, the responsible Head of the Department, of which they are the officers.

Perhaps it may be added that the jurisdiction of the Dominion appraiser or of the Board under s. 48 is only by way of appeal from a valuation or appraisal by an appraiser or collector as such. It would therefore appear that the exercise of the powers therein conferred presupposes a valuation or appraisement; and the consequence would be that when the value for duty is fixed by the Minister, and not by an appraisement, the section does not apply and the Dominion appraiser, or the Board, has no jurisdiction under it.

In conclusion, it may be stated, therefore, that an appraisal, in a sense, involves, on the part of any appraiser, whether in the initial steps, or upon review, or upon appeal under s. 48, the taking into consideration of the state of the law on the subject; but there is a clear distinction between that and the power to determine the question as a question of law.

At the argument, the Trade Agreement between His Majesty's Government in Canada and His Majesty"s Government in the United Kingdom, as approved by c. 2 of 23-24 Geo. V, was referred to. The Act respecting the

1934

REFERENCE CONCERNING THE JURISDICTION OF THE TARIFF BOARD OF CANADA.

Rinfret J.

Agreement was assented to on the 25th November, 1932. At that date, the Tariff Board Act was already on the statute book. By art. 12 of the Agreement, His Majesty's Government in Canada undertook to constitute forthwith the Tariff Board, for which provision had already been made in the Tariff Board Act (1931). Our attention was not drawn to any subsequent legislation modifying the Board Act after approval was given to the Trade Agreement. It follows that nothing contained in the Agreement may be helpful in construing the provisions of the Board Act.

For the reasons above stated, the questions referred to the Court will be answered as follows:

To Question No. 1: No;

To Question No. 2: No;

To Question No. 3: Yes.

1934

*Feb. 6, 7.
*Mar. 6.
*June 6.

ANGUS WILLIAM ROBERTSON (DEFENDANT) ..... } APPELLANT;

AND

ETHEL QUINLAN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS;

AND

CAPITAL TRUST CORPORATION LTD. (DEFENDANT)

AND

DAME CATHERINE RYAN AND OTHERS (MIS-EN-CAUSE)

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Evidence—Parol evidence—Commencement of proof in writing—What constitutes it—Facts which render alleged fact probable—Arts. 1233 (7), 1243 C.C.

At the time of his death, the late Hugh Quinlan had been engaged in business in partnership with the appellant, as general contractor, since over thirty years. In 1897 they had formed a commercial partnership during about 10 years, when they converted it into an incorporated company under the name "Quinlan, Robertson, Ltd." In 1919, they took a third associate, one Alban Janin and reorganized their company

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Hughes JJ.

under the name of "Quinlan, Robertson & Janin Limited." The capital stock of the new company was equally divided between the three associates. About 1925, the late Hugh Quinlan jointly with the appellant and Janin agreed upon the principle that, in the event of the death of one of them, the survivors would buy the shares owned by the predeceased partner in the various companies organized for the carrying on of their joint undertakings. Hugh Quinlan died on the 26th of June, 1927, leaving his last will and testament in notarial form, dated 14th April, 1926, by which he bequeathed all his property, apart from a few particular legacies, to his wife, but in trust jointly to the appellant and the Capital Trust Corporation, Limited, appointing them his testamentary executors. A year or so before his death, Mr. Quinlan, on account of failing health, gradually withdrew from active participation in the conduct and control of the various enterprises in which he was interested, leaving the management of them to his associates and especially to the appellant. As the improbability of his recovering his health became apparent, what he ought to do with his shares in the companies in which he and the appellant were interested became of increasing concern to Mr. Quinlan. He discussed the matter from time to time with the appellant and eventually decided that the shares should be sold at minimum fixed prices. The appellant testified that, at his request, the legal advisor of the company and Mr. Quinlan fixed the value of the shares at $250,000 and that, at Mr. Quinlan's demand, he put that decision in the form of a letter from himself to Mr. Quinlan and, three or four days before the latter's death, took it to Mr. Quinlan's house and read it to him before a witness and again discussed with him its subject-matter. The letter, dated 20th of June, 1927, reads partly as follows: "This will acknowledge your transfer of the following stocks to me: (1,601 shares of different companies), which stock represented all your holdings in the above companies. I have agreed to obtain for you the sum of two hundred and fifty thousand dollars ($250,000) for the above mentioned securities, payable one-half cash on the day of the sale, and one-half within one year from this date, which latter half will bear interest at 6%. Should your health permit you to attend to business within one year from this date, I agree to return all of the above mentioned stocks to you on the return to me of the moneys I have paid you thereon including interest at 6%." The appellant also testified that, having been unable to find a buyer for those shares, at the price agreed upon of $250,000, he had been obliged to keep them and had effectively paid to the estate that amount. The evidence also shows that the appellant had in his custody or under his control certificates endorsed in blank by Mr. Quinlan, on the 21st of May, 1927, when the appellant visited the latter, for the greater part if not for all of these shares, and that he, before the death of Mr. Quinlan, had the shares transferred on the registers of the companies respectively in his own name as owner. On that same day, Mr. Quinlan dictated to his son a memo. specifying all the certificates of shares he owned in those companies with the following note: "Dep. in A. W. Robertson's box," with the date of the endorsements, to wit: 21st of May, 1927. The respondents are two of the children of the late Hugh Quinlan; and the material conclusions of their action are that the Capital Trust Corporation, Limited, and the appellant, be dismissed as trustees and executors of the estate (*destitués de leurs fonctions*) for misfeasance in office and be ordered to

1934

ROBERTSON
v.
QUINLAN.

render account of their administration of the estate; that the sale and transfer of the shares mentioned in the said letter of the 20th of June, 1927, be annulled and that the appellant be ordered to return them to the estate of the late Hugh Quinlan or to pay to it their value, which the respondents estimate at $1,350,000. At the hearing of the trial, the appeallant proved, by his own testimony and by that of the witness there present that he had communicated the letter of June the 20th, 1927, to the late Hugh Quinlan, at the latter's house, by reading it aloud; but when he proceeded to prove that the late Hugh Quinlan had acquiesced to the contents of the letter and accepted the agreement therein contained, the trial judge refused to allow this evidence and held that the acquiescence and consent of the late Hugh Quinlan could not be proved by parol evidence. The trial judge dismissed the two first claims of the respondent as to the dismissal of the executors and as to the order to render account; he annulled the transfer of the shares by the late Hugh Quinlan to the appellant and he condemned the appellant to retrocede to the estate these various shares, with the profits made and the dividends paid since the death of the late Hugh Quinlan, or to pay their value as determined by him to be $408,728, but, in either case, the respondents were obliged to reimburse the appellant the sum of $270,000 paid by him, $20,000 being an amount mentioned in another transaction. And this judgment, with certain modifications, was affirmed by the appellate court.

Held (reversing the judgment appealed from) that, upon the evidence and upon consideration of many other facts stated in the judgment, the transfer of the shares to the appellant bearing the signature of the late Hugh Quinlan, their possession by the appellant, the memo. dictated by Mr. Quinlan to his son and the understanding between the partners in case of death of one of them, were all facts constituting a commencement of proof by writing, and, consequently, parol evidence should have been admitted by the trial judge to prove that the late Hugh Quinlan had acquiesced to the contents of the letter of the 20th of June, 1927. All these facts do not establish the assent of the late Hugh Quinlan to accept the sum of $250,000 for his shares; but they are facts which render probable the fact which the appellant wanted to prove. It is not necessary that facts or writings establish one of the elements of the fact to be proved; it is sufficient that they may constitute a starting point of a reasoning by the trial judge. The probability of an alleged fact is the criterion of the commencement of proof in writing.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, which affirmed the judgment of the Superior Court, Martineau J., and maintained the respondents' action.

L. E. Beaulieu K.C. for the appellant.

H. N. Chauvin K.C. and *C. Holdstock* for the respondent Ethel Quinlan.

Ed. Masson for the respondent Margaret Quinlan.

Geo. A. Campbell K.C. for the Capital Trust, defendant.

P. Couture K.C. for the other heirs intervenants.

1934

ROBERTSON v. QUINLAN.

The judgment of the Court was delivered by

CANNON J.—Les seules parties en présence devant nous sont l'appelant Robertson et l'intimée Ethel Quinlan et la Capital Trust Corporation comme fiduciaire exécutrice testamentaire de la succession de feu Hugh Quinlan, décédé le 26 juin 1927; le procureur de l'intimée Margaret Quinlan nous demande *acte* d'une transaction intervenue entre elle et l'appelant avec le concours de l'exécutrice et à laquelle sa sœur Ethel a refusé d'adhérer. Pour déterminer l'appel entre ces deux parties, sur cette partie du jugement de la Cour Supérieure portée en appel devant la Cour du Banc du Roi et devant nous, la question capitale, comme l'a fort bien dit le juge de première instance, est de savoir s'il y a eu une vente des actions en litige *avant* le décès du testateur. Si cette vente a eu lieu avant son décès, elle est valide, quelle que soit la vilité du prix; car, dit le juge de première instance, le 20 juin, M. Quinlan était en état de consentir à la vente; si, par contre, elle a eu lieu après, elle est invalide, vu la prohibition de l'article 1484 C.C. alors même que le prix représenterait la pleine valeur des actions. Le juge de première instance ne donne pas en détail les raisons pour lesquelles, après avoir permis la preuve que la lettre de Robertson, du 20 juin 1927, à Quinlan avait été lue à ce dernier en présence de M. Leamy, le tribunal a refusé de laisser faire la preuve par témoins de la nature de la réponse de Quinlan, alors que Robertson avait plaidé que ce dernier avait accepté sa proposition.

Il me paraît essentiel, avant de discuter les autres points soulevés, d'étudier d'abord le bien ou mal fondé de cette décision à l'enquête qui, d'après les notes de l'honorable juge Martineau, a entraîné comme conséquence cette partie du jugement final dont l'appelant se plaint. La situation des parties avant l'enquête me semble bien résumée comme suit par l'honorable juge Surveyer, dans son interlocutoire du 7 janvier 1929:

Considering that in paragraphs 11 to 25 of their declaration, plaintiffs allege in substance:

(11) that on or about the 22nd day of June, 1927, three days before the said testator died, said Angus William Robertson, one of the defendants, personally and for his own benefit, acquired a number of shares, the property of the testator, in different companies;

(12) that the said transfer of said shares to defendant Robertson is due to fraud on the part of said defendant Robertson and to collusion by him with others;

1934

ROBERTSON v. QUINLAN.

Cannon J.

(13, 14, 15, 16) that said transfer was made when said Hugh Quinlan was not *compos mentis;*

(17, 18, 19) that it was clandestine and made for less than the real value of the said shares;

(20, 21, 22, 23) that in order to conceal said transfer, said defendant Robertson has assigned some of these shares to *prête noms* of his, unable to pay for same;

(24) that the said transfer was not mentioned in the inventory sent by defendants to plaintiff Ethel Quinlan on August 8, 1928;

Considering that the allegations of defendant Robertson's plea are in the following terms:

(37) In or about the month of June, 1927, and some time before his death, the said late H. Quinlan transferred and delivered all his holdings of stock in the said companies to his partner and associate, defendant Robertson, under an agreement with said Robertson, the terms of which were as stated in a letter addressed by said Robertson, to said Quinlan, dated June 20th, 1927:

(38) Said letter reads as follows:

MONTREAL, June 20th, 1927.

Mr. HUGH QUINLAN,
357 Kensington Ave.,
Westmount, Que.

DEAR HUGH,—This will acknowledge your transfer of the following stocks to me:—

1,151 shares Quinlan, Robertson & Janin, Ltd.
50 shares Amiesite Asphalt Limited.
200 shares Ontario Amiesite Asphalt Limited.
200 shares Amiesite Asphalt Ltd., in the name of H. Dunlop.

Which stock represented all your holdings in the above companies. I have agreed to obtain for you the sum of two hundred and fifty thousand dollars ($250,000) for the above mentioned securities, payable one-half cash on the day of the sale, and one-half within one year from this date, which latter half will bear interest at 6 per cent. Should your health permit you to attend to business within one year from this date, I agree to return all of the above mentioned stocks to you on the return to me of the moneys I have paid you thereon including interest at 6%.

Yours truly,

(Signed) A. W. ROBERTSON.

(39) At the time the contract and agreement evidenced by the above letter was entered into, the said H. Quinlan was in full and complete possession of his faculties and thoroughly capable, in all respects, of passing upon the propriety and sufficiency of said transaction; and the defendant Robertson agreed to send the above letter only after he had been repeatedly and urgently requested to do so by and on behalf of the said late H. Quinlan;

(40) After the death of the late H. Quinlan, the defendant Robertson endeavoured strenuously to find some buyers, for said shares, at the price mentioned in the above letter, but was unable to do so, and finally he paid himself to the estate of the said late H. Quinlan, in fulfilment of his obligations, $250,000, as agreed upon between himself and the said late H. Quinlan;

(43) The shares mentioned in the above letter of June 20th, 1927, were not assets of the estate of the said late Hugh Quinlan, at the time of his death; but they were, in effect, sold and transferred by the said late Hugh Quinlan himself either to defendant Robertson, or to some other buyer, whom the latter agreed to obtain and, failing the obtaining of whom, said defendant Robertson was obliged and entitled to retain said shares at the price of $250,000, agreed to be paid therefor;

(44) It was an error on the part of a subordinate employee of defendant "Capital Trust Corporation Ltd." who helped prepare the statement of assets and liabilities constituting the estate of the said late H. Quinlan and filed as plaintiffs' exhibit P-2, that the said 1,151 shares of Quinlan, Robertson & Janin Ltd. (erroneously called "Hugh Quinlan & Janin Co.") were entered as an asset of said estate, the said shares being at the time of the death of the said Hugh Quinlan transferred and delivered to defendant Robertson with said other shares on terms of the agreement aforesaid, and all that should have been entered as an asset of the estate of the said late H. Quinlan was the claim against the said Robertson and of others to obtain payment of the price of said shares as and when it became payable in terms of said agreement;

Le défendeur Robertson fournit ensuite les détails suivants quant au paragraphe 37:

A. The said transfer of said shares from the said Hugh Quinlan to defendant A. W. Robertson, took place on or about the 20th of June, 1927;

B. The agreement was in writing;

C. The said agreement was dated the 20th of June, 1927;

D. The said agreement was signed by A. W. Robertson, the defendant, and by him delivered to Hugh Quinlan, who, in turn, delivered to the said defendant Robertson his certificate for said shares, endorsed in blank;

E. The document was a private writing under the form of a letter addressed to the late Hugh Quinlan, and signed by the defendant A. W. Robertson;

De sorte que l'on peut dire que l'action a été prise par deux légataires pour mettre de côté l'acquisition qu'elles allèguent avoir été faite le 20 juin, avant la mort du testateur, pour le motif que le transport des actions aurait été consenti alors que ce dernier, ne jouissant pas de la capacité mentale requise, aurait été victime des manœuvres dolosives de Robertson, son associé, qui aurait abusé de sa confiance en lui payant un prix insuffisant. Il semble donc que le litige entre les parties ne mettaient pas en doute l'existence d'une vente à cette date; mais il s'agissait simplement de prouver en quelles circonstances elle avait eu lieu et quelle était la capacité mentale de Quinlan lors de la transaction alléguée de part et d'autre dans les procédures.

Il nous faut donc décider aux lieu et place de la Cour Supérieure si la preuve déjà faite et les allégués étaient suffisants pour constituer le commencement de preuve par écrit

1934

ROBERTSON v. QUINLAN.

Cannon J.

exigé par le paragraphe 7 de l'article 1233 du code civil pour permettre la preuve testimoniale. Les faits et écrits devant la cour étaient les suivants:

1. L'entente de 1925, par laquelle Quinlan et ses deux associés, Robertson et Janin, avaient pourvu à l'acquisition par les survivants de la part de l'associé décédé; cet écrit porte la signature de Quinlan et celle de ses associés;

2. L'état de santé précaire depuis plusieurs mois de Quinlan, qui faisait prévoir sa fin prochaine;

3. Les pourparlers au sujet de cette acquisition entre Janin, Robertson et l'honorable M. Perron, avocat de Quinlan, qui lui a continué sa confiance même après sa mort en l'instituant par testament l'aviseur de sa succession;

4. L'entrevue de M. Perron avec Quinlan, au commencement de mai 1927;

5. La fixation du prix de $250,000 par M. Perron comme étant la juste valeur des intérêts de Quinlan dans les différentes compagnies contrôlées par les trois associés;

6. La visite de l'appelant à Quinlan, le 21 mai 1927, au cours de laquelle Quinlan endossa en blanc, en présence de l'appelant et de la garde-malade Kerr, la formule de transport au dos de quatre certificats d'actions, dont deux représentant 1151 actions de Quinlan, Robertson & Janin, et deux certificats de 50 actions de Amiesite Asphalt Co. Ltd.;

7. La témoignage de Mlle Kerr à l'effet qu'à cette occasion l'appelant lui avait expliqué le but de sa visite, qu'il s'agissait de la vente de certaines actions;

8. Le même jour, le testateur dicta à son fils le mémoire qui est devant la cour, énumérant tous les certificats qu'il détenait dans ces deux compagnies, avec la note suivante: "Dep. in A. W. Robertson's box," avec la date des endossements, savoir le 21 mai 1927, ce qui, à mon avis, démontrerait clairement que, dans l'esprit du testateur, ces valeurs devaient être considérées sous le contrôle et en possession de l'appelant à partir de cette date; cet écrit provient certainement du défunt;

9. Après cette livraison et cet endossement, Robertson soumit à M. Janin que le prix de $250,000 serait raisonnable; et ce prix, conformément à l'avis de l'honorable J.-L. Perron, fut fixé comme représentant la valeur réelle de ces actions;

10. Le fait qu'un double de la lettre datée du 20 juin 1927 fut trouvé dans la voûte de l'honorable J.-L. Perron à l'endroit que ce dernier avait indiqué à son secrétaire;

11. La preuve que cette lettre a été lue à Quinlan, qui, d'après le juge de première instance, était parfaitement en état de comprendre son contenu et de donner ou refuser son assentiment au prix proposé.

A part la nature de la contestation liée entre les parties, tel qu'indiqué plus haut, le transport des actions portant la signature de Quinlan et leur possession par Robertson et le mémoire préparé sous la dictée de Quinlan, joints à l'entente qui existait entre les associés, constituent-ils, oui ou non, un commencement de preuve par écrit? Le seul fait qu'il restait à prouver était qu'à cette date du 21 juin Quinlan a bien et dûment, pour le montant de $250,000 mentionné dans la lettre de Robertson, consenti à rendre définitive, suivant les conditions de la lettre de Robertson, l'aliénation des actions dont les certificats endossés par lui étaient déjà physiquement en la possession de Robertson depuis le 20 mai. Ces écrits ne constatent pas le consentement de Quinlan à accepter $250,000; mais constatent-ils des faits qui rendent vraisemblable le fait allégué? Il n'est pas nécessaire que l'écrit établisse un des éléments du fait à prouver; il peut être simplement le point de départ d'un raisonnement pour le juge. 25 Revue Trimestrielle de Droit Civil (1926) p. 410.

Il ressort des décisions jurisprudentielles (nous disent Planiol & Ripert, 7 Droit Civil, n° 1534) que le fait établi par le commencement de preuve doit rendre à première vue le fait allégué vraisemblable, que la vraisemblance n'est pas l'apparence de la vérité, mais ce qui est probable, mais qu'il ne suffit pas que le fait allégué soit rendu seulement possible. Le juge ne se contente pas de prendre en considération le fait établi et le fait allégué; mais il examine tout le procès en se basant sur ces circonstances extrinsèques.

En appliquant ce critère, il nous semble que le juge de première instance a restreint la portée qu'il fallait donner aux écrits et aux allégués des parties en refusant, comme il l'a fait, de prouver par témoins l'attitude et la conduite de Quinlan en cette circonstance. Il se contente de dire qu'il est *possible* que le prix de $250,000 ait été fixé en vue des conditions énoncées en l'acte d'accord du 11 juin 1925. Nous croyons qu'il aurait dû aller jusqu'à accepter la vraisemblance et la probabilité que ce prix de $250,000, ayant été fixé dans les circonstances plus haut relatées

1934

ROBERTSON v. QUINLAN.

Cannon J.

après les entrevues de Quinlan avec son homme de confiance et avocat, l'honorable M. Perron, a été accepté par Quinlan comme définitif, lorsqu'il lui fut offert par écrit par son associé Robertson. Or la vraisemblance du fait allégué est le criterium du commencement de preuve par écrit.

Voir *Cox* v. *Patton* (1).

Il a été décidé en revision dans *Lefebvre* v. *Bruneau* (2), que la possession en fait de meubles équivaut à un commencement de preuve par écrit, suffisant pour permettre au possesseur d'expliquer sa possession par une preuve testimoniale.

Le juge Tellier a jugé de même dans *Boucher* v. *Bousquet* (3), que la possession seule d'effets mobiliers fournit en faveur du défendeur une présomption de droit de propriété assez forte pour lui donner droit de prouver son titre par témoins. Or, dans l'espèce, Robertson était en possession des actions depuis mai 1927, et aussi de celles endossées par Dunlop. Voir aussi *Forget* v. *Baxter* (4).

En présence de la plaidoirie écrite résumée plus haut, ne pouvons-nous pas dire, comme feu le juge-en-chef Taschereau, parlant au nom de cette cour dans *Campbell* v. *Young* (5):

> It is not a commencement of proof of a contract that is in question. * * * The appellant had not to prove it, since it is admitted, pleaded by the respondents themselves. * * * Once a contract is admitted, no commencement of proof in writing is required for the admissibility of oral evidence of the amount of the consideration thereof.

Mais, même si l'article 1243 C.C. et la règle de l'indivisibilité de l'aveu s'appliquent, nous dirions, comme dans cette cause:

> The contract must be proved by the opposite party, aliunde of the admission. But *the admission is sufficient as a commencement of proof in writing to legalize oral evidence of it and of its conditions.*

L'honorable juge Howard nous dit:

> The appellant answers: "Well, if the evidence does not amount to complete proof, it constitutes a commencement of proof sufficient to open the door to testimony on the point."
>
> Again I cannot agree. If the evidence were all one way, it would, in my opinion, be sufficient, but it is rebutted by the significant fact that the appellant and his co-executor treated these shares as belonging to the succession of the late Mr. Quinlan, whereas if the proposal had been accepted by Mr. Quinlan and therefore the agreement, whatever it should be called, completed before his death, these shares would have been removed from his succession and their value, that is, the consideration received for them, would have taken their place among its assets. This con-

(1) (1874) 18 L.C.J. 317.
(2) (1870) 14 L.C.J. 268.
(3) (1889) M.L.R. 5 S.C. 11, at 15.
(4) [1900] A.C. 467, at 474, 475.
(5) (1902) 32 Can. S.C.R. 547, at 550.

flict in the evidence now under consideration defeats the appellant's claim that it constitutes a commencement of proof.

Avec respect, l'honorable juge nous semble avoir été trop sévère. Le fait que ces actions avaient été, par erreur suivant la prétention du défendeur, mentionnées par sa co-exécutrice testamentaire, exclusivement chargée de la comptabilité, comme faisant partie de l'actif de la succession, aurait parfaitement pu servir à la transquestion de Robertson, mais n'est pas suffisant par lui-même pour détruire la vraisemblance du fait allégué, savoir l'acceptation du prix de $250,000 par Hugh Quinlan. Ce n'est pas d'ailleurs l'acte personnel de Robertson. Il est fort possible que dans l'esprit de ce dernier et de sa co-exécutrice, étant données les conditions de cette acquisition, aussi longtemps que le montant convenu n'avait pas été payé par un acheteur ou par lui-même, la valeur des actions, sinon les actions elles-mêmes, faisaient nécessairement partie de l'actif de la succession. Il s'agit de mots, plutôt que de la substance de la chose: de toutes façons, ces actions ou leur valeur devaient figurer au bilan de la succession Quinlan. Cette erreur, qui a été expliquée, ne devrait pas, à notre avis, suffire pour mettre de côté tous les éléments de preuve énumérés plus haut et qui, d'après le juge Howard, seraient suffisants pour constituer un commencement de preuve par écrit. La nature du contrat intervenu peut expliquer cette attitude de Robertson, que lui reproche M. le juge Howard. Il s'obligeait à payer à Quinlan ou à ses héritiers la somme de $250,000 pour obtenir la propriété des actions énumérées dans la lettre. Il y a donc eu d'après lui, contrat d'aliénation d'une chose certaine et déterminée pour un prix en argent, ou, en d'autres termes, une vente. Le prix devait être payé moitié comptant et l'autre moitié dans l'année. Il s'agit dans l'espèce d'une vente avec "réserve d'élection d'amis" ou de déclaration de "command". Colin et Capitant (Droit Civil, vol. 2, page 429) nous disent à ce sujet:

> L'acheteur se réserve donc, dans le contrat, la faculté de se substituer une autre personne, généralement non désignée, laquelle prendra le marché pour son compte. Si cette personne, appelée command, ne se déclare pas, c'est l'acheteur en nom ou commandé qui reste acheteur.
>
> La vente avec réserve de déclaration de command (ajoutent-ils) est moins une vente conditionnelle qu'une vente affectée d'une alternative, quant à la personne de l'acheteur, l'un des deux acheteurs éventuels étant dès à présent déterminé et l'autre restant encore inconnu. (Voir note de M. Glasson, D.P. 95,2,1.)

1934

ROBERTSON v. QUINLAN.

Cannon J.

La conduite des intéressés, dès le 22 juin 1927, en enregistrant le transport dans les livres des compagnies, semble confirmer cette interprétation de l'entente alléguée.

Nous sommes donc d'avis de mettre de côté les jugements de la Cour Supérieure refusant cette preuve testimoniale. Vu cependant les frais énormes déjà encourus, nous désirons, avant d'aller plus loin, entendre les parties durant le terme actuel pour décider ce qu'il serait juste et convenable de faire dans les circonstances.

As it appears by the last words of the above judgment, a final judgment was not rendered by this Court, which was desirous, owing to the enormous costs already incurred, to hear later on the parties in order to decide what should be reasonably done under these circumstances. The parties were so heard, and, on the 6th of June, 1934, the following final judgment by the Court was delivered by

CANNON J.—Since the court ruled, on March 6, 1934, that the trial judge misdirected himself when he refused to hear oral evidence of the testator's answer to Robertson's letter of June 20, 1927, the parties were heard and requested to file in writing their views of the proposed settlement and as to what evidence should be allowed, if the case be sent back to the Superior Court. The respondent Margaret Quinlan reiterated her decision not to be any longer involved as plaintiff in this case and prayed that, under the agreement of settlement executed between herself and all parties interested in the estate of the late Hugh Quinlan, excepting only the appellant Dame Ethel Quinlan (Mrs. Kelly) and the tutor, if any, of her minor children, passed before R. Papineau Couture, N.P., on the 31st of January, 1934, whereof a certified copy was left with the Registrar, this court should either declare that it sees no objection to the intervenants carrying it into effect or grant *acte* thereof.

The intervenants also explained that the reason why the stipulation of paragraph 6 was inserted in the agreement was because the intervenants, having filed before this court a declaration that they submit to justice, there was at least doubt of their right to enter into a settlement without the acquiescence of the court.

We see no reason why we should not declare that the settlement forms part of the record of the appeal and that

we grant *acte* thereof without passing upon the validity or the binding character of the agreement in question, nor deciding whether or not the intervenants acted within their powers and the officers of the intervenants within their authority. As far as Robertson and Margaret Quinlan are concerned, we cannot refuse to find as a fact that they have settled their differences and wish to stop this litigation.

The filing of the agreement in the record so that it will form part thereof for the future is all that is required and granted by giving "acte" of the production of the settlement.

Therefore, there remains before us only the appellant Robertson, the respondent Ethel Quinlan (Mrs. Kelly) and the two trust companies, who intervened here at the request of the court to watch the proceedings, although they, at first, only appeared to submit to justice, *s'en rapporter à justice,* they having accepted the judgment of the Superior Court.

The appellant's counsel submits that the only additional evidence which should be allowed, if the *enquête* is reopened before the Superior Court, is the evidence which has been offered, and refused by the trial judge. This should include oral evidence to show:

(*a*) the answer given by the late Hugh Quinlan when the letter of June 20, 1927, was read to him, including, of course, the conduct, statements, communications and declarations of the persons present when the letter was so read and of the late Hugh Quinlan himself and generally, all relevant circumstances relating thereto;

(*b*) All the facts, circumstances, statements and communications relating to the drafting of the said letter of June 20, 1927, including the conduct of all those who shared in the drafting of the said letter; and the whereabouts and safekeeping of said letter;

(*c*) All the facts, circumstances, statements and communications relating to the visits of the Honourable J. L. Perron and of the present appellant to the late Hugh Quinlan, during the month of May, 1927, or thereabout, and to the endorsement of the four certificates of shares filed as exhibits P-9, P-10, P-26 and P-27; also to the memorandum of the 21st of May, 1927, P-66; including the conduct of all the participants in these various events;

1934

ROBERTSON v. QUINLAN.

Cannon J.

(*d*) Generally, all facts, conditions and circumstances tending to show that the late Hugh Quinlan agreed, or disagreed, as the case may be, to the contents of the letter of June the 20th, 1927.

The respondent would also bring new evidence of all facts, declarations and statements which might tend to rebut the evidence to be afforded as aforesaid by the appellant. The respondent in her memorandum does not object to the above suggestions of the appellant's attorney. We must take it that she would be content to reopen the *enquête* within the above mentioned limits, although she has refrained from offering any suggestions in respect thereto.

We believe, however, that we should not send the case back to the Superior Court before deciding the question of the status of the plaintiff Ethel Quinlan, which was strongly attacked and defended before us. It must be borne in mind that the litigation has taken a different aspect since the judgment of the Superior Court, which dismissed a very substantial part of the conclusions, to wit

1. The prayer that the appellant A. W. Robertson and the Capital Trust Company be removed from office;

2. The prayer that they be condemned to render an account;

3. The prayer that the inventory be annulled;

4. The various allegations of fraud against the appellant, as well as the allegation that the late Hugh Quinlan was not of sound mind when the letter of the 20th of June, 1927, was read to him.

Now, the plaintiff having acquiesced in the judgment of the trial judge, the issue before the Court of King's Bench and before us was limited to the following points:

(*a*) The existence or nullity of the transfer to the appellant of the shares enumerated in the letter;

(*b*) The validity of the transfer to the appellant of four hundred shares of the Fuller Gravel Company Limited;

(*c*) The value of the shares whose transfer has been set aside; and as to the time at which the valuation should retroactively be made;

(*d*) The legality of the finding that the appellant should pay all the profits made and dividends paid since the death of the late Hugh Quinlan.

In this connection, we must take cognizance of the last will and testament of the late Hugh Quinlan, dated April 14, 1926.

The testator empowered his executors and trustees, in part, as follows:

I extend the duration of their authority and seizin as such executors and trustees beyond the year and day limited by law, and I constitute them administrators of my succession and declare that they and their successors in office shall be and remain from the date of my decease seized and vested with the whole of my said property and estate for the purpose of carrying into effect the provisions of this, my present will, with the following powers in addition to all the powers conferred upon them by law:

(*a*) Power to collect all property assets and rights belonging to my Estate: power to sell and convert into money all such portions of my property and Estate, movable and immovable, as are not herein specially bequeathed, and that they may deem inadvisable to retain as investments as and when they think best, for such prices and on such terms and conditions as they may see fit: to receive the consideration prices and give acquittances therefore; to invest the proceeds and all sums belonging to my succession in such securities as they may deem best but in accordance with Article 981o of the Civil Code of the Province of Quebec, and to alter and vary such investments from time to time.

(*b*) To compromise, settle and adjust or waive any and every claim and demand belonging to or against my succession.

(*c*) To sell, exchange, convey, assign, borrow money, mortgage, hypothecate, pledge, or otherwise alienate or deal with the whole or any part of the property or assets at any time forming part of my succession, either movable or immovable, bank or other stocks or bonds and to execute all necessary deeds of sale, mortgage, hypothec and pledge, acquaintances and discharges and other documents, in connection herewith, and thus "de gré à gré," without judicial formalities and with the express understanding that any third party dealing with my Executors and Trustees shall never be compelled to attend or to control the investment or re-investment (emploi ou remploi) of the moneys.

* * * * *

(*d*) After the death of my said wife, to distribute and divide all the net income or revenue of my Estate equally between my children issued of my marriage with the said Dame Catherine Ryan "par tête" or the legitimate issue "par souche" and thus until the death of the last survivor of my said children at the first degree, it being my wish and desire that should any of my said children die without issue, his share in the revenues of my Estate shall be added to the share of his survivor brothers and sisters per capita "par tête" and nephews and nieces "par souches."

(*e*) After the death of all my said children at the first degree to divide the capital and property of my whole Estate, with all accrued interests and revenues equally *per capita* "par tête" between my grandchildren and great grandchildren issued of legitimate marriages and then living.

Article Twelfth

In order that all the stipulations of this, my present will, may be respected by all and each of my legatees and beneficiaries, I hereby formerly (sic) declare that should any of them contest any stipulation of

1934

ROBERTSON v. QUINLAN.

Cannon J.

this, my present will and testament, they shall *ipso facto* lose their rights and titles of legatees or beneficiaries in this, my present will.

Article Thirteenth

I expressly declare that no other parties or persons may have the right to endeavour, control, manage and divide the property of my estate, but my said testamentary executors and trustees and their successors in office and thus, without any intervention of any third party, tutors, curators and so on and so on and that the powers and authority hereinbefore given to my testamentary executors and trustees shall be interpreted as covering all deeds, documents and proceedings without any special judicial formalities being required and thus notwithstanding any provisions of the law to the contrary.

The nature of the rights vested in the female respondent under the will of the late Hugh Quinlan is not doubtful. He bequeathed his entire estate, save and except certain legacies in particular title, "in trust" to his trustees who are "seized and vested with the whole of my said property and estate."

As to the children of the first degree, their rights are strictly limited, until the death of their mother, to

an annual sum not less than one thousand dollars ($1,000) and not over two thousand dollars ($2,000) payable by monthly instalments in advance as will seem fit to my executors and trustees, and thus until such child or children will not remain with his or their mother.

And after the death of their mother, the rights of the children of the first degree are restricted to "all the net income or revenue of my estate," with the stipulation that, in the event of the death of one of them

his shares in the revenues of my estate shall be added to the shares of his surviving brothers and sisters, per capita (par tête), and nephews and nieces "par souche."

The appellant has submitted to us that the children of Hugh Quinlan have no other right in their father's estate than the personal claim to the revenue payable out of the said estate; that mere creditors of revenues are as such unable to dispose of the estate or any portion thereof and that therefore they have no status to take an action concerning the ownership of any property appertaining to the estate.

The only remaining plaintiff now prays, as above stated, that the various sales and transfers of shares be declared null and void and that it be declared that these shares belong and have never ceased to belong in full ownership to the estate of Hugh Quinlan. As creditors of the revenues of the estate, the plaintiffs certainly had an interest sufficient to sue for the removal of the executors, if

they were acting fraudulently. But now that these conclusions have been refused, and that this issue has been finally determined between the parties, can we say that the sole remaining plaintiff has the right to compel the executors and Robertson to undo what she alleges has been done illegally and return to the "corpus" the shares in question? We believe that Ethel Quinlan Kelly, to the extent that she is entitled to a variable share in the net revenue of the estate of her father, has sufficient interest and "status" to preserve intact the "corpus" of the estate if she can satisfy the court, that the shares mentioned in the letter of June 20, 1927, or that the 400 shares of the Fuller Gravel Company Limited were illegally transferred after the death of her father to the present appellant and should be returned to the estate.

We do not and cannot disturb that part of the judgment of the Superior Court which is now "res judicata" between the parties, since the respondent acquiesced in the dismissal of that part of her conclusion above enumerated, nor can we disturb that part of the judgment accepted by the executors and trustees.

We therefore allow the appeal with costs; quash in part the judgment of the Superior Court and also the rulings during the trial refusing oral evidence of the facts and circumstances hereinabove mentioned under paragraphs A, B, C and D; we declare such oral evidence to be admissible, and we send back the parties to the Superior Court to so complete the evidence already taken by a further *enquête* and then secure a new adjudication on the merits of the issues hereinabove shown as remaining to be decided as between the respondent Dame Ethel Quinlan (Mrs. Kelly) and the appellant Robertson personally. The Court gives "acte" and considers as part of the record of this case the deed or agreement of settlement passed before R. Papineau Couture, N.P., on the 31st day of January, 1934, within the limits above stated.

Appeal allowed with costs.

Solicitors for the appellant: *Beaulieu, Gouin, Mercier & Tellier.*

Solicitors for the respondent: *Tanner & Desaulniers.*

1934
*May 21.
*June 6.

ST. FRANCIS HYDRO ELECTRIC COMPANY LIMITED AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING AND SOUTHERN CANADA POWER COMPANY LIMITED (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Appeal—Jurisdiction—"Final judgment" (Supreme Court Act, R.S.C., 1927, c. 35, ss. 2 (b), 36)—Appeal from judgment referring the record back to the trial court in order that some historical evidence, refused by the trial judge, might be received.

The Supreme Court of Canada is without jurisdiction to hear an appeal from a judgment of an appellate court maintaining an appeal because of the refusal of the trial judge to admit some historical evidence and referring the record back to the trial court in order that such proof might be received in the record. Such judgment is not a final judgment within the meaning of s. 2 (*b*) of the *Supreme Court Act* as it does not, in whole or in part, determine or put an end to the issue raised and in respect to which the judgment was rendered: it determined nothing with regard to the titles or the rights relied on *by the parties* and it is purely provisional. Such judgment is even not one in the nature of a judgment "directing a *new trial*" contemplated by s. 36 of the *Supreme Court Act*.

MOTION by each of the respondents to quash for want of jurisdiction an appeal from a judgment of the Court of King's Bench, appeal side, province of Quebec.

Aimé Geoffrion K.C. and *J. D. Kearney K.C.* for the motion.

Ls. St. Laurent K.C. contra.

The judgment of the Court was delivered by

RINFRET J.—A motion has been launched by each of the respondents to quash this appeal for want of jurisdiction.

The action was brought by way of a petition of right against His Majesty the King and Southern Canada Power Co. Ltd., seeking to set aside an emphyteutic lease entered into between the province of Quebec and the Power Company comprising the bed of the St. Francis River at or near

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crockett and Hughes JJ.

Spicer Rapids, on the grounds: (*a*) that the river was neither navigable nor floatable, and consequently belonged not to the Crown but to the appellants *usque ad medium filum aquæ* as riparian owners; and, (*b*) that, even if the river were floatable or navigable, the petitioners' titles having been granted *in free and common soccage* carried with them the right to the bed and banks of the river.

In the Superior Court, on the question of navigability and floatability, the respondents tendered certain historical evidence concerning the condition of the river at or about the time the appellants' lots were granted at the beginning of the nineteenth century. The learned trial judge rejected the evidence thus submitted.

The learned judge found that the river was neither floatable nor navigable opposite the appellants' properties, and set aside the lease between the Crown and Southern Canada Power Co. Ltd.

The Crown and Southern Canada Power Co. appealed to the Court of King's Bench, which maintained the appeal because of the refusal of the trial judge to admit the historical evidence and referred the record back to the Superior Court for further enquête, in order that the historical proof might be received in the record, the right of the adverse party to contradict it being reserved, and that, upon the said proof being submitted, the Superior Court might deal with the case on the merits; Mr. Justice Howard and Mr. Justice Bernier dissenting—the first named judge being in favour of maintaining the appeal and the second named judge being in favour of dismissing it.

The respondents allege that the judgment of the King's Bench is not a final judgment, and that consequently this Court is without jurisdiction to hear an appeal from that judgment.

We have come to the conclusion that the motion to quash should be granted.

As pointed out in *Davis* v. *The Royal Trust Company* (1), in order that a judgment may come under the definition of a "final judgment" in s. 2 (*b*) of the Supreme Court Act, it must have, "in whole or in part," *determined* or put an end to the issue raised and in respect to which the judgment was rendered.

(1) [1932] S.C.R. 203, at 206.

1934

ST. FRANCIS HYDRO ELECTRIC CO. v. THE KING.

Rinfret J.

Dealing with the judgment *a quo* only as a matter of interpretation, it seems to us that it determined nothing with regard to the titles or the rights relied on *by the parties,* and that it is purely provisional. The *dispositif,* in our view, makes that clear. It says:

> Fait droit à l'appel, avec dépens; Infirme le jugement final de la Cour Supérieure, ainsi que les décisions à l'enquête refusant la preuve historique offerte par les défendeurs; Déclare cette preuve admissible en loi, sauf au tribunal à en apprécier la force ou la valeur probante, lorsqu'il s'agira du mérite de la cause, et Renvoie les parties à l'enquête pour que là, cette preuve déjà offerte et toute autre de même nature soient reçues au dossier, que la partie adverse puisse la contredire, s'il y a lieu, et que cela fait, la Cour Supérieure puisse à nouveau adjuger au mérite de la cause, suivant que de droit.

It will thus be seen that all the judgment does is to refer the record back to the trial court for further enquête. It does not even decide that if the evidence already tendered or other evidence of a similar character be established, a certain result will conclusively follow. No directions, in that respect, are given to the Superior Court; far less is there to be found in the judgment any declaration to that effect binding upon the Court of King's Bench. Both courts are left entirely free to appreciate the new evidence and to decide upon it, concurrently with the facts already of record, in absolute independence. To paraphrase the words of M. Lacoste ("De la chose jugée," n° 50):

> La juridiction d'appel n'a donné à la partie qui a obtenu l'interlocutoire qu'une simple espérance; elle était en présence d'une instruction imparfaite et n'a pas apprécié les faits d'une manière définitive.

Nor is a judgment like the present one in the nature of the judgment "directing a new trial" contemplated by s. 36 of the *Supreme Court Act.* While it may be said perhaps that in enacting subs. (*b*) of s. 36 ("a judgment granting a motion for a nonsuit or directing a new trial") Parliament had in mind only jury trials—as to which it is unnecessary to decide here,—there is no doubt that, in the premises, the judgment does not order a new trial. The supplementary enquête will be merely the continuation of the original trial. The record will remain exactly as it is, and the future judgment will have to be pronounced upon that record, except that special leave is given to adduce further evidence upon the particular point and within the limited scope therein expressly stated. Otherwise the parties remain precisely in the same position as they were before, apart from

the fact that the first judgment is set aside. (And see *Hudon* v. *Tremblay* (1)).

The appellants, however, pointed to the following *considérant:*

> Considérant que les requérants ont *primâ facie* établi leurs titres, mais qu'il convient de dire qu'il ne résulte pas de la stipulation de *franc et commun soccage* qui est à l'acte de concession originaire de ces terrains, que l'on puisse appliquer au cas qui nous est soumis une autre règle que celle du code civil;

and they expressed the fear that, if their appeal were not asserted, this *considérant* might constitute *res judicata* against them.

We are of opinion that this is not well founded. Under the Civil Code (art. 1241) the authority of *res judicata* "applies only to that which has been the object of the judgment." At bar, Mr. Geoffrion, while conceding—as well he might—that *res judicata* will sometimes result from the implied decision (though stated only in the *motif*), which is the necessary consequence of the express *dispositif* of the judgment (Refer *Ellard* v. *Millar* (2)), was frank to admit that, in the ensuing proceedings, it would not be possible for his clients to contend that the issue raised in respect of the title under franc and common soccage was finally determined between the parties in virtue of the above *considérant.*

In our view, the whole case is left open by the judgment appealed from. It may be that the trial judge and even the Court of King's Bench will feel inclined to follow the opinion expressed in that *considérant.* In no way, however will that be as a result of *chose jugée;* and we are definitely of the view that the parties will not be bound by it in such a way as to be prevented from raising the point before a higher court, should there be an appeal to such court after the final judgment has been delivered. (*Davis* v. *Royal Trust* (3)).

We are the more influenced in giving that interpretation to the judgment *a quo* and towards construing it as not having determined the issue now in question, because, in their reasons for judgment, two only of the judges of appeal have expressed any opinion upon the point which forms

(1) [1931] S.C.R. 624. (2) [1930] S.C.R. 319, at 326, 327.
(3) [1932] S.C.R. 203 at 208.

1934

ST. FRANCIS HYDRO ELECTRIC CO. v. THE KING

Rinfret J.

the subject of that *considérant* and, of those two, one (Howard J.) does so only inferentially.

The motions to quash will therefore be granted with costs.

Motions granted with costs.

1933

* Oct. 23, 24.

1934

* Apr. 24.

WESTERN ELECTRIC COMPANY, INCORPORATED, AND NORTHERN ELECTRIC COMPANY (PLAINTIFFS) } APPELLANTS;

AND

BALDWIN INTERNATIONAL RADIO OF CANADA (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent law—Infringement—Specification—What it should disclose—Construction of—Within province of court, and not of jury or experts—Also question of law—Matters on which experts may give evidence—Devices for amplifying electric signal waves—Audions.

In an action for infringement of a patent, not only is the construction of the specification exclusively within the province of the Court, and not within that of the jury or expert witnesses, but it is also for the Court a question of law. To quote the words of Lindley, L.J. in *Brooks* v. *Steele* (14 R.P.C. 9), "the judge may, and indeed generally must, be assisted by expert evidence to explain technical terms, to show the practical working of machinery described or drawn, and to point out what is old and what is new in the specification. Expert evidence is also admissible, and is often required, to show the particulars in which an alleged invention has been used by an alleged infringer, and the real importance of whatever differences there may be between the plaintiff's invention and whatever is done by the defendant. But, after all, the nature of the invention for which a patent is granted must be ascertained from the specification, and has to be determined by the judge and not by a jury, nor by any expert or other witness."

On the merits of the appellant's action for infringement of letters patent relating to devices for amplifying electric signal waves, upon the evidence adduced in the case, the trial judge was right in holding that the language of the claims must be construed by reference to the disclosure of the nature of the invention in the body of the specification and that, so construed, the thing done by the respondent did not constitute an infringement.

APPEAL from the judgment of the president of the Exchequer Court of Canada, Maclean J., dismissing the

* PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Crocket JJ.

appellants' action for infringement of letters patent relating to devices for amplifying electric signal waves.

O. M. Biggar K.C., R. S. Smart K.C. and *M. B. Gordon* for the appellants.

E. G. Gowling and *D. K. MacTavish* for the respondents.

The judgment of the Court (Smith J. taking no part) was delivered by

DUFF C.J.—First, as to the Arnold patent. The action, in so far as concerns this patent, is founded upon allegations that the respondents have infringed the monopoly limited by claim no. 2, which is in these words:

2. The combination with a plurality of thermionic repeaters connected in tandem, the first repeater of the series having a high-voltage output and the last repeater of the series having a high-current output.

It will be convenient, at the outset, before stating the precise considerations which seem to me to dictate the construction of this claim, to mention some long established and well understood principles of patent law.

The first I shall mention could hardly be better stated than in the language of the treatise in Lord Halsbury's collection, of which Lord Halsbury himself was the author:

In order that the public may have sufficient and certain information respecting what they are prohibited from doing whilst the privilege continues, the patentee must particularly describe and ascertain the nature of his invention. In order that, after the privilege is expired, the public may be able to do what the patentee has invented, he must particularly describe and ascertain the manner in which the same is to be performed; (22 Hals. 161, Art. 338).

In *Tubes, Ld.* v. *Perfecta Seamless* (1), Lord Halsbury explained the purpose and meaning of a specification in these words:

* * * if one has to look at first principles and see what the meaning of a specification is * * * why is a specification necessary? It is a bargain between the State and the inventor: the State says, "If you will tell what your invention is and if you will publish that invention in such a form and in such a way as to enable the public to get the benefit of it, you shall have a monopoly of that invention for a period of fourteen years." That is the bargain. The meaning which I think, in my view of the patent law, has always been placed on the object and purpose of a specification, is that it is to enable, not anybody, but a reasonably well informed artisan dealing with a subject-matter with which he is familiar, to make the thing, so as to make it available for the public at the end of the protected period.

(1) (1902) 20 R.P.C. 77 at 95, 96.

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

The question here is whether that has been done. Now it appears to me that the mode in which one ought to face that question is to look—and I should say so not only of the specification of a patent, but of every instrument—at the whole of the instrument to see what it means—not to take one isolated passage out of it and make that inconsistent with the general invention, but to see substantially what the inventor really means, and when you arrive at that, then see whether the language is within the test that I have suggested as the proper test to apply to such a specification and is such as will enable a typical workman to give the public the benefit of the invention.

In *Clark* v. *Adie* (1), Lord Cairns said:

* * * it must be made plain to ordinary apprehension upon the ordinary rules of construction, that the patentee has had in his mind, and has intended to claim, protection * * *

for the things which the infringer is alleged to have taken or done contrary to the prohibition of the patent.

In *Dudgeon* v. *Thomson* (2), Lord Cairns expressed it in this way,

* * * that which is protected is that which is specified, and that which is held to be an infringement must be an infringement of that which is specified.

You ascertain what is specified by considering the specification as a whole. Lindley, L.J., in *Needham* v. *Johnson* (3), after quoting the language of the plaintiff's second claim, used these words:

Now the first thing is to ascertain what that means; and with a view to ascertain what the whole sentence means, it is necessary to understand exactly what is meant by the expression "conduit". The expression "conduit" requires explanation, and one must look for it, and see what it does mean. Of course it does mean that which the patentees have said it means. You are not to look into the dictionary to see what "conduit" means, but you are to look at the specification in order to see the sense in which the patentees have used it.

I should add also that not only is the construction of the specification exclusively within the province of the court—but also it is for the court a question of law. In *British Thomson-Houston Co.* v. *Charlesworth, Peebles & Co.* (4), Lord Buckmaster said,

My lords, what did the specification of 1906 disclose and what did the patent of 1909 protect? These are the questions that arise for determination on this appeal, and their resolution depends upon the construction of two documents; such construction is the exclusive duty of the court, and this duty can neither be delegated nor usurped. As however in ordinary cases the existing circumstances in which documents were prepared, the relationship of the parties and the interpretation of terms of art are the proper subject-matter of evidence, so in specification of patents the state of knowledge in the craft, art or science to which the specification is directed and the explanation of technical terms, words and phrases are

(1) (1877) 2 A.C. 315, at 321.
(2) (1877) 3 A.C. 34, at 44, 45.
(3) (1884) 1 R.P.C. 49, at 58.
(4) (1925) 42 R.P.C. 180, at 208.

the proper subject-matter of testimony to aid interpretation; but beyond this, evidence affecting construction should not be allowed to stray. Finally, the document must be regarded as addressed to craftsmen in the particular branch of industry to which the alleged invention relates.

And Lindley, L.J., in *Brooks* v. *Steele and Currie* (1), expressed himself thus:

> The judge may, and indeed generally must, be assisted by expert evidence to explain technical terms, to show the practical working of machinery described or drawn, and to point out what is old and what is new in the specification. Expert evidence is also admissible, and is often required, to show the particulars in which an alleged invention has been used by an alleged infringer, and the real importance of whatever differences there may be between the plaintiff's invention and whatever is done by the defendant. But after all, the nature of the invention for which a patent is granted must be ascertained from the specification, and has to be determined by the judge and not by a jury, nor by any expert or other witness. This is familiar law, although apparently often disregarded when witnesses are being examined.

This is a case in which the specification, read as a whole, sheds a peculiarly revealing light upon the meaning of this claim. Moreover, we have the assistance of another document—a contemporary document—which, in view of the manner in which it was dealt with in the court below may properly be looked at for some purposes which will appear as I proceed.

It is necessary, however, I think, perhaps, to speak a word of caution with regard to such evidence. The duty of the inventor to disclose with certainty the nature of the invention for which he claims protection is a duty owing to the public, as Lord Halsbury observes, and that duty arises out of important public considerations. The protection afforded him by the grant is strictly limited to the invention disclosed and specified. He cannot enlarge his monopoly beyond that which he has specified, or that for which he has claimed protection (in such a manner as to make it clear to those to whom the document is addressed) by reference to supposed intention gathered from some contemporary document which is not part of the specification and has never been made known to the public. Such a document may establish or support a contention that the true nature of the invention has not been disclosed, or that the best manner known to the inventor of performing it has not been made known; and such matters may redound to the disadvantage of the patentee because it is a double condition of his right to a grant that

(1) (1896) 14 R.P.C. 46, at 73.

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

he has invented a new manufacture and that he has disclosed completely his invention. But the rule limiting his monopoly right to what is clearly disclosed by the specification is a rule of substantive law, which it is the duty of the court, in the public interest, to enforce, and the application of it is quite independent of any question as to the admissibility in evidence of any particular document for some other purpose.

All this is, no doubt, applied with some qualification where the issue concerns the validity of a patent or the validity of a claim; where the claim is attacked, for example, on the ground that it is so broadly expressed as to embrace matters not included in the invention, or to embrace matters in respect of which it is alleged that there was no novelty at the date of the patent; or on other cognate grounds. In passing upon such an issue, the courts, as in the case of other documents, have, where they have been satisfied that there was a meritorious invention, resorted to the maxim *ut res magis valeat quam pereat.* And, where the language of the specification, upon a reasonable view of it, can be so read as to afford the inventor protection for that which he has actually in good faith invented, the court, as a rule, will endeavour to give effect to that construction.

But, I am now dealing with the construction of the specification from another point of view; for the purpose of ascertaining the limits of the monopoly acquired by the appellants and determining whether or not what the respondents do is something which the appellants' patent prohibits. In relation to such a question, the principles indicated above have full play.

The document I have just mentioned, which is a memorandum produced by Arnold for the information of his superior officer, Colpitts, thus discloses the subject matter of his investigations which led to the invention: the memorandum is headed "Audion amplifiers without transformers," and the first sentence is as follows:

> This relates to the use of audions as amplifiers in circuits from which it is advisable to exclude transformers.

That is the subject matter of the memorandum. The subject matter of the specification is defined in very much the same way in these words:

This invention relates to the use of repeaters generally, and of vacuum discharge repeaters more particularly, as amplifiers without transformers. Still more particularly, it relates to the use of thermionic repeaters for securing amplification of current in circuits of low impedance.

In his memorandum, Arnold outlines the nature of the difficulties and disadvantages attending the use of audions then "on the market" as amplifiers. Before doing that, he explains that in certain very important fields for use of audions as amplifiers, it is advisable to exclude transformers. These include telegraph circuits of all kinds, land, submarine and wireless. He emphasizes cable telegraph circuits and also the reproduction of speech and music where undistorted amplification must be secured over a wide range of frequency. He explains that, in this last case especially, the inherent selectivity of a transformer is undesirable. Then he states that with the audion then "on the market" it is necessary to use transformers in order "to secure appreciable amplification". He adds that this is especially true where the circuit in which amplification is desired is of low impedance. This is due, he points out, to the "characteristics of the audion itself." If there is a circuit of low impedance, say 1,000 ohms, and it is desired to secure amplification in that circuit, you cannot obtain more than 10% of the possible current amplification without the use of a transformer, because, with the audions then in current use, the impedance of the input side, when the audion is operating efficiently, is greater than 100,000 ohms, and it did not appear that any structural change would be likely to reduce it.

Then, with the same type of "commercial audion structure," if you were to attempt, without transformers, to operate into a line of like impedance there must always be a considerable loss of "possible amplification," on account of the magnitude of the impedance on the output side. So that if you desired to take a current from a line of low impedance and deliver that current, after amplification, to a line of like impedance, you could not get more than 10% of the possible current amplification, unless you made use of transformers,—transformers at the point of reception from the incoming low impedance line and at the point of delivery to the outgoing low impedance line.

The problem before him was to design "circuit arrangements" which would escape these difficulties and disadvantages; and he says, at the end of his memorandum,

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

We have designed circuit arrangements such that a combination of audions can operate without the use of transformers, and, even between circuits of low impedance, can give an output current in excess of 50 times the arriving current for all frequencies from those suitable to wireless signalling down to the lowest frequencies used in cable telegraphy.

It is this circuit arrangement, involving this combination, which is the subject matter of the patent. In the specification he states,

> It has been discovered that a combination of one or more of the aforementioned high-voltage output type of audions working into one of the high-current output type, will operate, without transformers, from a line of low impedance, for example, 250 ohms, into a like line with a resultant current much greater, fifty or more times greater, than would flow in the second circuit if it were directly connected to the first circuit. The present invention is directed to such combination of two different types of repeaters, preferably audions.

It is well to point out, perhaps, that the invention which the respondents are alleged to have infringed is not that involved in the discovery and construction of the special types of audion themselves made use of in this circuit arrangement. The patentee explains in his specification that in respect of the audions themselves, applications have been made for patents, which, it appears, were afterwards granted, and, further, he explains that an application was made for a patent for another somewhat analagous combination but involving the use of only one of the new types of audion.

The combination, however, to which he declares in the specification that "the present invention is directed," and which in his memorandum he describes in the passage just quoted, seems to be very clearly defined. For the moment, the feature of it with which I am concerned is this: it is a circuit arrangement in which a combination of audions "will operate without transformers, from a line of low impedance" into a line of like impedance.

It is not necessary to consider, for the purposes of this appeal, whether or not the patentee has conformed to the conditions of patent law which would be necessary to enable him validly to claim protection for a combination of repeaters other than audions. The infringement, if there has been one, is an infringement by the use of audions in a manner in which the appellants allege to be precluded by their monopoly under the patent, and we are concerned with audions alone.

I now proceed to consider, first, the particular point of controversy as to transformers: whether, that is to say, the absence of transformers is a characteristic and essential feature of the invention disclosed by the specification.

Now, Arnold, in his memorandum, follows up the passages already cited with this:

> It has been found possible to construct audions with any desired output impedance, but no modification of this kind has produced a single audion-structure which will operate to advantage in low impedance circuits from which transformers are excluded.
>
> Obviously an attempt might be made to use several audions, the one operating into the next, etc., in the hope that by such a succession of devices the output and input losses noted above might be so far overcome as to render the complete operation of value. Various attempts at so-called "cascade" operation have been made by DeForest and others, but never, so far as I am informed, in circuits from which transformers are excluded.

This appears to indicate that at least one of the desiderata which he is aiming to meet is the exclusion of transformers from such circuits.

Then he proceeds to tell what he and his associates have accomplished:

> In the course of our experiments we have discovered that certain forms of audion structure are especially adapted to this end.

Then he describes these "forms of audion structure" which are "especially adapted to this end." They are of two types. The first type provides

> without the use of transformers * * * the possibility of stepping up the input voltage in one step to as much as 30 times its original value, or in two successive steps to as much as 500 times its original value.

Audions of the second type "step down the input voltage to one-third its original value." He does not say in so many words that this audion is operated without a transformer but he makes it quite plain, by implication, because he says,

> It is not because of this property that this latter type is of value, however, but rather because its output impedance can be made as low as 500 ohms, and hence it can be worked efficiently into a line of like impedance.

One surmises from the context that the figure 500 is a slip of the pen and ought to be 250.

Then he proceeds to explain the nature of the combination that has been discovered, which is a combination of the two types of audion he has invented; each of which being (by a definition) operated without the use of transformers, as already explained; and he sums up the results obtained at the end of the memorandum by a description

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

of the circuit arrangement involving this combination, in terms already quoted in which it is made perfectly clear that one fundamental characteristic of the invention is that, through these circuit arrangements, a combination of the two types of audions so described can operate "without the use of transformers," and can, without the use of transformers, take a current from a circuit of low impedance and deliver it amplified by at least fifty times into a circuit of like impedance.

To revert to the definition of the combination to which, as the specification says, "the invention is directed," it would be difficult to find any construction, consistent with the grammatical sense of the words, that would exclude the absence of transformers from the essential features of the combination in respect of which protection is claimed. First of all, he defines the "high-voltage output audion"; and an element of that definition is that "without the use of transformers" it will perform certain operations on the input current.

Then, there is a definition of the "high-current output audion," which does not explicitly make the absence of transformers an essential element, but which, as already indicated, appears very clearly to do so when it is read with the specification as a whole properly construed.

Then, after mentioning that the patentee has applied for patents in respect of these types of audions, he proceeds to describe the combination, and the combination, which is the invention for which he desires protection, is of

one or more of the aforementioned high-voltage output type of audions

(a type which, by definition, is of such a construction that it performs the function assigned to it in this circuit arrangement without the use of transformers) with one of the high-current output type.

This combination, he says in explicit terms will "operate without transformers"; and it is "such a combination" to which, he says, the "present invention is directed."

This conception of the absence of transformers as characteristic and essential in the invention, essential, that is to say, for the purpose of efficiently securing the desiderata at which the inventor is aiming, indeed, pervades the whole specification as well as the whole memorandum addressed to Colpitts.

The specification is illustrated by figures and there is not in any one of these figures a suggestion of a transformer.

In finally summing up the advantages of his invention, he emphasizes the various fields, indicated in the memorandum and in the beginning of the specification, in which the invention is hoped to prove of the greatest service. All these fields are fields in which, he declares, more than once, it is desirable to exclude transformers; and, I think the fair conclusion from his memorandum is that by that he means it is necessary in these fields to exclude them in order to secure efficient, if not, indeed, "appreciable" amplification.

My conclusion is that the learned trial judge was right in holding that it is an essential feature of the invention, for which the specification claims protection, that it should be capable of efficient operation for the purpose of amplification in currents of low impedance and in the fields to which he draws special attention, without the use of transformers. Indeed, the inventor has not left us in doubt as to his own view of the relation between the absence of transformers and the efficiency of the circuit arrangements which he has designed. After describing the two types of audion and describing the discovery of the combination of the two types and its happy effects in amplification between lines of low impedance, and emphasizing the transcendant importance of this discovery for submarine cable circuits, he proceeds to say,

> An essential part of the system of amplification is the circuit whereby the several elements are interconnected without the use of transformers.

The significance of this statement is brought into relief by the fact that, so far as I have been able to observe, this paragraph and the preceding paragraph in his memorandum are the only places where he makes any explicit statement as to what he regards as the essential parts of his system. In the preceding part of this paragraph he says,

> It must be admitted that the "B" type is not an essential to this scheme of operation but it is, however, necessary that audions of the "A" type must be used at the input.

And then follows the sentence I have just quoted in which he declares that the exclusion of transformers is an essential part of the system.

I now turn to the construction of the specification in another aspect. To revert to the language of claim no. 2:

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

2. The combination with a plurality of thermionic repeaters connected in tandem, the first repeater of the series having a high-voltage output and the last repeater of the series having a high-current output.

The learned President has held, in addition to his holding as to the use of transformers, that the language of this claim must be construed by reference to the disclosure of the nature of the invention in the body of the specification, and that, so construed, the thing done by the respondents does not constitute an infringement. I agree with him in both these conclusions.

First of all, as to the construction of the claim, we need not concern ourselves with the phrase "plurality of thermionic repeaters connected in tandem". The controversy really concerns the meaning of the phrase "the first repeater of the series having a high-voltage output and the last repeater of the series having a high-current output."

As already observed, this is especially one of those cases in which it is the document itself which affords the most valuable assistance possible for ascertaining the scope and signification of the phrases employed to limit the claim. That will fully appear as I proceed.

"High-voltage output" and "high-current output" as applied to audions or thermionic repeaters do not appear, so far as the evidence discloses, to have been terms of art prior to Arnold's invention. No witness says they were, and Arnold's memorandum rather suggests that they were not, as we have seen.

He describes two types of audion which he and his associates have succeeded in designing, one of which steps up the input voltage (type "A") to as much as thirty times its original value, and the other of which steps down the input voltage by as much as two-thirds of its original value; the first being denominated type "A" and the second, type "B."

In the first paragraph of his summing up, at the conclusion of his memorandum, he refers to this particular matter in this way,

> We have discovered the fundamental factors and their relative importance in audion structure to such an extent that we are able to make one particular type of structure which provides a large amplification of input voltage, and another type of structure which provides large amplification of current with considerable diminution of voltage.

The memorandum seems to show very clearly that both types of audion are new,—the inventions of himself and

his associates. In the specification, where the description in the memorandum is virtually repeated, the denominations are changed. Type "A" becomes the "high-voltage output audion" and type "B" the "high-current output audion".

The specification seems to indicate that, as regards the high-voltage output audion, what Arnold has done is to give "audions of the usual type" a form of construction which provides certain effects that are essential to the operation of his circuit arrangements; while, as to the "high-current output audion," he speaks of it in the specification as a "new type of audion". As already mentioned, it apparently was patented in January, 1915.

In the specification, he says, referring to the "high-voltage output audion",

> This type of audion will, for convenience, be hereinafter referred to as the high-voltage output audion.

Referring to the high-current output type, he says,

> This new type of audion will, for convenience, hereinafter be referred to as the high-current output audion.

The natural conclusion from all this is, that Arnold conceives himself to be assigning a denomination to a new type of audion designed by him for certain purposes, and a denomination to a special construction of the usual type of audion designed by him for specific purposes; and that these denominations are assigned for the purposes of the exposition of his invention in the specification. The particular type is to be "hereinafter referred to" under its appropriate denomination.

As we proceed through the specification, at the very outset, we are met with a sentence in which he defines the combination to which, he says, the "invention is directed", as

> one or more of the aforementioned type of audions working into one of the high-current output type."

As to the significance of these phrases, I shall come to that later. In the meantime it is sufficient to point to the perfectly definite way in which the specification tells the people to whom it is addressed: Here is a type of audion which has been devised and which has certain definite features; and that type of audion will hereinafter be referred to under its appropriate denomination. Then he proceeds immediately, in defining the combination, in re-

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

spect of which the invention is claimed, to speak of a combination of the "aforementioned types".

One might multiply references:

Fig. 1. is * * * an audion of the high-voltage output type;

Fig. 2. * * * an audion of the high-current output type;

Fig. 7. * * * audions of the high-voltage type in tandem working into * * * audions of the high-current output type * * *

Fig. 8. * * * a circuit arrangement embodying the invention in which the two different types of audions are combined in one bulb.

In the drawings, the audions 1 are of the high-voltage output type and the audions 2 are of the high-current output type.

In the high-current output type of audion, the input electrode * * * may be at any side of the filament * * * As hereinbefore stated, the high-voltage output type of audion gives an amplification with low current and high voltage in its output circuit; whereas the high-current output type gives amplification with high current and low voltage, and hence low impedance, in its output circuit.

Fig. 7 shows a plurality of the high-voltage output audions in tandem working into a plurality of the high-current output audions.

Fig. 8 shows * * * an audion of the high-voltage output type (which) works into an audion of the high-current output type * * *

I do not believe that any member of the class of people to whom this specification is addressed could have much doubt that the specification is employing these phrases in the sense defined by the specification itself. As I have already said, there is no evidence that they were terms of art having a generally understood signification in the art at the date of the patent, and, even if there had been such evidence, I should have regarded it as quite immaterial, because the inventor has made it plain that he is not using these phrases in any sense caught from the air, or from some general usage, but with a precise signification which he has defined in his specification.

It ought to be mentioned that Mr. Arnold admittedly is a distinguished scientist, and it seems not an unreasonable assumption that he would express himself in a manner likely to be understood by practitioners in his own art. Such persons, I think, could not fail, in perusing this document, to read the phrase "high-current output type" and "high-current output audion" as phrases denoting the "new type" which the specification has already defined and which it declares will be "hereinafter referred to under the denomination high-current output audion". Nor do I think this exposition is calculated to convey to an intelligent reader any other impression than the impression that the phrases "high-current output" and "high-voltage output" are employed to denote what is described

in the paragraph defining "high-voltage output audion" and "high-current output audion" respectively.

Moreover, I find it impossible to separate claim no. 2 from the final summing up of the invention beginning,

> It has been discovered that a combination of one or more of the aforementioned high-voltage output type of audions working into one of the high-current output type, will operate, without transformers, from a line of low impedance, for example, 250 ohms, into a like line * * * The present invention is directed to such combination of two different types of repeaters, preferably, audions.

I have no doubt whatever that, on a proper construction of the specification as a whole, the combination mentioned in the second claim is the combination described in the passage just quoted; or that the "thermionic" repeaters mentioned in the claim must be taken to be thermionic repeaters having the characteristics ascribed by definition to those with which the inventor has succeeded in securing the results which he says are secured by his invention. As a matter of construction, the point does not really appear to me to be open to serious argument.

Then, what are the essential features of the combination? The combination, I repeat, is defined in the passage quoted, and it is

> a combination of one or more of the aforementioned high-voltage output type of audions working into one of the high-current output type.

I do not think there is much controversy as to the essentials of the high-voltage output audion, but there is a controversy as to the high-current output audion. Grammatically, there could be no possible question about the construction of the language which is used in defining the high-current output audion. In the first sentence it is stated that

> It has been discovered that audions may be constructed which will step down the output voltage to, for instance, one-third its original value.

Then follows the sentence, "This last mentioned type of audion has a high current and low voltage output." "Last mentioned type of audion" means, grammatically, the type of audion mentioned in the first sentence; and the only typical thing about the audion mentioned in the first sentence is that it "will step down the input voltage, for instance, to one-third its original value." Then follows the sentence, "Because of its low output impedance * * * such type of audion" (which means this "last mentioned type of audion" of the next preceding sentence, that is to

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

say, the type of audion which steps down the input voltage) "can be worked efficiently into a line of like impedance." Then, the final sentence, "This new type of audion," (which, of course, is the type of audion with which alone the paragraph is concerned, the type of audion "mentioned" in the first sentence, "will, for convenience, hereinafter be referred to as the high-current output audion."

Then, in the description of the combination just cited, the definition of the two types of audion is imported by this phraseology.

* * * a combination of one or more of the aforementioned high-voltage output type of audions working into one of the high-current output type * * * The present invention is directed to such combination of two different types of repeaters, preferably audions.

Grammatically, therefore, the type of audion which is denominated the "high-current output audion" or the "high-current output type," and in the description of the combination is the last of the series of audions, and in the claim is referred to as "the * * * repeater * * * having a high-current output" is, for our present purposes, since we are here not concerned with repeaters other than audions, a type of audion which is defined by the possession of the property that it "will step down the input voltage to one-third its original input value." That is the result of reading the words in their ordinary grammatical sense, and there is not in the specification, or in Arnold's memorandum, anything I can discover which would justify a departure from the grammatical sense. On the other hand, there is much in these documents, apart from the paragraph cited, which goes to show that the property of stepping down the voltage is a property of essential importance. In the definition of high-current output audion, there is this which is not without significance:

Because of its low output impedance * * * such type of audion can be worked efficiently into a line of like impedance.

That is to say, "such type of audion" (the type which "will step down the input voltage") possesses, as such, a low output impedance which can be worked into a line of low impedance. Elsewhere in the specification, and in Arnold's memorandum, this relation between the reduction of input voltage below its original value and low output impedance is recognized in unequivocal terms.

In a passage already quoted from the specification it is stated,

> The high-current output type gives amplification with high current and *low voltage and hence* low impedance in its output circuit.

It is the low output impedance, which is characteristic of the high current output audion that, by definition, steps down the input voltage, that makes it possible to have an audion, so defined, work efficiently into a line of like low impedance. That is one, at all events, of the cardinal virtues of this type of audion.

The capital purpose of the inventor, no doubt, is to secure a high amplification of current flowing into a line of low impedance.

> The audion 2, says the specification, acts as an amplifier in which the current is increased and the voltage lowered in its output circuit. Because of the fact that the impedance * * * is lowered, it can be worked efficiently into a line of similarly low impedance.

In his memorandum, Arnold describes the high current output type in this way,

> We have also succeeded in making audions which step down the input voltage to one-third its original output.

He goes on to explain that this property, that is, the property of stepping down the input voltage is not, *per se*, the thing which gives this type its value; but that such value directly results from the property by which the output impedance can be made low, by reason of the fact, as the specification explains, that the voltage has been lowered, making it suitable therefore, for direct connection to a low impedance outgoing line.

Again, at the conclusion of his memorandum, in describing this type of audion, the properties mentioned are

> that it provides a large amplification of current with considerable diminution of voltage.

It is quite clear, I think, that one of the essential characteristics of this type, for the purposes of the invention in question, is that it should be capable of diminishing, and does diminish, the input voltage below its original value.

I do not propose to enter upon a scientific discussion touching the relations between voltage, impedance and current in thermionic repeaters of the kind with which Arnold is dealing in their bearing upon this device of Arnold's in which the input voltage is reduced below its original value, and by the use of which he produces such

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

results in magnitude of current and minimization of impedance in the output circuit as to enable the inventor to arrive at that at which he says he has arrived, viz., to obtain a current amplification of fifty-five times between circuits of 250 ohms impedance with sufficient energy capacity to deliver at least one-tenth of an ampere at the terminals. There was no satisfactory scientific discussion of these matters at the trial and, although I have read the evidence many times, I have not discovered any evidence (and our attention has not been called to any) which would enable me to go into scientific matters of which I do not think I can take judicial notice without a much more complete instruction upon them than this record presents.

It is sufficient that Arnold himself says he obtained these results with a series of tubes consisting of one or more of the high-voltage type and one of the new type known as the high-current type, the primary characteristic of which is (by definition) that it steps down the input voltage below its original value, and that he was able to do so because this tube, in which the input voltage is lowered as low, for example, as one-third its original value, is a tube in which the impedance of the outgoing circuit can be reduced as low as 250 ohms or 500 ohms which makes it possible to work it into a line of like impedance,—the normal impedance, as one of the witnesses says, for low impedance circuits.

I now come to the matter of infringement. The issue is, to adopt the language of Lord Cairns in *Clark* v. *Adie* (1). "Whether" (the alleged infringer has) "adopted the substance of the instrument patented", or, to vary the phrase, whether he has "taken in substance the pith and marrow of the invention".

Infringement is a mixed question of law and fact. First of all, it involves the construction of the specification and, if there is any dispute about that, the issue, let me repeat, is an issue of law for the court.

There is further an issue of fact whether the invention, as disclosed by the specification as construed by the court, has been in substance taken by the defendant. This issue is, to adopt again the language of Lord Cairns in *Clark* v. *Adie* (2), "either for a jury or for any tribunal judging

(1) (1877) 2 A.C. 315, at 320. (2) (1887) 2 A.C. 315.

of the facts of the case". It is for the appellants to establish by reasonable evidence to the satisfaction of the court, as judge of the facts, that the respondents have really taken and adopted the substance of the invention which Arnold specified in his specification.

The contention of the appellants is that the thing which the respondents do is prohibited by claim no. 2.

The description of Baldwin's system, given by the witness Cornwell in the course of his examination, may, I think, for all relevant purposes be accepted as accurate. It is as follows:

117. Q. Do that briefly?

A. The first tube of this amplifier is a type 224 vacuum tube and it is a potentially operated tube, in other words, its function depends on nothing but voltage which is applied to the terminals connected by the input. It has a very high impedance circuit in design and when connected there is a resistance of 200,000 ohms. This tube is a screen grid tube, a development of late years, where in a high rate of amplification is realized over what was had in the days of Colpitts and Arnold; by virtue of the introduction of this screen grid this tube steps up the voltage that is applied to its grid and in addition increases the current at the same time; in other words, it is an energy amplifier which is the standard and common action of all conventional radio tubes. If I might give a value that perhaps would make it more clear. We can apply at the input 3/10 of one volt, a very small fraction, and by virtue of its amplifying power it will step up that voltage to 50 volts; that is, we could get off the plate of that tube 50 volts if 3/10 of a volt was applied to its grid. In so much as it is a pulsating or alternating current of 50 volts it will travel to the grid of the tube labelled (B) and it travels directly to this grid through a copper conduction, there being introduced in that circuit nothing in the way of condensers, inductors or batteries, giving the conductivity the value of the lowest possible resistance, which assures more efficiency than is disclosed in patents in the prior art. This tube receives this 50 volts and steps it up still higher. Relatively speaking, the 224 tube is rather a low voltage tube as regards the value of its output in comparison with the voltage of the output of tube (B) which has a value of about 3·8; in other words, it multiplies the voltage 3·8 times. However, we do not realize exactly that full value but actually realize a gain of three times, which means that off the plate of this second tube we obtain 150 volts and a small increase in current as well. This plate, the output or plate of this tube also contributes voltage to the grid of tube (C), the third tube. The voltage is conveyed to tube (C) through another resistance and those resistances are R10, R9 and R8 and they maintain a fixed value of ratio nearer that grid and tube (C) will receive 50 volts when the grid of tube (B) is receiving 50 volts by reason of the gain to tube (B) from the amplification power and tube (C) steps it up to 150 volts, and those two plates as mentioned above are working in a series relation to each other, so that they gain double that voltage, making it 300 volts which is, of course, a very high value. The relationship of the tubes (B) and (C) to each other, in so far as performance is concerned, can be explained as follows:

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

If tube (B) is removed from the circuit and tubes (C) and (A) are retained, then the whole instrument ceases to function. If tube (B) is replaced and tube (C) is withdrawn, the circuit will function but unsatisfactorily, due to the fact that its power is reduced to less than half and it is distorted due to unbalanced potentials and change of impedance in what we call the inductance T. The two tubes are essentially then to give operation that is acceptable for general commercial standards of quality. The two terminals, labelled output, upon being measured, possess the value of approximately 8,000 ohms impedance, which is a high value. With the impedance of 8,000 ohms, roughly figuring upon driving the whole amplifier with this 3/10 of a volt, is computing it at 300 volts, and with the imposed values of that impedance of 8,000 ohms, we get power, which is energy, the product of current and voltage, of 11 watts. In consideration of 300 volts being embraced the current would be, very roughly figuring, about 37/1000 of one ampere, which is, of course, quite low. That is, the output would not work when connected to a cable line or telephcne line of the conventional values of 250 ohms impedance or that of 500, as far as efficiency or quality is concerned, first, because of the values in the circuit the amplifier is not able to reproduce the low frequencies that go down to as low as 30, 20 or 10 cycles and no efficiency could be realized at 2 cycles with it and if you desire to apply it to a telephone line, if you want to obtain any efficiency or quality at all, as well as vitality of wave form, it is essential that a transformer be connected to that output, that is, to reduce the voltage and to also, of course, reduce the impedance down to a value that is comparable to the impedance value of your line, and naturally, when you reduce that voltage but retain that power, your current then will increase, but it can only be done by the insertion of a transformer; the tubes do not do it, but the transformer does it in such a case. I believe that covers the circuit.

* * *

126. Q. Is there any device or such a thing as a cable telephone or microphone which you could attach to the input of the defendant's circuit and have it match the impedance of the circuit generally?

A. Microphones and telephones of general type are low impedance instruments, telephone lines are also low impedance circuits usually. If any of them were connected to the input of the defendant's amplifier natural impedance matching would not be realized; it naturally suffers in efficiency and does not amplify as much as it might or should do if they matched.

127. Would you say whether it was practical to use the defendant's circuit without transformers, input and output, in public address systems?

A. No, sir.

Subject to what the defendants' witnesses say in regard to the use of transformers, the physical characteristics of the Baldwin system are briefly summed up in a passage from the appellants' factum which I quote in full:

20. Specific figures were given with respect to the defendant's system. The input upon which the calculations at the trial were based was 3/10 of a volt and the input amperage fifteen ten-millionths of an ampere. In the first tube (A) the voltage is amplified 166 times, and the current only 55-66 times. In each of the tubes of the pair (B and C) on the other hand, the current is amplified 370-444 times and the voltage only 1·8-3·8 times, the variance in the figures depending upon the particular method

of calculation adopted. By reason of the last repeater consisting of a pair of tubes the resulting voltage output of the system is double what it would have been if there had been only one. In the final result the system's output of power is just short of 25,000,000 times the input, a result which by the use of ordinary tubes in cascade would require five stages instead of two, and about 80 tubes of the kind until lately used.

Now, comparing broadly Baldwin's device with Arnold's invention, and postponing for a moment the matter of transformers, you have these contrasted features:

Arnold's specification contemplates his amplifying system as one which, without the use of transformers, could be efficiently worked from and into it a line of low impedance, 250 to 500 ohms, for example. He refers thus to some of the fields in which he thinks his invention can be most usefully applied:

> As applied to submarine cable work for amplifying the feeble current at the receiving end the invention is of special importance. And, he adds, the invention is particularly adapted for use in circuits where especially pure, loud reproducton of speech or music is desired. In general in the art of submarine, land and wireless telegraphy, the invention is of importance with reference to recording, high-speed working and direct repetition from one type of system to another type of system.

As to the Baldwin system, the impedance of the first repeater reaches the high magnitude of 200,000 ohms, and, as a result of the evidence as a whole, I have no hesitation whatever in saying that, without the use of transformers, a repeater having such an order of input impedance could not be efficiently operated from lines with such impedance as would be encountered in those fields which Arnold has specially in view. Cornwell's evidence is perfectly clear on that point. Cornwell's evidence is quite explicit that the use of this system is not practicable for the transmission of speech and music without transformers at both ends of the circuit, that is to say, at the input of the first repeater, as well as at the output of the last repeater.

It is admitted, it is true, that in some cases where the incoming line connected with the input of the first repeater has an impedance ranging from 5,000 to 8,000 ohms the system can be put to some practical purpose; though this is emphatically denied by the appellants' expert witness. The point I am concerned with at the moment is that by reason of the very high impedance of the first repeater, Baldwin's system cannot be usefully employed without the use of a transformer in the wide and important fields

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

specially mentioned by Arnold. That, coupled with the fact already mentioned that in his disclosure of his combination he contemplates working from a line of low impedance, say 250, ohms, into a line of like impedance without transformers, is a not unimportant circumstance when considering whether or not the pith and substance, the spirit of Arnold's invention, has been taken by Baldwin.

Then, there is another feature which is not without its importance in Baldwin's first repeater. Arnold contemplates no appreciable increase of current in his first repeater. Baldwin's first tube is vastly different. It amplifies the current over 60 times. This is of significance when it is remembered that Arnold only contemplates a total amplification of current by his whole system of 55 times.

Now, coming to the second repeater consisting of a pair of tubes (B and C) in series. The distinction is marked. It is an essential feature of Arnold's invention, that the second type of repeater, according to the intention of the inventor, and by express definition in the specification as well as in the memorandum, reduces the output voltage of the first repeater below its original value; Baldwin does not lower the output voltage from the first repeater. On the contrary, the second repeater, involving two audions, amplifies that voltage by six times. I shall have to return to this in discussing one of the arguments addressed to us, but, in the meantime, I pass on to the output impedance of the system.

One of Arnold's capital aims is to reduce the output impedance of the system, which he was eminently successful in accomplishing, to 250 or 300 ohms. The difference in figures alone is striking but the practical consequences are of still greater importance. Arnold's object, let me repeat to the point of weariness, in reducing impedance to 250 or 500 ohms was to enable him to work his output circuit of his last repeater into a line of low impedance directly, without the use of transformers, and this to enable him to employ his system in the fields already mentioned with all the advantages arising, as he considered, from the absence of transformers.

In Baldwin, the output impedance reaches at least 4,000 ohms and in the most efficient operation it reaches 8,000 ohms. It is not seriously disputed that Baldwin's output

circuit, working through such impedance, could not be efficiently connected with an outgoing line, for any of the purposes for which his devices are employed, without the use of transformers.

A word upon the subject of transformers. The learned trial judge rightly found as a fact that for practical purposes the Baldwin system is not used without transformers connected with the output circuit; that for all except some very exceptional purposes for which such systems are used, a transformer is employed and is necessarily employed between the incoming line and the input circuit of the first repeater.

To sum up, Baldwin employs an initial repeater having 200,000 ohms in his output circuit, which, if it can be worked directly at all with an incoming line of low impedance, cannot be efficiently worked with an incoming line of impedance less than 5,000 ohms.

Arnold's invention contemplates a system which, after amplification of current by 50 times can be worked directly, without the use of transformers, into a line of low impedance and ordinarily will be so worked.

Baldwin employs a repeater of outgoing impedance of from 4,000 to 8,000 ohms which cannot be efficiently, and is not in practice, worked, into an outgoing line without the use of transformers.

Arnold employs as his first repeater a repeater which does not amplify the current. Baldwin employs a repeater which amplifies the current of the incoming circuit between 55 and 66 times.

Arnold's invention involves a final repeater of such characteristics that it diminishes the voltage of the input circuit by a factor of two-thirds. Baldwin employs a repeater consisting of two audions which increases the output voltage of his first repeater by a factor of six, and these differences are not mere differences in figures. They have most important results in relation to the respective objects aimed at.

As I have already said, I entirely agree with the conclusion of the learned trial judge, and on the issue of fact whether or not Baldwin's arrangement in substance infringes Arnold's patent, I agree with his finding.

I also agree with the view expressed by him upon what is also a mixed question of fact and law, as I have already

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

intimated, that neither the individual audions which constitute Baldwin's second repeater, nor the repeater as a whole, can be brought within the definition derived from Arnold's specification of high-current output audion.

This brings me to one or two points argued on behalf of the appellants to which I think it is necessary to refer. In order to be sure that I am doing no injustice to the argument, I quote from the appellant's factum:

> 28. The patent specification refers to audions of the kind adapted for use as the first repeater as being of the "high voltage output type", and to audions of the kind adapted for use as the second repeater as being of the "high current output type". It describes the construction of each type. They differ in the size and spacing of their electrodes, which are to be larger or smaller and more or less far apart according to the result desired. This result is, in the case of the first type, a high output impedance, which leads to a high voltage amplification and inhibits the ready flow of current in the output circuit; in the case of the second type it is a low output impedance which permits a large increase in current but is inconsistent with a corresponding voltage amplificaton. In a passage twice quoted in the judgment Arnold says that he has discovered that audions of the second type can be made with so low an output impedance as even to "step down the voltage, for example to one-third of its original value". From this the learned trial judge infers that such a stepping down of the voltage in the second repeater was an essential feature of Arnold's idea, and accordingly holds that although each of the audions constituting the defendant's second repeater amplifies the current 370-444 times and the voltage only 1·8 to 3·8 times, these audions are not of the high current output type contemplated by the patent. Not only is the learned trial judge's inference directly contrary to the intention really entertained by Arnold and expressed in the preliminary memorandum, but it is also contrary to the oral evidence. The plaintiffs' witness Waterman categorically states that the second repeater in the defendant's system is a "high-current output tube", and the definition which the defendant's witness gives of the expressions "high-voltage output" and "high-current output" supports this statement. The point is one upon which, in the plaintiffs' submission, a judicial conclusion contrary to the express evidence cannot be supported. The plaintiffs further submit that Arnold's object is accurately expressed in his patent. He proposes to obtain a high undistorted amplification of signal energy by using audions in tandem, the first so constructed as to secure the amplification primarily of voltage and the second primarily of current. It is such a system which Arnold's claim defines and the defendant uses. There is no excuse for attributing to Arnold an intention to restrict his invention, or for interpreting his claim as being confined, to a system in which either of the audions used is the most extreme possible example of its type.

The essential fallacy of the argument seems to lie in the assumption that the phrase "high-current output audion" is to be construed by witnesses, and that the tribunal charged with interpreting the specification is bound to

accept the opinions of witnesses as to the effect of these words.

I have already fully discussed this point of construction and I will now repeat that the question of the meaning of these terms in the specification, and the construction of the claim with reference to these terms, is a matter exclusively within the province of the court; and the learned trial judge would have fallen into grave error if he had accepted, as binding upon him, the evidence of witnesses with reference to that matter, as the appellants contend he ought to have done.

I repeat that the witnesses relied upon in the factum did not profess to say that these terms had, before the publication of Arnold's patent, derived any commonly known meaning from usage in the art; that the specification itself provides the dictionary by which the scope and effect of these terms is to be ascertained; and, moreover, that it is clear that Arnold did not intend them to be read in any sense imposed by general usage, but solely in the sense in which he himself defines them.

I may add, moreover, that if I were at liberty to treat the construction of these phrases as a question of fact, that is to say, if I were at liberty to treat as a question of fact, to be determined upon the testimony of witnesses along with the other facts in evidence, whether the meaning ascribed by the appellants to the phrase "high-current output" corresponds with the sense in which Arnold intended to use it, or intended it to be understood, I should have no hesitation in coming to the conclusion that the oral evidence relied upon by the appellants, whatever be the effect of it, is entirely overborne by the internal evidence of documents before us.

Then, the argument includes this statement:

> Not only is the learned trial judge's inference directly contrary to the intention really entertained by Arnold and expressed in the preliminary memorandum, * * *

I have already discussed the memorandum sufficiently to show that in my judgment the evidence is diametrically in contradiction to this argument, but I must notice for a moment the reference by which that statement is supported. The first of these is a paragraph in these words:

> It has been found possible to construct audions with any desired output impedance, but no modification of this kind has produced a single

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

audion-structure which will operate to advantage in low impedance circuits from which transformers are excluded.

In several respects, this passage is not entirely clear. I am not sure that Arnold is speaking of some invention of his own. The context, especially the two following paragraphs, seem to indicate that he is not. However, the point of his observation seems to be this: The single audion-structure, whatever its impedance, it has not been found possible to devise in such a way as to make it possible to operate efficiently without transformers. I do not think that lends much force to (indeed, I am afraid I think it tells neither way) the contention the appellants are advancing.

The next reference is to another paragraph which is in these words:

> It must be admitted that the "B" type audion is not an essential to this scheme of operation. We may replace one of the "B" type by from 10 to 100 of the "A" type in parallel, and secure comparable results. It is obvious, however, that the use of one audion of the "B" type is to be preferred. It is, however, necessary that audions of the "A" type be used at the input end, since only this type has the property of voltage step-up transformation.

I must admit that here again I cannot ascribe any weight to this paragraph either for or against the appellants. The point under discussion is the validity of the learned judge's conclusion as to the nature and properties of a "high-current output tube" as that phrase is used in Arnold's specification. The paragraph quoted points out that Arnold's "scheme of operation" as conceived by him, does not necessarily involves the use of an audion of the "high-current output type" which may be replaced by a series of from 10 to 100 audions of the high-voltage output type arranged in parallel.

We are only concerned with Arnold's specification. There is no suggestion that the claim sued upon (which relates to a combination of two different types of thermionic repeaters) or the invention as described in the specification, embraces this alternative method; and, indeed, it is stated in the specification that, for a method which, from its description, I take to be this alternative method, Arnold has applied for a separate patent. I am unable to see what bearing all this has upon the scope and significance of the phrase "high-current output audion" in Arnold's specification.

On the other hand, I must point out that these are the only two passages from Arnold's memorandum that are referred to in support of the proposition that the learned trial judge's conclusion in respect of the nature and properties of that type of audion is "directly contrary to the intention really entertained by Arnold and expressed in the preliminary memorandum." These references, as I have said, in my opinion have no weight either way. There are many other passages in the memorandum, however, to which reference might be made which at least point to the conclusion that this comment upon the learned President's judgment rests upon a misconception of the essential effect of the memorandum.

For example,

> We have discovered the fundamental factors and their relative importance in audion structure to such an extent that we are able to make one particular type of structure which provides a large amplification of input voltage, and another type of structure which provides large amplification of current with considerable diminution of voltage.

The expert witness called by the appellant insists that in the high-current output type of audion the high-voltage delivered from the first type is accepted and passed on "without material alteration." It will be plain from what has already been said that this description is a quite inadequate substitution for the definition given in Arnold's memorandum and his specification of this electrical device.

There is one general observation which, I think, ought not to be omitted. Fortunately, in this case we have, in the memorandum of Arnold, an exposition in language chosen by the inventor himself (who is a distinguished scientist and admittedly an entirely competent expert in this particular field of science) of the characters and circumstances of his inventions. The character of the devices, of the combination and of the circuit arrangements is explained by Arnold for the information of his superior officer in the memorandum before us, and we may assume that he would not use language of which the grammatical sense, as well as the sense imposed by the context, is the very opposite of what he intended to convey. A like remark would apply to the specification.

I cannot yield my adherence to the process of replacing the plain language selected by Arnold himself to express his

1934

WESTERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA.

Duff C.J.

ideas of the properties of his inventions and substituting therefor paraphrases, possibly ingenious, but far from faithful.

With reference to Colpitt's case, it does not seem necessary to add anything to the observations of the learned trial judge. I entirely agree with his conclusions.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Smart & Biggar.*

Solicitors for the respondent: *Henderson, Herridge & Gowling.*

1934

*Feb. 27, 28.
*Apr. 24.

NORWICH UNION FIRE INSURANCE SOCIETY LTD. (PLAINTIFF)..... } APPELLANT;

AND

LA BANQUE CANADIENNE NATIONALE (DEFENDANT) ..... } RESPONDENT;

AND

THE CITY OF CHICOUTIMI AND OTHERS (MIS-EN-CAUSE)

(TWO APPEALS)

ON APPEALS FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Appeal—Jurisdiction—Action in revendication of a cheque—No value in controversy—Bank and banking—Insurance company—Cheques drawn by insured for premiums to order of the company—Endorsed by company's agent and credited to latter's account by the bank—Moneys not refunded by agent to company—Action by company to recover amount of cheques from the bank.

The appellant brought an action in revendication, directed against the respondent bank, of a post-dated cheque for $7,788.02 drawn by the city of Chicoutimi. The cheque had been handed to the appellant company's agent at Chicoutimi in error as to the amount and the city countermanded payment. The appellant's purpose in taking its action was merely to get the cheque from the respondent bank in order to remit or tender it back to the city of Chicoutimi.

Held that the appeal should be quashed, as the value in controversy from the point of view of the appellant company is insufficient to bring the appeal within the jurisdiction of this court.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Crocket JJ.

The other action concerns three cheques amounting to $7,380.14 and interest drawn by the mis-en-cause, the city of Chicoutimi, payable, in payment of insurance premiums, to the company appellant, with whom the city mis-en-cause had fire and workmen's compensation insurance. Those cheques were delivered by the city mis-en-cause to one, Vézina, who, at the material times, was acting as agent for the appellant company, and was also mayor of the city of Chicoutimi. All these cheques were delivered to the latter by the city before the premiums, for which they were severally intended to be given in payment, were due. This was done on the instructions of the mayor, (Vézina), himself. They were all, either cashed by him at the respondent bank's branch in Chicoutimi, or discounted by him when post-dated, and the proceeds were all deposited by him in his own account at the respondent bank. The agent Vézina having failed to remit the amount of these cheques to the appellant company the latter, by its second action, claimed the amounts from the respondent bank.

Held that the appellant company, under the circumstances disclosed by the evidence, was not entitled, on the form of action as taken by it, to recover from the respondent bank the amount of the above mentioned cheques. The appellant company might have a claim for damages against the respondent bank, on the ground that, through the latter's negligence, it deprived the appellant of the advantage resulting from the possession of the cheques, but, at this stage of the case, the appellant company is not entitled to obtain from this Court the right to amend its action and convert it into a claim for damages; *per* Rinfret J. especially when the appellant still possesses its right against the city of Chicoutimi for the recovery of the premiums.

Per Rinfret J.—The question whether these cheques were properly paid by the respondent bank is a matter between the bank and the city of Chicoutimi. It was not the appellant company's funds that the respondent bank appropriated towards the payment so made: the cheques were the city's cheques and the moneys out of which they were paid were the city's moneys; and the matter resolves itself into one of accounting between the bank and the city.

Cannon J.—Under the circumstances disclosed by the evidence, the authority vested in Vézina to collect premiums due to the appellant company and grant discharges, included the right to endorse cheques for the purpose of making the collection of his commission and of the moneys to be remitted to the appellant sixty days after the issue of the policies or when the amount due for workmen's compensation premiums would be finally adjusted.

Appeal from the Court of King's Bench (Q.R. 55 K.B. 538) aff.

APPEALS from the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgments of the Superior Court Greenshields C.J., and dismissing the two actions brought by the appellant company.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

(1) (1933) Q.R. 55 K.B. 538.

1934

NORWICH UNION FIRE INS. SOC. LTD. v. LA BANQUE CANADIENNE NATIONALE.

John T. Hackett K.C. and *F. W. Hackett* for the appellant.

Aimé Geoffrion K.C. and *A. Gérin-Lajoie K.C.* for the respondent.

The judgment of Duff C.J. and Lamont J. was delivered by

DUFF C.J.—This appeal relates to the subject matter of two actions in the Superior Court of Quebec; the one, no. 406, and the other, no. 407. These actions concern certain cheques drawn by the mis-en-cause, the city of Chicoutimi, payable, in payment of insurance premiums, to the appellants, with whom the mis-en-cause had fire and workmen's compensation insurance. Those cheques were delivered by the mis-en-cause to one Vézina, who, at the material times, was acting as agent for the appellants and was also mayor of the municipality. All the cheques with which we are concerned were delivered to him by the municipality before the premiums, for which they were severally intended to be given in payment, were due. This was done, as Mr. Blackburn, city treasurer, says, on the instructions of the mayor (Vézina) himself. They were all, either cashed by Vézina at the respondent's branch in Chicoutimi, or, as the bank manager describes it, discounted by Vézina when post-dated. The proceeds of all were " deposited by " Vézina, to quote the words of the respondents' factum, " in his own account " at the respondent bank

> which account was a personal one in which Vézina deposited all moneys which came into his hands whether or not they belonged, or were supposed to belong, to the insurance company, or anyone else. The proceeds of all these cheques were, therefore, credited to the account of Vézina and on this account he drew cheques for personal and other purposes as he deemed fit.

There is some dispute as to whether these proceeds went in reduction of a claim the bank had against Vézina, but, in the view I take of the appeal, it is not necessary to discuss that point. It is not disputed that the bank gave credit to Vézina for the proceeds of these cheques, and I see no reason to disagree with the view taken by the courts below that he had personal control over such credit.

The cheques, in all of the cases with which we are concerned, were payable to the Norwich Union Fire Insurance Society, Ltd., although there are slight immaterial differ-

ences in the descriptions of the payee. In one case, for example, the description is "Norwich Union Fire." They were also endorsed by Vézina with slight, immaterial variations, "Norwich Union Fire Insurance Co., P. Vézina." There is no serious dispute that it was well understood by the bank that Vézina was acting as agent of the Norwich Union Fire Insurance Society, Ltd., or that the cheque, of which the proceeds were deposited to his credit, were in his hands as such agent.

To deal with the cases in numerical order. The first action, no. 406, concerned a postdated cheque for $7,788.02. It was an action in revendication, accompanied by a writ of seizure issued at the instance of the appellants and directed against the bank. There are two points in regard to this cheque, and the second, at all events, is decisive; as to the other, I do not, for the moment, desire to express any opinion.

This cheque is said, and I think there is no dispute on the point, to have been drawn and handed to Vézina in error as to the amount to which the appellants would be entitled. It was roughly $3,000 in excess of the amount for which the cheque should have been drawn. This fact was discovered some time before the maturity of the cheque and after discount of it by Vézina, and (and this is the second point) the municipality promptly stopped payment of it, and it was, accordingly, not charged against the account of the municipality. In these circumstances, I am unable to perceive any evidence which would enable us to ascribe a value to this document, from the point of view of the appellants, of sufficient magnitude to bring it within the minimum of value required in order to make the appeal competent, viz., $2,000. It is a case in which leave to appeal should have been obtained, and the appeal ought, on that ground, to be quashed with costs.

The action no. 407 concerns three other cheques amounting in the aggregate to $7,380.14 and interest. They are dated respectively, December 18, 1930, March 19, 1931, and May 21, 1931. As already mentioned, all these cheques were issued at a time when no premiums were due by the city of Chicoutimi to the appellants. They were issued on the authority of Vézina (as mayor), and delivered to him as agent of the appellants.

1934

NORWICH UNION FIRE INS. SOC. LTD. v. LA BANQUE CANADIENNE NATIONALE.

Duff C.J.

The first of the cheques, dated 18th December, 1930, was payable on demand and was cashed on the 20th. The second was dated the 19th of March, 1931, was payable the 12th of August, 1931, and was paid on the 15th of April. It was then credited to Vézina's account but not charged to the municipality until later. The cheque of the 21st May, 1931, was payable on demand and was actually paid on the same day and credited to Vézina's account.

Now, these documents, as already observed, were in the hands of Vézina as agent of the appellants. They were the appellants' property. Unless Vézina had authority, I shall have a word to say about this later, to endorse and deliver them to the bank for deposit to the credit of the account mentioned, he was committing a wrongful act in doing so. The bank, as we shall see, was bound to know this. In such a case, unless the agent possessed such authority, a bank, taking a cheque, marking it paid, treating it in such a way as to make it appear on its face as a cancelled cheque and returning it to the drawer, would, *primâ facie,* be wrongfully and unlawfully dealing and interfering with the property of the agent's principal; and, therefore, would be committing a "fault" by "positive act" within the meaning of art. 1053 C.C.; and if damage was caused thereby such conduct might constitute an actionable wrong under that article. The elements of this proposition, perhaps, had better be discussed separately.

First, as to the authority of the agent in respect of the endorsement of the cheque and delivery of it to the bank for deposit to the credit of his personal account. In this particular case there was written authority—there was a document in existence defining the authority—and by that authority he had power to collect premiums; and I am going to assume that, if a case arose in which endorsement was a necessary step in the process of collection, the agent had authority to endorse; if, for example, he was in circumstances requiring it, depositing a cheque in an authorized account kept under the name of his principals. The point is, perhaps, open to argument, but I am going to assume that he might, in such circumstances, have done such acts as this under his power of attorney. But, the agent's actual authority, and it is that which I am now discussing, in so far as it was derived from his power of

attorney, must be ascertained from the language of the power. Moreover, when something done by an agent who purports to act under such a written authority is challenged as an act beyond the limits of that authority, it is necessary that the person relying upon the validity of the act should show

> that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms, or by necessary implication. *Bryant* v. *La Banque du Peuple* (1).

In terms, the instrument before us gives no power to endorse. It gives a power to collect. It may be, as I have said, that cases might arise in which endorsement might be necessarily incidental to collection. Although the decision in this case rests upon other grounds, and what I am about to say forms no part of those grounds, I think it advisable to observe that the power to collect cannot imply, least of all imply with such coercive force as to constitute a "necessary implication," a general authority to endorse such cheques in the name of the principals; nor can it imply in the sense mentioned, that is to say, necessarily, the authority to endorse for the purpose of depositing the cheque in, or of directing the bank to receive the cheque, or its proceeds, for the credit of an account which the agent uses for depositing and disbursing indifferently his own funds with the funds of his principals.

Actual authority, it is true, might be evidenced by course of dealing, but, where the authority is expressed in writing, parties relying upon a modification of that writing by reason of a course of dealing, as establishing a wider authority than can be found in the writing, have a peculiarly difficult task, especially where the principal is an incorporated company. Actual authority, whether proved by a written document or established by evidence of a course of dealing, means authority derived from the actual assent of the principal; and, when the evidence is of this last mentioned character, it must show, where the principal is an incorporated company, that the company has assented in fact to the possession and exercise of such authority by the agent; and such assent can be operative only if given through the officials or the body which by its constitution are, or is, competent to constitute such assent (*Gresham* v.

(1) [1893] A.C. 170, at 177.

1934

NORWICH UNION FIRE INS. SOC. LTD. v. LA BANQUE CANADIENNE NATIONALE.

Duff C.J.

Bank of Montreal (1)); and, where authority is already defined by a written instrument, is competent to enter into a binding agreement with the agent for altering the terms and effect of that instrument. Moreover, it must be proved that such assent includes the very transaction, or transactions of the very kind as that, concerning the validity of which the controversy arises.

In the hypothetical case already outlined, if the agent's authority to endorse the cheque and deliver it to the bank for deposit in his personal account were alleged to rest upon evidence supplied by a course of dealing, it would be incumbent on the party alleging the existence of the authority to establish that such course of dealing was inconsistent with the absence of such authority. It would not, for example, be sufficient for this purpose to show that the agent was in the habit of transmitting premiums received by him through cheques drawn in his own name upon a bank account. Assuming that assent to such a procedure were brought home to an official or a body competent to bind the company, as above mentioned, there would still remain a further difficulty. The fact that his principals received payment by cheque drawn on a bank account would not necessarily involve the assumption that the account was an account in which the agent mixed his personal moneys with the moneys of his principal, or an account other than one used exclusively for the purpose of depositing and paying to his principal the moneys of his principal.

Let us, then, consider the position of the bank with reference to the actual authority of the agent. The point is very clearly covered by the *Bills of Exchange Act,* which is in these words,

> 51. A signature by procuration operates as a notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.

It is unnecessary, therefore, to resort to more general principles of law. The bank, in the supposititious case, would be bound to know, and would be held to have accepted these documents from the agent with a knowledge of his actual authority; with a knowledge, that is to say, of the authority which the agent possessed as between him and his own principal by virtue of the principals' actual assent.

(1) [1930] A.C. 659.

In such a case, where the person dealing with the agent has knowledge, or is deemed in law to have knowledge of the limits of that assent, we are not concerned with ostensible authority, or with authority by "holding out," or by estoppel. It must be distinctly understood that I am expressing no opinion upon the effect of the application of these principles to the concrete facts in this case.

I have felt it necessary to say this, because there are some things in the judgments in the courts below to which, if I clearly understand them, I should, with great respect, have some hesitation in giving my adherence; and because these observations are directed to topics of commercial and mercantile law, the rules of which affect the great mass of people carrying on business in their every day transactions.

I have, nevertheless, been forced to the conclusion that the appellants are not entitled to succeed on the case advanced by them at the trial, in the Court of King's Bench, and, indeed, here. I shall not elaborate the reasons; the specific rules of the common law under the heading of "conversion" are not, I am satisfied, specifically in force in the province of Quebec under the civil code. I add that qualification, not because of any particular exception in my mind at present, but because in Quebec as in other parts of Canada, there are very considerable fields of law governed by Dominion statutes, or outside the provincial domain, and I wish to avoid pre-judging any question which might arise in respect of transactions in those fields.

Notwithstanding the wide power of amendment vested in us, this is not, I think, a case in which that power could be advantageously used. We could not permit, on the record as it stands, a claim to be advanced on the basis which I have indicated above; and, rather than direct or give the appellants an opportunity to make an amendment to their claim, and to proceed to a new trial, under the onerous terms in which alone that indulgence could be granted, it is better, I think, that the appeal should be dismissed.

There is one further observation which it is desirable, perhaps, to make. It would be a mistake to treat cheques dealt with by a bank, as in the hypothetical case, as pieces of paper simply. A cheque drawn upon a bank in possession of funds out of which it owes a duty to the drawer to

1934

NORWICH UNION FIRE INS. SOC. LTD. v. LA BANQUE CANADIENNE NATIONALE.

Duff C.J.

pay the cheque on presentation, which, moreover, will be paid on presentation, is not a mere piece of paper. The document in the hands of the payee has a value. In a practical business sense it is worth to him its face value, and, if it is wrongfully destroyed (as, for example, if the pay cheque of a government servant is destroyed by the wrongful act of a third person), he may suffer substantial loss in respect of which he has a remedy under Art. 1053 C.C. If the principles of the common law were applicable, the principal could, in the hypothetical case, recover immediately from the bank the face value of the cheque.

Art. 1053 C.C., however, does not, apparently, embrace within its ambit the specific doctrines of "conversion" as understood by common lawyers; and, assuming the appellants might, on a case aptly framed and presented, be entitled to recover some substantial sum by way of damages against the bank, still, for the purpose of determining damages, other considerations would come into play, such, for example, as the value of the appellants' rights against the municipality of Chicoutimi.

The appeal should be dismissed with costs.

The judgment of Rinfret and Crocket JJ. was delivered by

RINFRET J.—I agree with my Lord the Chief Justice that the appellant cannot succeed.

In the case bearing appeal no. 406, the appellant revendicates a cheque drawn by the city of Chicoutimi on the bank respondent. The city countermanded payment of that cheque. The bank had no longer any authority to pay it and owed no duty to anybody in respect of the cheque (*Bills of Exchange Act*, s. 167).

Assuming, but not admitting, the appellant had, under the circumstances, a right of revendication (see Code of Civil Procedure, art. 946, 2nd parag.), it had no title to the amount of the cheque. In fact, its avowed intention was to get the cheque from the bank to remit or tender it back to the city. That makes it clear that the value in controversy is insufficient to bring the appeal within the jurisdiction of this Court. The appeal must be quashed with costs.

In the case bearing appeal no. 407, the cheques were issued by the city of Chicoutimi to the order of the appel-

lant and given to one Vezina, who was the mayor of the city. They were for premiums on insurance policies against risks under the *Workmen's Compensation Act*, although they were handed over to Vezina before the premiums were due.

Vezina endorsed the cheques in the appellant's name and deposited them in his own account with the respondent bank. He failed to remit to the appellant the amounts of the several cheques and the appellant now claims these amounts from the bank.

The trial judge held that,

under the circumstances disclosed by the proof, the authority vested in Vezina * * * included the right to endorse cheques for the purpose of making the collection.

On that ground, amongst others, he dismissed the appellant's action.

In the Court of King's Bench, two of the judges were for confirming this finding purely and simply. The third one (Létourneau J.—forming the majority) arrived in effect at the same conclusion. The finding is based, as I understand it, not particularly on the interpretation of the contract between Vezina and the appellant, but on the weight of all the circumstances established in evidence. While I feel that due consideration would have to be given to the concurrent judgments, I fully appreciate the importance of the observations of the Chief Justice on that point and, like him, I think it is sufficient to say that the appeal fails " on the case advanced by the (insurance company) at the trial."

It should be emphasized that actions in conversion are unknown to the law of Quebec (*Corporation Agencies Limited* v. *Home Bank of Canada* (1)). It follows that most of the English cases relied on by the appellant have no application here.

Primarily, the question whether these cheques were properly paid by the bank, is a matter between the bank and the city. They were the city's cheques, and the moneys out of which they were paid were the city's moneys. The main question is whether the bank had the right to charge the city's account with these cheques.

Vézina was a broker, that is to say he

exercised the trade and calling of negotiating between parties * * * lawful (insurance) transactions.

(1) [1925] S.C.R. 706, 722.

1934

NORWICH UNION FIRE INS. SOC. LTD. v. LA BANQUE CANADIENNE NATIONALE.

Rinfret J.

He may have been the mandatory of both parties and have bound both the city and the insurance company by his acts in the business for which he was engaged by them (Art. 1735 C.C.).

But, be that as it may, the cheques delivered to Vézina did not, of themselves, give any right of action to the insurance company against the bank. They did not operate as an assignment of funds in the hands of the bank available for the payment thereof (*Bills of Exchange Act*, ss. 127, 165). Until the cheques were accepted, the bank owed exclusively to its customer the duty of paying them.

The consequences would be that, even assuming Vézina received the cheques as agent of the insurance company, the mere giving of the cheques to him did not operate as a payment to the company. The cheques would become payments only in the event of their being ultimately honoured by the bank.

In fact, the cheques never reached the insurance company itself; and, at all events, if it be true, as contended by the company, that Vézina had no power to endorse and cash the cheques, the company has never been paid. The insurance company is bound by the signature of Vézina only if Vézina "in so signing was acting within the actual limits of his authority" (*Bills of Exchange Act*, s. 51). If he was, that is the end of the appellant's rights, if any, against the bank. If he was not, Vezina's signature is inoperative (s. 49), and the cheques, now in the hands of the city, will be no answer to the appellant's claim or action against the city for the insurance premiums due by the latter. In such case, the bank paid to the wrong party.

But it was not the appellant's funds that the bank appropriated towards the payment so made. It was the city's funds. And the matter resolves itself into one of accounting between the bank and the city.

As for the appellant, none of its funds have disappeared. Certain cheques, which gave the appellant no direct right against the bank, are alleged to have been diverted on their way to the appellant. The respondent's complicity was denied by both courts below. Its good faith, on the facts (as distinguished from any question of constructive notice), was acknowledged in both judgments.

The appellant might have a claim for certain damages against the respondent, on the ground that, through the latter's negligence, it deprived the appellant of the advantage resulting from the possession of the cheques. But I am in entire agreement with my Lord the Chief Justice that, clearly, the appellant has not the right, which it has attempted to assert, of securing the payment of the amounts represented by the cheques under the guise of a claim for damages, if it still retains its full recourse for the premiums against the city of Chicoutimi. Such however would be the situation if, as the appellant contends, Vezina's endorsements were unauthorized and, consequently, null and void. (*Bills of Exchange Act*, ss. 49, 139, 166.) Under those circumstances, the appellant's rights against the city of Chicoutimi are still alive and its original cause of action for the premiums is unaffected.

It follows that the appellant's loss, if any, is not the loss it has claimed in the premises and in respect of which the whole trial has been exclusively conducted.

The respondent has a very clear interest in insisting that it should be called upon to account for the impugned cheques only towards the city of Chicoutimi, out of whose funds the cheques were paid. As between the bank and the city, there may be reasons why the city is precluded from disputing Vézina's authority to cash the cheques and the bank's right to charge them to the city's account. On all those questions, the real debate is between the bank and its customer, not with the appellant.

The action as brought could not be maintained and the appeal must be dismissed with costs.

CANNON J.—In the revendication case (no. 406) I agree with the Chief Justice that the appeal must be quashed with costs for lack of jurisdiction.

In the second case, however, I would dismiss the appeal with costs on different grounds.

Vézina had the right to collect the premiums, grant discharges and remit the net balance. Mr. M. Jack who handled the Workmen's Compensation business and Mr. Paul, the assistant manager of the appellant, testified that ever since Vézina had been handling their business in Chicoutimi, they never looked to their assured directly for the payment of premiums, but left it entirely to Vezina.

1934

NORWICH UNION FIRE INS. SOC. LTD. v. LA BANQUE CANADIENNE NATIONALE

Cannon J.

I, therefore, agree with the learned trial judge and the Chief Justice of Quebec that, under the circumstances disclosed by the proof, the authority vested in Vézina to collect premiums due to the plaintiff and grant discharges included the right to endorse cheques for the purpose of making the collection of his commission and of the moneys to be remitted to the plaintiff sixty days after the issue of the policies or when the amount due for workmen's compensation premiums would be finally adjusted. When the cheques in question issued, no premiums were actually due by the city of Chicoutimi to the plaintiff, but Vézina secured payments in advance, for his own accommodation and convenience.

We, therefore, have in this case, at least, for the locality with which we are concerned, an agent having possession of commercial paper belonging to his principal with general authority to indorse such instruments in the course of transacting the business of the principal and for his benefit. If the agent misuse such authority by applying the paper so indorsed to his own private purposes his dealing with it is from beginning to end a violation of his principal's rights; but third parties taking the paper *from him with no knowledge or suspicion of his breach of duty and for value acquire nevertheless an indefeasible title even as against the principal.* This was expressly decided, if not elsewhere, at least in *The Bank of Bengal* v. *McLeod* (1), and *Bryant Powis & Bryant* v. *Quebec Bank* (2). A passage in Lord Brougham's judgment in the first mentioned case which has often been cited appears to be applicable to the circumstances of this case:

"But it is further said, that even if the expression be read as only amounting to this, the endorsement is to be only made for the benefit *of the principal, and not for the purposes of the agent.* We do not see how this very materially affects the case, for *it only refers to the use to be made of the funds obtained from the endorsement, not to the power;* it relates to the purpose of the execution, not to the *limits of the power* itself; and though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power."

The above quotation is from the judgment of this Court *re Ross* v. *Chandler* (1).

The respondent had not insured the fidelity of Vézina towards his employers, nor were they bound to see that he would remit regularly the moneys which he owed them after deducting his commission from the premiums which he was alone authorized and in duty bound to collect from their clients in that locality.

(1) (1849) 7 Moore P.C. 35. (2) [1893] A.C. 170.
(1) (1911) 45 S.C.R. 127, at 150-151.

1934

NORWICH UNION FIRE INS. SOC. LTD. v. LA BANQUE CANADIENNE NATIONALE

Cannon J.

If the endorsements are irregular and ineffective, as contended by the appellant, why not claim against its debtor, the city of Chicoutimi, unless the appellant is afraid to be met with arguments and objections from the city that would prove and establish the validity of the endorsements?

The good faith of the bank is not questioned; they gave value for these cheques and the appellant is the victim of its own imprudence in trusting perhaps too blindly to the honesty and good financial standing of Vézina. They have no action based on the cheques as payee against the bank. They cannot, under the guise of an action in damages for negligence, succeed under the circumstances disclosed.

I, therefore, agree with the Chief Justice that this appeal fails and must be dismissed with costs.

Appeal (Case No. 406) quashed with costs.

Appeal (Case No. 407) dismissed with costs.

Solicitors for the appellant: *Hackett, Mulvena, Foster, Hackett & Hannay.*

Solicitors for the respondent: *Gérin-Lajoie & Beaupré.*

J. G. WU (ALIAS WU CHUCK).....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1934

*Apr. 30.
*June 6.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Wounding with intent to commit murder—Sufficiency of charge to jury—Criminal intent—Provocation—Self defence—Defence of alibi—Inconsistency with other defences—Legal consequences from story of complainant being different from that of witnesses.

On the trial for wounding with intent to commit murder, the complainant stated that at about a quarter to 6 o'clock on the evening of November 6, 1932, after turning south on Jackson avenue from Hastings street, in Vancouver, he turned and saw accused following him. He then walked faster but as accused was catching up to him he ran diagonally across the road in a southeasterly direction. When he reached the curb on the east side of the road the accused caught up to him and fired a shot at him with a revolver. Accused then took $90 from his pocket and after firing two more shots at him ran across a vacant lot in a northeasterly direction, and on emerging on Hastings street he was recognized by two witnesses with a revolver in his hand. Two other Crown witnesses, Irwin and Brodner, were standing on

*PRESENT:—Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

1934

WU
v.
THE KING.

the southwest corner of Hastings street and Jackson avenue, when they saw two Chinamen run from the northwest corner of Pender street and Jackson avenue (Pender street being one street south and parallel with Hastings street) across Jackson avenue in a northeasterly direction, followed by a third Chinaman who was calling to them in Chinese and gesticulating with his arms, and when the two men reached the curb on the east side of Jackson avenue the rearmost of the two men turned and fired a shot at the man following, who fell. He then "paused," stooped down and fired two more shots at him and he and his companion then ran northeasterly across the vacant lot. The accused attempted to prove an *alibi* by several Chinese witnesses who swore he was in Victoria from the 2nd until the 12th of November, 1932. The accused was convicted. On appeal the conviction of McDonald J. was affirmed by an equal division of the Court. Counsel for the accused contended before this Court that the trial judge should have instructed the jury that the accused was entitled to have them consider any alternative defence the supporting facts of which appear in the record, and that, as the record shewed that the complainant was chasing the accused, waving his arms and shouting in Oriental, such conduct was sufficient, if the jury believed the evidence, to bring into play the sections of the Criminal Code relating to provocation and self defence. He contended that the failure of the trial judge to adequately instruct the jury on the issue of self defence, was a misdirection which entitled the accused to a new trial. Counsel for the accused also contended that the trial judge failed to properly instruct the jury on the question of intent, and erred in his charge in not explicitly and fully instructing the jury as to the legal consequences flowing from the two contradictory stories, in respect to the conduct of the parties prior to the shooting, as related by the complainant on one side, and Irwin and Bodner on the other.

Held that, under the circumstances of this case, there was no duty on the trial judge to instruct the jury on the issues of provocation or self defence. If it were material to the accused to prove that the words shouted in Oriental by the complainant amounted to provocation the onus was upon him to prove what the words were. In any event provocation, which would reduce murder to manslaughter, is not a defence to the charge as laid. Shooting in self defence would constitute a valid defence provided the accused brings himself within sections 53 and 54 of the Code. It is justifiable to repel an unprovoked attack if the force used by the accused is not meant to cause death or grievous bodily harm and is not more than is necessary for the purpose of self defence. It is justified, even if it does cause death or grievous bodily harm, if it is done under reasonable apprehension of death or grievous bodily harm to himself, and if he believes, on reasonable grounds, that it is necessary for his own preservation. There is no evidence in the record from which a jury could reasonably infer that the accused when he shot the complainant did so under a reasonable apprehension of death or bodily harm to himself, or that he reasonably believed that he could not otherwise save himself from bodily injury. Such evidence is not in the record. The rule, therefore, that an accused person at trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record.

Even then the rule is not without exception, and one exception is, that it has no application where the accused by his defence (alibi) which he sets up at the trial, has negatived the alternative defence for which he afterwards seeks a new trial.

The trial judge instructed the jury as follows: "If you believe that the accused did what the witnesses say was done by the man who assailed the complainant then he would be guilty of the charge laid." Counsel for the accused contended that there was misdirection, because the trial judge's statement meant that the accused would be guilty of the crime charged irrespective of his intent, if the jury accepted the evidence of Irwin and Bodner that the complainant was pursuing the other two.

Held that the language used by the trial judge is not open to the meaning sought to be put upon it. It was intended to mean, and would be understood by the jury to mean, that if the accused shot and wounded the complainant, with a revolver, in the manner described by the three persons who witnessed the shooting, the accused would be guilty of wounding with intent to murder; or, in other words, if the shooting took place in the manner detailed by the witnesses, the intent was obvious and would be implied. More than that if, under the circumstances of this case, the jury had, without any explanation from the accused as to his intent, reached the conclusion that intent to murder was not established, the verdict would have been perverse.

Held also that, as to the inconsistencies between the evidence of the witnesses, Irwin and Bodner, and that of the complainant as to the actions of the parties before the shooting took place, it was for the jury to consider those inconsistencies if they thought they were material; and the jury must have given them full consideration and rejected them because they did not throw any light upon the shooting or the intent of the accused.

Judgment of the Court of Appeal (48 B.C. Rep. 24) aff.

APPEAL by the accused from the judgment of the Court of Appeal for British Columbia (1), dismissing his appeal on equal division of the Court from his conviction by D. A. McDonald J., and a jury, for murder.

The material facts of the case and the questions at issue are fully stated in the head-note and in the judgment now reported.

W. B. Farris K.C. for the appellant.

J. A. Ritchie K.C. for the respondent.

The judgment of the Court was delivered by

LAMONT J.—This is an appeal from the decision of the Court of Appeal for British Columbia (1) affirming, by an equal division of the court, the conviction of the accused,

(1) (1933) 48 B.C. Rep. 24; [1933] 3 W.W.R. 651.

1934

WU
v.
THE KING.

Lamont J.

J. G. Wu (alias Wu Chuck), in the Supreme Court of British Columbia, following the verdict of the jury.

The accused was charged:

> That at the city of Vancouver in the county and province aforesaid, on the sixth day of November in the year of our Lord one thousand nine hundred and thirty-two, J. G. Wu, alias Wu Chuck, unlawfully did wound Wong Toy with intent thereby then and there to murder the said Wong Toy, * * *

The charge raised two points for consideration, first as to the wounding and second as to the intent.

That Wong Toy was wounded at the time and place stated in the indictment is established. He was found by police constable Carstairs, a little before 6 p.m. on November 6, 1932, lying in a pool of blood about fifty feet north of the northeast corner of Jackson avenue and Pender street with three bullet wounds in his body. The manner in which he received his wounds was testified to by three witnesses. First there was Wong Toy himself. He is a Chinese labour contractor and his story is: that, about 5.45 p.m., on November 6, 1932, he was walking along the west side of Jackson avenue in the city of Vancouver going towards Pender street when he observed that the accused was following him. He then began to walk faster and, looking back over his shoulder, saw that the accused had also accelerated his speed. He then began to run, heading southeast across Jackson avenue, and the accused chased after him and reached the sidewalk on the east side of Jackson avenue about the time he (Wong Toy) reached it; that the accused drew a revolver, pointed it at him and fired. The shot struck him in the leg about four inches above the knee and caused him to drop to the sidewalk; that, as he was sitting on the sidewalk leaning on his arm with his hand on the ground, the accused came up close, stooped down and took $90 out of his pocket; that he (Wong Toy) then shouted "Hold-up, hold-up" and that the accused fired two more shots at him, hitting him on the right loin near the point of the thigh and also on the right shoulder breaking his collar-bone; that the accused then ran northeast across a vacant lot lying just east of Ferrera Court, which building is on the corner of Jackson avenue and East Hastings street. Wong Toy was taken to the hospital and found to be very severely wounded. He positively identified the accused as his assailant and said he had known him more than two years.

Two other persons were eye witnesses of the shooting. They were Elmer G. Irwin and James Bodner. They testified that they were standing on the southwest corner of Jackson avenue and Hastings street and that they had a clear view of Jackson avenue. They say they saw two men running in a northeasterly direction angling across Jackson avenue, followed by a third who was running after them and waving his arms and shouting in Oriental. Irwin's story is that as they approached the sidewalk on the east side of Jackson avenue, the rearmost of the two men turned and fired at the third man who was within a few feet of him; that after the shot was fired the one who did the shooting paused and then "he kind of stooped a little bit and fired two other shots." He says that he and Bodner were more than half a block from where the shooting took place (the plan drawn to scale shews that they were about 250 feet away); that the night was "kind of dark, a little foggy, just getting dusk." He was asked if the man who did the shooting or his companion had touched the body of the victim, and he replied "I don't think they touched, I didn't see it anyway." After the shooting Irwin says he and Bodner went to where the victim was lying but they did not know him, neither had they recognized the man who did the shooting. This man, after firing the third shot, turned and ran in the direction of Ferrera Court.

Bodner testified that when they first saw the third man pursuing the other two he was a few yards behind them, and, that when the two in advance reached the curb of the sidewalk, the pursuer was almost up to them; that one of the pursued turned and shot the pursuer and brought him to his knees; that, after firing the first shot, an interval of about one minute elapsed when the man who had fired the shot stepped up close to the victim and fired two more shots at him. Bodner denied that the shooter had touched the victim with his hands. After firing the third shot he says he turned and ran toward the back of Ferrera Court. The night was about half light and a little foggy.

Four other persons were in the neighbourhood at the time of the shooting and they were called as witnesses by counsel for the Crown. Two of them were Chinese, Wong Lee Fong and Gong Fay. At the time of the shooting

1934
WU
v.
THE KING.
Lamont J.

these two were walking westerly along Hastings street when they heard a shot fired, and then two more, and, shortly afterwards, they saw the accused—whom they both had known for between two and three years—emerging from between the two sign-boards on the vacant lot just east of Ferrera Court on Hastings street. When they first saw him he had a revolver in his hand and was running, but he put the revolver in his pocket when he came to a puddle of water lying between the two sign-boards, then, plunging through the water, he ran across Hastings street about ten paces in front of them. They then went down Jackson avenue to where Wong Toy was lying.

The other two witnesses were brothers, Jack Massey and Cyrus Massey. They were walking east on Hastings street near Ferrera Court when they heard the noise of three shots, but thought it was the bursting of fire-crackers. They say that about a second or so after they heard these explosions a man ran out from between the sign-boards on the vacant lot just east of Ferrera Court, and ran across Hastings street and then turned towards Princess street. Their attention was attracted when he plunged into the water between the sign-boards. Jack Massey did not attempt to identify the accused but his brother Cyrus did. The probative value of his identification was, however, greatly weakened by his admission that he did not see the accused's face but identified him by his size and, that, before the preliminary examination at the police station at which he identified the accused, a Chinaman had shewn him a photograph of the accused and told him that that was the man and asked him if he would recognize the man represented by the photograph as the man who ran across Hastings street on the occasion in question.

On the evening of November 6, after the shooting, an information was sworn out in Vancouver against the accused, but it is established that he went over to Victoria and, under the name of Mark Ark (a name by which he was not known in Vancouver), sailed for China on November 12th on the ss. *President Taft* (the first boat to sail from Victoria for China after November 6th). When he was asked by the immigration officer for his photograph for identification on his return, he told the officer that he was not returning to Canada. He was arrested in Hong

Kong on December 20th on a charge of attempted murder, and arrived back in Vancouver January 16th, 1933.

At the trial the only defence he set up was that, on November 6th, 1932, he was in Victoria, B.C., and not in Vancouver at all, and he brought a number of Chinese witnesses from Victoria to establish his alibi. Two of them swore that they saw the accused in Victoria on November 2, 1932, and every day thereafter until he sailed for China on the 12th. Another testified that he saw him in Victoria on November 3rd, and each subsequent day until the 12th. A fourth witness testified that he was present at a banquet given to the accused by his brother-in-law, N. G. Hong, on November 6th; that the banquet commenced around 5.30 p.m. and was all over by seven o'clock, when they went home. The accused did not give evidence at the trial.

The jury rejected the evidence as to the accused being in Victoria at the time of the shooting and found him guilty of the charge as laid. The trial judge sentenced him to imprisonment for life.

The accused appealed to the Court of Appeal but that court, by an equal division, affirmed the conviction. The accused now appeals to this Court.

The chief reasons put forward on behalf of the accused for the granting of a new trial are:

1. That the trial judge instructed the jury as follows:

> If you believe that the accused did what the witnesses say was done by the man who assailed the complainant then he would be guilty of the charge laid.

that this was a misdirection

(*a*) Because in effect it withdrew from the consideration of the jury the question of provocation and the issue of self-defence, which defence, it was contended, was still available to the accused notwithstanding that the jury rejected his alibi.

(*b*) that the statement meant that if the jury accepted the evidence of Irwin and Bodner that Wong Toy was the pursuer, that nevertheless, the accused would be guilty of the crime charged, irrespective of his intent.

2. That the trial judge failed to properly instruct the jury on the question of intent.

3. That the trial judge erred in his charge in not explicitly and fully instructing the jury as to the legal con-

1934

WU
v.
THE KING.

Lamont J.

sequences flowing from the two contradictory stories, in respect to the conduct of the parties prior to the shooting, as related by the complainant on one side, and Irwin and Bodner on the other.

1. (*a*) Counsel for the accused contended that the trial judge should have instructed the jury that the accused was entitled to have them consider any alternative defence the supporting facts of which appear in the record, and that, as the record shewed that the complainant was chasing the accused, waving his arms and shouting in Oriental, such conduct was sufficient, if the jury believed the evidence, to bring into play the sections of the Criminal Code relating to provocation and self defence. He contended that the failure of the trial judge to adequately instruct the jury on the issue of self defence, was a misdirection which entitled the accused to a new trial.

Counsel for the Crown pointed out that the trial judge had instructed the jury on the question of self defence and had read to them sections 53 and 54 of the Criminal Code which set out the law on the subject, and contended that such instruction was sufficient to enable the jury to pass upon the issue.

There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is, that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto. The only evidence appearing in the record upon which even an argument could be founded that the accused shot in self defence is that of Irwin and Bodner that, prior to the shooting, the complainant was running after the accused and his companion, waving his arms and shouting in Oriental. What he was saying we do not know. If it were material to the defence to prove that the words amounted to provocation, the onus was upon the accused to prove what the words were. On any event provocation,

which would reduce murder to manslaughter, is not a defence to the charge as laid. Shooting in self defence would constitute a valid defence provided the accused brings himself within sections 53 and 54 of the Criminal Code. It is justifiable to repel an unprovoked attack if the force used by the accused is not meant to cause death or grievous bodily harm and is not more than is necessary for the purpose of self defence. It is justified, even if it does cause death or grievous bodily harm, if it is done under reasonable apprehension of death or grievous bodily harm to himself, and if he believes, on reasonable grounds, that it is necessary for his own preservation. There is no evidence in the record from which a jury could reasonably infer that the accused when he shot the complainant did so under a reasonable apprehension of death or bodily harm to himself, or that he reasonably believed that he could not otherwise save himself from bodily injury. The rule, therefore, that an accused person at trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record. Even then the rule, in my opinion, is not without exception, and one exception is, that it has no application where the accused, by the defence which he sets up at the trial, has negatived the alternative defence for which he afterwards seeks a new trial.

The only defence which the accused set up at the trial was an alibi. In effect he said:

> I did not shoot the complainant as a result of provocation, neither did I shoot him in self defence. At the time of the shooting I was in Victoria and therefore I could not have shot either under provocation or in self defence.

It is quite true that the accused did not go into the witness box and swear that he was in Victoria at the time of the shooting, but that is the defence which was set up on his behalf, with his consent and acquiescence, and which he asked the court to accept, and, in my opinion, he is bound by it. The defence that the accused was in Victoria at the time of the shooting was not only inconsistent with, but it negatived the defence now sought to be set up. Under these circumstances I fail to see how any duty could rest on the trial judge to instruct the jury to consider an alternative defence which the accused, by the defence he did set up, declared had no foundation in fact.

1934

WU
v.
THE KING.

Lamont J.

In *Rex* v. *Philpot* (1), the Court of Criminal Appeals in England held that upon an application for a new trial the court would not entertain a case for the appellant inconsistent with the defence set up at the trial. At page 143, Lord Alverstone, Chief Justice, in giving the judgment of the court, said:—

> It would be a great danger if people could conduct cases on one line in the Court of first instance, and, when that was unsuccessful, conduct them on another line in the Court of Appeal. No case ought to be urged in this Court which is inconsistent with the case set up in the Court below.

and in *Rex* v. *Deane* (1), it was held, upon an appeal from a conviction, that

> the Court will not entertain a defence which was not, but which could have been, set up at the trial.

The accused did not at the trial claim that he shot in self defence. He could not have set up that defence without endangering everything he hoped to achieve by his alibi.

I am, therefore, of opinion that, under the circumstances of this case, there was no duty on the trial judge to instruct the jury on the issue of self defence. But, assuming such a duty to exist, the trial judge, by explaining to the jury the extent to which, and the circumstances under which, a person unlawfully assailed was justified in using force to defend himself, did, in my opinion, sufficiently instruct them to enable them to properly pass upon the issue.

1. (*b*) I entirely disagree with the meaning sought to be placed on the trial judge's statement that the accused would be guilty of the crime charged irrespective of his intent, if the jury accepted the evidence of Irwin and Bodner that Wong Toy was pursuing the other two. The judge's statement makes no reference as to which was the aggressor. The trial judge simply states that if they believe that the accused did what the witnesses say was done by the man who assailed the complainant, he would be guilty of the charge laid. It will be observed that he is referring there to what the witnesses said, not to what any one witness said. Now what did the witnesses say was done by the man who assailed the complainant? There were three witnesses who saw what the assailant did, and they all agree that he shot and wounded the complainant. That is what the as-

(1) (1912) 7 Cr. App. R. 140. (1) (1912) 7 Cr. App. R. 69.

sailant did. The complainant himself goes a little further and says that his assailant robbed him as well, but, as the accused is not charged with robbery, that phase of it does not seem to me to be material because the statement simply says that the accused would be guilty of the charge laid and the charge laid was wounding with intent to murder. The language used by the trial judge, in my opinion, is not open to the meaning sought to be put upon it. It means, and I am satisfied, was intended to mean, and would be understood by the jury to mean, that if the accused shot and wounded the complainant, with a revolver, in the manner described by the three persons who witnessed the shooting, the accused would be guilty of wounding with intent to murder; or, in other words, if the shooting took place in the manner detailed by the witnesses, the intent was obvious and would be implied. If, therefore, the trial judge was right in his law—that the wounding, under the circumstances, implied an intent to murder—he not only succinctly stated the law but placed it before the jury in a manner which enabled them to easily understand their duty in respect both to the facts and the law.

In *Rex* v. *Monkhouse* (1), the accused was charged with wounding with intent to murder, and Coleridge J. on the question of intent charged the jury as follows:—

> It is a general rule in criminal law and one founded on common sense that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol, which he knew to be loaded, to another's head and fire it off without intending to kill him; but even there the state of mind of the party is most material to be considered. For instance if such an act were done by a born idiot the intent to kill could not be inferred from the act. * * *
>
> Under such circumstances as these, where the act is unambiguous if the defendant was sober, I should have no difficulty in directing you that he had the intent to take away life, where death had ensued the crime would have been murder.

The same principle was laid down in *Rex* v. *Howlett* (1): In that case the prisoner was indicted for wounding John Allen, with a tin can, with intent to murder him. In summing up to the jury Baron Alderson, after pointing out that they would have to consider whether, in case death had ensued, the accused would have been guilty of murder, instructed them as follows:—

(1) (1849) 4 Cox C.C. 55. (1) (1836) 7 C. & P., 274.

1934

WU
v.
THE KING.

Lamont J.

When a deadly weapon, such as a knife, a sword, or gun is used, the intent of the party is manifest; but with an instrument such as the present (a tin can), you must consider, whether the mode in which it was used satisfactorily shews that the prisoner intended to inflict some serious or grievous bodily harm with it.

In the case at bar there could be no doubt that had death ensued from the shooting the accused must have been guilty of murder. Therefore, in view of these authorities, I am of opinion that the trial judge was quite right in instructing the jury that if they found that the accused wounded the complainant with a revolver in the manner described by the witnesses, his intent to murder was obvious and would be implied. This objection to the judge's charge therefore fails.

In addition to what I have already said on the question of intent, I would be prepared to go further and hold that if, under the circumstances of this case, the jury had, without any explanation from the accused as to his intent, reached the conclusion that intent to murder was not established, the verdict would be perverse. What were the circumstances? The accused had shot the complainant and brought him to his knees. The complainant was either kneeling on the ground or partially sitting on the sidewalk, leaning on his hands. The accused could see that he had no weapon in his hands, and the hospital authorities have established that he had no weapons on him. Having the complainant at his mercy, the accused makes a perceptible pause, then stoops down when close to the complainant and fires two more shots into him. What was the object of stooping? The complainant says to steal his money. The only other suggestion was (and that was by counsel for the accused) that he stooped for the purpose of getting a better shot, or a shot at him in front. The complainant was evidently facing the accused on his hands and knees, for all shots took effect in front, and it may be that the accused stooped so as to be able to shoot him in front with the last two shots. If that be the explanation of the stooping it only demonstrates that the intention of the accused was to murder him. If the stooping was to rob him he was equally guilty. As there was abundant evidence that the accused did the shooting, the jury, in my opinion, in the absence of any explanation of his intention

by the accused, were quite right in holding that the intent was sufficiently apparent to justify them in convicting the accused.

3. Counsel for the accused seemed to be of opinion that, where the counsel for the Crown calls witnesses who give inconsistent stories, he is under an obligation to in some way reconcile these stories, otherwise the jury should take the inconsistencies as shewing that the Crown has failed to establish the charge. In my opinion counsel for the Crown is under no such obligation. I have always understood that it was the duty of the Crown counsel to place before the court the evidence of those who were eye witnesses of the crime with which the accused was charged, whether they give evidence which is consistent with the commission of the crime by the accused or otherwise. I have always considered that counsel for the Crown was in the position of an officer of the court whose duty is to get at the truth irrespective of whether or not the evidence supports the Crown's case. And, when he has put in the evidence of the eye witnesses, he can leave it to the jury to say which of the witnesses they will believe and how much of the testimony of each they will accept.

The evidence of the witnesses, Irwin and Bodner, is inconsistent with that of the complainant as to the actions of the parties before the shooting took place, it was therefore for the jury to consider those inconsistencies if they thought they were material; and I have no doubt the jury gave them full consideration and rejected them because they did not throw any light upon the shooting or the intent of the accused.

Considering the charge of the trial judge as a whole and the evidence as it appears in the record I see no good reason for differing with the majority of the Court of Appeal. I would, therefore, affirm the conviction and dismiss the appeal.

Appeal dismissed.

1934

*May 15.
*June 6.

LA CITE DE QUEBEC (DEFENDANT).....APPELLANT;

AND

ALPHONSE BARIBEAU (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Notice of action—Municipal corporation—Negligence—Accident—Claim for damages—Notice given after the delay prescribed by statute—Exception clause providing valid excuse—Irresistible force (force majeure) or analogous reasons—Knowledge of the accident by officers or employees of the municipality—Section 535 of the Charter of the City of Quebec, 19 Geo. V, c. 95.

The respondent's action for bodily injuries, sustained by him on the 28th of August, 1931, while giving a hand to the appellant city's employees, on their invitation, was maintained by the trial judge, which judgment was affirmed by the appellate court. Counsel for the appellant before this Court, in view of these unanimous judgments on question of facts, admitted the appellant city's liability; and the controversy was limited to the validity of the notice of action which the respondent was bound to give to the city prior to the institution of his action. The need of such notice is prescribed by article 535 of the Charter of the City of Quebec, the important part of it being as follows: "Notwithstanding any law to the contrary, no right of action shall exist against the city for damages resulting from bodily injury, caused by an accident * * * unless, within thirty days from the date of such accident or damages * * * a written notice has been received by the city, containing the particulars of the damages sustained. * * * The default of such notice, however, shall not deprive the victims of an accident of their right of action, if they prove that they were prevented from giving such notice by irresistible force (force majeure), or for any other similar (analogous) reasons deemed valid by the judge of the Court." The appellant city received a written notice of action, contained in a letter from the respondent's solicitors, dated 9th of January, 1932, four months and ten days after the date of the accident; but the respondent alleged that he had been prevented from giving the notice by irresistible force or by circumstances over which he had no control amounting to irresistible force, or an analogous cause. The principal facts, more fully stated in the judgment, are as follows: Immediately after the accident, the respondent was conveyed to an hospital, where he remained until the 6th of September, 1931; he was unconscious, delirious and apparently suffering from mental trouble, so that he was removed to a clinic hospital for mental diseases where he remained, until the 30th of September; he left the hospital notwithstanding the adverse opinion of the attending physicians; but he returned to the hospital on two different occasions, from the 15th to the 20th of November and from the 14th to the 21st of December; during the intervals, he was under the care of physicians; one doctor testified that, before the beginning of the year 1932, the re-

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

spondent was not able to attend properly to his business; the respondent himself declared that he had not a complete knowledge of what he was doing during those periods.

Held, affirming the judgment of the Court of King's Bench (Q.R. 55 K.B. 255), that, under the circumstances of this case, the respondent had not been able to give notice of action to the appellant sooner than he did and that his case was falling within the exception clause provided by art. 535 of the appellant's charter. The condition of the respondent's mental powers constituted, if not a case of irresistible force (force majeure) in the strict sense of the word, at least precisely one of the analogous causes (raisons analogues) which the legislature intended to foresee and which entitled the trial judge to hold that it was a valid excuse for not having given notice of action within the delay provided by Art. 535.

Held also that the knowledge, by some officers or employees of a municipal corporation, of the circumstances of an accident or of a claim made by the injured party does not exempt the latter from giving notice of action in the manner and within the delays prescribed by the civil code or by statute (*Jobin* v. *City of Thetford Mines,* [1925] S.C.R. 686 cited); though such knowledge may have some weight in deciding whether the details or particulars contained in a notice given within the delays are sufficient.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Gelly J., and maintaining the respondent's action for damages resulting from an accident.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

Ernest Lapointe K.C. and *J. E. Chapleau K.C.* for the appellant.

R. R. Alleyn K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET, J.—L'intimé a été, le 28 août 1931, la victime d'un accident pour lequel il a poursuivi l'appelante et lui a réclamé des dommages-intérêts.

L'appelante a été trouvée responsable de cet accident par la Cour Supérieure et par la Cour du Banc du Roi (1). Sur cette question, les juges furent unanimes. Aussi, devant cette cour, l'appelante a-t-elle admis qu'elle ne pouvait espérer faire infirmer ces jugements concordants; et

(1) (1933) Q.R. 55 K.B. 255.

1934

LA CITÉ DE QUÉBEC v. BARIBEAU.

Rinfret J.

son argumentation s'est-elle limitée à la validité de l'avis donné par l'intimé avant l'institution de l'action.

La loi particulière qui s'applique à la cité de Québec exige un avis spécial avant d'intenter certaines poursuites contre la cité. A l'époque de l'accident, cette loi (c. 95 du statut de Québec, 19 Geo. V, 1929) se lisait comme suit:

535. Nonobstant toute loi à ce contraire, nul droit d'action n'existe contre la cité pour dommages-intérêts résultant de blessures corporelles infligées par suite d'un accident, ou pour dommages à la propriété mobilière ou immobilière, à moins que, dans les trente jours de tel accident ou de tels dommages et, dans le cas d'accident et de dommages provenant d'une chute sur un trottoir ou sur la chaussée, à moins que, dans les quinze jours de tel accident et de tels dommages, un avis écrit n'ait été reçu par la cité, mentionnant en détail les dommages soufferts, indiquant les nom, prénoms, occupation et adresse de la personne qui les a subis, donnant la cause de ces dommages et précisant l'endroit où ils sont arrivés.

Aucune action en dommages-intérêts ou en indemnité ne peut être intentée contre la cité, avant l'expiration de trente jours de la date de la réception de l'avis ci-dessus.

Le défaut d'avis ci-dessus ne prive pas, cependant, les victimes d'accidents de leur droit d'action, si elles prouvent qu'elles ont été empêchées de donner cet avis par force majeure ou pour d'autres raisons analogues jugées valables par le juge ou le tribunal.

Il s'agit de savoir si l'intimé s'est conformé à cet article avant d'intenter son action contre la cité de Québec.

En effet, l'avis qui est exigé ne constitue pas une simple mesure de procédure. Il fait partie de la formation même du droit d'action contre la cité. La législature, comme elle en avait le droit, a envisagé l'avis comme élément additionnel du droit d'action lui-même, et elle l'a exigé "nonobstant toute loi à ce contraire". Dès 1907, la Cour du Banc du Roi, dans la cause de *Montreal Street Railway* v. *Patenaude* (1), pouvait affirmer:

Il est maintenant de jurisprudence que l'action ne peut être portée que si l'avis a été donné au préalable, tel que prescrit, et que sans cet avis le droit de réclamer en justice n'existe pas.

Cet avis est une condition préalable et essentielle à l'existence du droit d'action. Il n'y a pas là une question de prescription. La prescription du droit d'action contre la cité est couverte par les articles 536 et 538 de la charte, qui la fixent à six mois à compter du jour où le droit d'action a pris naissance, "nonobstant tout article ou disposition de la loi à ce contraire". En vertu de l'article 535, ce n'est pas le droit d'action qui se perd par prescription, si l'avis requis

(1) (1907) Q.R. 16 K.B. 541, at 543.

n'est pas donné dans les quinze ou les trente jours (suivant le cas) fixés par l'article; c'est le droit d'action qui ne prend pas naissance, à moins que l'avis ne soit donné, sauf dans les cas d'exception qui y sont prévus. Le droit d'action n'est pas perdu par défaut d'agir; au contraire, il ne prend pas naissance à moins que la victime n'agisse; il n'existe pas si l'avis n'est pas donné au préalable, tel que prescrit.

L'article 535 ajoute que le droit d'action n'existe pas "à moins qu'un avis écrit n'ait été reçu par la cité". Cet avis doit contenir certains détails et fournir certaines précisions sur l'accident. Il n'y a pas lieu de s'y arrêter en l'espèce, car ici la cité ne se plaint pas de la suffisance de l'avis. Mais ce sur quoi il faut insister, c'est que la cité a droit de recevoir "un avis écrit"; et cet avis doit lui être communiqué régulièrement, de la même façon que tout autre avis officiel est communiqué à la corporation. Il ne s'agit pas, en effet, d'une simple formalité sans importance, dont le réclamant peut être dispensé ou que l'on peut remplacer par une autre formalité quelconque que le tribunal jugerait suffisante pour en tenir lieu.

Cette exigence de la loi, par exemple, ne peut être mise de côté sous prétexte d'absence de préjudice. Le texte de l'article 535 ne permet pas d'y introduire ce correctif (*Carmichael* v. *City of Edmonton* (1). En particulier, la connaissance de l'accident que certains employés ou certains officiers de la corporation ont pu acquérir individuellement ne peut remplacer l'avis exigé par la charte (*Cité de Montréal* v. *Bradley* (2). L'absence de préjudice ou la connaissance des faits par les employés ou les officiers de la cité ne peut être d'un certain poids que dans la question de savoir si un avis qui a été reçu dans les délais contient les détails ou les indications suffisantes.

C'est dans ce sens qu'il faut entendre le passage souvent cité du jugement de cette cour dans la cause de *Jobin* v. *City of Thetford Mines* (3):

> With the view of the Court of King's Bench that the notice given by the plaintiff was a sufficient compliance with the statute as to the damages claimed for injuries to the mill and such things as may reasonably be considered as incidental or appurtenant thereto, we are in accord. The legislature did not intend that there should be a detailed account of the items of the damage. The purpose of the notice was to give the

(1) [1933] S.C.R. 650. (2) [1927] S.C.R. 279, at 283.
(3) [1925] S.C.R. 686, at 687.

1934

LA CITÉ DE QUÉBEC v. BARIBEAU.

Rinfret J.

municipal corporation such knowledge of the claim in respect of which it was given as would enable it to make the necessary inquiries to ascertain, within a reasonable time after the claim arose, the basis of it and the material facts and circumstances affecting the corporation's liability. The notice, therefore, was properly treated as sufficient to support a claim for liability for damages caused by the flooding to the mill property itself and to its appurtenances.

Dans cette cause, la loi exigeait de la victime un avis "containing the particulars of his claim". Un avis avait été donné; et il s'agissait seulement de savoir s'il contenait des indications suffisantes pour satisfaire les exigences du statut. Mais ce passage du jugement de M. le juge-en-chef Anglin, parlant au nom de la cour, n'a jamais eu l'intention de suggérer que si les officiers de la corporation municipale acquéraient la connaissance d'un accident ou d'une réclamation, par eux-mêmes et en dehors de tout avis tel que requis par la loi, les tribunaux seraient autorisés à traiter la connaissance ainsi acquise comme dispensant la victime de donner l'avis en la façon et dans les délais prescrits.

Nous avons cru nécessaire de faire les observations qui précèdent—et qui découlent, suivant nous, de l'interprétation stricte du texte de l'article 535—à cause de certains arguments qui nous ont été adressés par l'intimé.

Après avoir ainsi précisé la situation, il nous reste maintenant à faire à l'espèce qui nous est soumise l'application de l'article 535 tel que nous venons de l'interpréter.

L'accident a eu lieu le 28 août 1931. La cité en a reçu un avis écrit par une lettre des procureurs de l'intimé en date du 9 janvier 1932. L'appelante ne se plaint pas de la suffisance des détails ou des informations contenus dans cette lettre; mais elle soumet que cet avis est tardif. En effet, il a été adressé exactement quatre mois et douze jours après l'accident. Il est donc indiscutable que l'avis n'a pas été reçu dans les délais prescrits; et le résultat doit être que le droit d'action de l'intimé contre la cité n'existe pas, à moins qu'il ne tombe dans l'exception prévue au troisième paragraphe de l'article.

Sans doute l'intimé fait remarquer que la cité n'a pas expressément invoqué ce moyen. Elle s'est contentée, dans sa plaidoirie écrite, d'admettre qu'elle avait reçu l'avis et d'ajouter: "lequel parle par lui-même". Mais si, comme nous l'avons dit, l'avis est un élément de la formation du

droit d'action, c'est au poursuivant qu'il incombe d'invoquer dans son action la réception de cet avis par la cité. Il doit nécessairement l'alléguer et la prouver. S'il est dispensé de l'envoi de l'avis, c'est également à lui qu'il importe d'alléguer et de prouver la force majeure, ou l'existence d'autres raisons analogues qui le font tomber dans l'exception.

Dans le cas actuel, en tenant compte des plaidoiries écrites, il nous paraît probable que l'appelante aurait pu faire valoir, même pour la première fois devant cette cour, le moyen de droit résultant de l'absence de l'avis spécifié; mais il appert des notes des juges de la Cour Supérieure et de la Cour du Banc du Roi que cette question a été, en réalité, celle qui a fait l'objet principal de la discussion devant eux. Nous sommes d'avis que l'appelante avait évidemment le droit d'en faire la base de son appel devant notre cour.

La Cour Supérieure et la majorité de la Cour du Banc du Roi ont décidé que, en l'espèce, le défaut d'avis dans les délais requis ne privait pas l'intimé de son droit d'action, parce qu'il avait prouvé qu'il avait été empêché de donner cet avis pour une raison qu'elles ont jugée valable.

Il faut reconnaître que le troisième paragraphe de l'article 535 laisse au juge de première instance une certaine discrétion dans laquelle le tribunal d'appel, en règle ordinaire, évitera d'intervenir. Mais, comme le fait observer M. le juge Rivard en exprimant sa dissidence du jugement de la Cour du Banc du Roi dans cette cause-ci, le premier juge doit exercer cette discrétion "par des motifs juridiques et dans le respect du texte de la loi".

Ici, la loi exige, pour dispenser de l'avis, que la victime prouve force majeure ou une autre raison analogue jugée valable par le tribunal. Il en résulte qu'il appartient tout d'abord au juge de première instance de constater les éléments de fait constitutifs de la force majeure ou de l'excuse analogue. Cependant, pour employer l'expression de M. Bonnecase, dans son Supplément au Traité de Droit Civil de Baudry-Lacantinerie (Supplément, t. 3ème, p. 525):

> Cela ne signifie pas que les juges du fond doivent ou puissent se laisser aller au gré de leurs inspirations; ils ne se prononceront sainement que s'ils apprécient les éléments de fait en fonction d'une notion préconçue du cas fortuit et de la force majeure.

1934

LA CITÉ DE QUÉBEC v. BARIBEAU.

Rinfret J.

Pour répartir les fonctions respectives du fait et du droit dans une question comme celle-ci, nous croyons donc pouvoir nous inspirer des principes suivis par la Cour de Cassation, en France, tels que nous les trouvons exposés dans Demogue, Traité des Obligations (tome 6, p. 646, nº 602):

> Il appartient souverainement au juge du fait de constater les circonstances de la force majeure, mais il est réservé à la Cour de Cassation de reconnaître si elles présentent le caractère de la force majeure.

Appliquer à l'article 535 le principe ainsi posé veut tout d'abord dire que les tribunaux envisagent comme une question de droit la question de savoir si les faits reconnus comme établis par la preuve ont le caractère de la force majeure ou d'une "raison analogue".

Mais, en plus, il s'agit de tenir compte d'un fait justificatif dont la portée est générale; et il faut donc que le fait de force majeure ou raison analogue soit régulièrement constaté. Or, malheureusement, dans la cause actuelle, le juge de première instance a commis une erreur dans le texte de la loi qu'il a appliqué aux faits qu'il avait à apprécier. La loi se lit:

> si elles prouvent qu'elles ont été empêchées de donner cet avis par force majeure ou pour d'autres raisons analogues jugées valables.

L'honorable juge a transcrit le texte de la façon suivante:

> s'ils prouvent qu'ils ont été empêchés de donner cet avis par force majeure ou pour d'autres raisons jugées valables.

et il a procédé à examiner les faits à la lumière du texte ainsi transcrit.

Le texte cité par le savant juge était celui de l'article 692 de la charte de Québec tel qu'il existait avant 1929 et, en particulier, en vertu de la loi 6 Geo. V, c. 43, s. 8. Ce texte, qui est également celui de l'article 536 de la charte de la cité de Montréal et qui paraît semblable à celui de plusieurs autres chartes de corporations de cités ou même de la loi générale des cités et villes dans la province de Québec, avait jusque-là été interprété comme donnant au juge une discrétion assez large pour apprécier la valeur des raisons qui pouvaient excuser une victime de donner un avis dans le genre de celui qui est exigé par l'article 535. Ce texte avait donné lieu, entre autres, à deux décisions de la Cour du Banc du Roi dans les causes de *La cité de Montréal* v. *Sigouin* (1), et *Cité de Québec* v. *Cleary* (2). Mais par la loi 19 Geo. V, c. 95, en vigueur lors de l'accident subi

(1) (1929) Q.R. 46 K.B. 397. (2) (1930) Q.R. 49 K.B. 80.

par l'intimé, le texte a été modifié, pour la cité de Québec, en introduisant, après les mots "d'autres raisons", le mot "analogues". La conséquence en est, ainsi que le faisait remarquer M. le juge Rivard, dans la cause de *Cité de Montréal* v. *Sigouin* (1) (p. 398), que, sous l'ancien texte:

> Il n'appert pas que les autres raisons dont parle (la loi) doivent nécessairement s'assimiler à la force majeure pour produire le même effet: il suffit qu'elles soient jugées valables.

En vertu du nouveau texte de la charte de Québec, au contraire, il ne saurait y avoir de doute: il faut une force majeure ou une raison analogue. Analogie veut dire similitude; et il faut donc décider que l'amendement à la loi qui régit la cité de Québec, en insérant le mot "analogues", a apporté à l'article, au moins tel qu'il avait été interprété par la jurisprudence, une importante modification.

Par conséquent, le jugement qui nous est soumis ne saurait bénéficier de la règle que nous suivons habituellement lorsque nous nous trouvons en présence de jugements concordants sur les faits. Ici, la Cour Supérieure a apprécié les éléments de fait en fonction d'une notion inexacte de la loi; et la majorité de la Cour du Banc du Roi, nonobstant la divergence importante du texte de la charte actuelle de la cité de Québec, a jugé la cause en traitant comme décisifs ("decisive authorities on the pivotal points of this case") ses arrêts de *Sigouin* (1) et de *Cleary* (2), qui avaient été rendus sur des textes différents. Nous avons donc ici la situation examinée par le Conseil Privé dans la cause de *Robins* v. *National Trust Co.* (1) et, de nouveau, dans la cause de *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills* (2) où Viscount Dunedin dit, à la page 273:

> In a case tried by a judge alone he fulfils the functions of both judge and jury. If, therefore, it can be shown that in the view he has taken there is something which, if addressed to a jury, would be a misdirection, there is no finding of pure fact in the judgment, and the rule, as explained above, does not apply.

Il nous a donc fallu passer en revue les faits de la cause pour voir si, dans les circonstances, ils répondent à la qualification de force majeure ou de forces analogues (6 Demogue, Obligations, n° 543). Il est prouvé que, immédiatement après l'accident, l'intimé a été transporté à l'Hôtel-Dieu de Québec. Il y est resté jusqu'au 6 septembre. Il

(1) [1927] A.C. 515. (2) [1929] A.C. 269.

1934

LA CITÉ DE QUÉBEC v. BARIBEAU.

Rinfret J.

affirme, et il semble certain, qu'il n'a pas eu connaissance de son transport ou de son séjour à l'Hôtel-Dieu. "Il présentait des troubles mentaux * * * Il avait de la fièvre; il délirait"; et, à cause de cela, on l'a envoyé à la clinique Roy-Rousseau, où l'on traite les maladies mentales. Il y est resté du 6 au 30 septembre. Il en est sorti à cette dernière date, malgré l'avis des médecins. Il y est revenu faire deux autres séjours, l'un du 15 au 20 novembre et l'autre du 14 au 21 décembre 1931. Mais dans les intervalles il est resté sous les soins des médecins et, à "de nombreuses reprises", il a dû venir les consulter à la clinique.

Dès le premier examen on a constaté une commotion cérébrale, "une espèce d'ébranlement extrêmement violent transmis au cerveau, aux méninges et qui entraînait des maux de tête, du délire, de la fièvre, des nausées, des vomissements, des vertiges". Il était, au dire des médecins qui l'ont traité, dans une "condition alarmante". D'après la preuve qui nous est soumise, il faut conclure que le trouble mental, les maux de tête, les étourdissements, les vertiges, ont continué pendant assez longtemps après que Baribeau eût laissé la clinique Roy-Rousseau pour la première fois, le 30 septembre, puisque le docteur Albert Brousseau nous dit que l'intimé "a été obligé de nous consulter presque chaque semaine dans l'année 1932". Ce médecin ne pense pas que, avant le commencement de l'année 1932, Baribeau "était capable de mener ses affaires d'une manière convenable". Il affirme qu'il "ne réalisait pas sa situation". Et l'intimé lui-même, lorsqu'on lui demande s'il ressentait des troubles pendant qu'il était chez lui, répond: "J'avais pas d'idée; je savais qu'est-ce que je faisais, mais j'avais pas d'idée de rien."

Voilà donc les faits auxquels il faut nous demander si nous pouvons appliquer la qualification de force majeure ou de "raisons analogues".

Par définition traditionnelle, la force majeure désigne un événement qui n'a pu être prévu et auquel il est impossible de résister (Art. 17, par. 24 C.C.). L'événement imprévu doit être irrésistible, au-dessus des forces de l'homme, d'un caractère insurmontable (Baudry-Lacantinerie, Droit civil, Supplément de Bonnecase, vol. 3, p. 487, n° 251). La force majeure correspond à la notion d'impossibilité absolue (Ibidem, p. 505, n° 258). Il s'agit d'un "fait irrésistible qui

ne laisse aucune possibilité d'exécution" (Demogue, Obligations, vol. 6, nº 537). On peut dire que la doctrine et la jurisprudence s'accordent sur les caractéristiques de la force majeure que nous venons d'énumérer: on la définit comme une "force absolument irrésistible" et qui rend l'exécution de l'obligation "radicalement impossible". Nous avons eu l'occasion encore récemment d'examiner cette question et d'en faire l'application dans la cause de *Rivet* v. *Corporation du Village de St-Joseph* (1). On voit par là toute la difficulté de la tâche qui est imposée au réclamant qui veut se prévaloir de l'exception contenue dans l'article 535 de la charte de Québec.

Mais, par cela même, nous sommes amenés à conclure que le législateur, en y ajoutant les mots: "ou pour d'autres raisons analogues jugées valables par le juge ou le tribunal" a, sans aucun doute, entendu atténuer la rigueur de la loi, qui lui aurait paru autrement excessive. S'il eût voulu s'en tenir à une condition d'exonération qui résulterait exclusivement de la force majeure—ce qui veut dire, comme nous l'avons vu, fait insurmontable ou d'une impossibilité absolue—le législateur n'avait pas besoin d'ajouter d'autres mots. Tout cela était contenu dans l'expression: "force majeure". Décider que les "autres raisons analogues" doivent avoir précisément le caractère de la force majeure, ce serait interpréter comme une simple redondance une phrase où il faut, au contraire, suivant les règles généralement reçues, tâcher de donner un sens à tous les mots, dont on ne doit pas supposer qu'ils ont été employés au hasard, mais, au contraire, qu'ils ont été insérés à dessein dans la loi.

La loi exempte de l'obligation de donner l'avis celui qui prouve qu'il en a été empêché par d'autres raisons analogues, qu'elle permet au juge ou au tribunal de trouver valables. Analogie, nous l'avons déjà dit, correspond à similitude; mais à raison même du texte adopté par le législateur, il faut évidemment se garder de confondre *similitude* avec *identité*. Il s'ensuit que les raisons que le juge ou le tribunal peut trouver valables, tout en étant analogues à la force majeure, ne doivent pas nécessairement avoir le caractère insurmontable de cet obstacle. Autrement le législateur

(1) [1932] S.C.R. 1, *vide* pp. 4 to 6.

1934

LA CITÉ DE QUÉBEC v. BARIBEAU.

Rinfret J.

aurait parlé pour ne rien dire; et la deuxième partie de l'exception n'ajouterait rien à la première. Cette deuxième partie, suivant nous, permet au juge de ne pas exiger la preuve de l'impossibilité stricte et de ne pas s'en tenir à ce que Demogue appelle "la notion rigide de force majeure" (Ibidem, p. 658). Comme il le dit encore (p. 665):

S'il faut tenir la main à ce que le débiteur ne se libère pas trop facilement, il ne faut pas exagérer cette idée par une sorte de discipline de fer.

La démence constitue un cas de force majeure (voir 24 Demolombe, p. 550; Comp. Cass. 18 janv. 1870, Compagnie d'assurance ancienne mutuelle, Dev. 1870-1-97). Il a été jugé par la Cour de Revision de Montréal, en 1893 (1), que, en principe, le dérangement des facultés mentales constituait un cas de force majeure qui produirait l'irresponsabilité civile et écarte l'application de l'article 1053 C.C.

Les faits de la présente cause permettent, suivant nous, de décider que l'intimé tombait dans l'exception prévue par l'article 535. La preuve médicale établit un cas de trouble mental caractérisé. Pendant la période qui a suivi immédiatement l'accident, l'intimé était dans un état mental qui rendait absolument impossible l'exécution de l'obligation de donner l'avis. Sa situation rentrait alors indiscutablement sous la désignation de la force majeure. Il a donc prouvé que, pour une certaine période, il a été empêché de donner l'avis dans des conditions qui satisfont les exigences même du premier cas d'exception.

Pendant combien de temps ces conditions ont-elles continué? L'appelante nous demande de décider que cette situation avait cessé du jour où l'intimé a laissé la clinique Roy-Rousseau. Nous ne ferions là qu'une supposition que d'ailleurs la preuve ne nous permet pas de faire. Il est acquis au dossier que l'intimé a quitté la clinique malgré les médecins. Il est constant que les "troubles mentaux", les maux de tête, les étourdissements et les vertiges ont persisté jusqu'à une époque qui va bien au delà de celle où la lettre-avis a été envoyée par les procureurs de l'intimé. Ce dernier, comme nous l'avons vu, affirme que jusqu'au commencement de l'année 1932, il n'avait "pas d'idée de rien"; et le docteur Brousseau nous assure qu'il "était incapable de mener ses affaires d'une manière convenable * * * qu'il ne réalisait pas sa situation." Si l'on relie ensemble ces différentes constatations, on en arrive à ceci: que, à raison

(1) (1893) Q.R. 3 S.C. 254.

de son état mental, l'intimé n'était pas en état de voir à ses affaires; et voir à ses affaires, cela inclut évidemment voir à initier et à conduire sa réclamation contre la cité de Québec. Il nous paraît donc que, dans les circonstances actuelles, le dérangement des facultés mentales de l'intimé constituait, même après septembre, sinon un cas de force majeure dans le strict sens du mot, au moins précisément l'un de ces cas analogues qu'a voulu prévoir le législateur et qu'il a autorisé le tribunal à juger comme une excuse valable.

Nous n'ignorons pas que, dans la cause de *Lesage* v. *La cité de Montréal* (1), il a été jugé que:

> The facts, though plaintiff was, while in the hospital, in a more or less delirious condition and, later on, could not leave his house after the accident, do not constitute a valid reason for not giving the required notice, as he was visited by his wife and other relations and, while at home, he was in constant communication with his family and relations.

Cette décision suppose évidemment que, même si la victime ne peut donner l'avis elle-même, elle ne satisfait pas, quand même, aux exigences de l'article, s'il n'est pas établi que l'avis n'aurait pas pu être donné par un autre. C'est d'ailleurs ce qui paraît avoir été décidé dans la cause de *Pétel* v. *La cité de Montréal* (2); et c'est une question que s'est posée la Cour de Revision de Montréal dans la cause de *Fee* v. *Cité de Montréal* (3). Cette question est discutée par M. Demogue (Ibid. p. 650, n° 605).

Nous ne voudrions pas poser de principes trop absolus sur ce point. Dans le cas actuel, l'intimé n'avait pas de représentant. Personne de ceux à qui pouvait incomber, à la rigueur, le devoir, même moral, de s'occuper de ses intérêts n'était au courant des détails de l'accident et ne pouvait donner les indications essentielles pour envoyer l'avis prescrit par la loi. C'est un cas où il ne pouvait se faire remplacer convenablement; et même s'il s'agissait d'une obligation qu'un tiers pouvait exécuter pour lui, son état de maladie ne lui permettait pas de fournir à ce tiers les informations nécessaires, ni de lui donner les instructions requises pour que cette obligation fût exécutée (Demogue, ibidem, p. 618). En l'espèce, l'obligation n'était susceptible d'exécution que par lui seul; et, à cause de son état mental, il était incapable de l'exécuter ou de la faire exécuter.

(1) (1910) 21 R.L. n.s. 70. (2) (1911) 21 R.L. n.s. 71.
(3) (1917) Q.R. 52 S.C. 336, at 340.

1934

LA CITÉ DE QUÉBEC v. BARIBEAU.

Rinfret J.

Nous aurions pu nous demander si, pendant la période de temps qui s'est écoulée jusqu'à ce que l'avis fût donné, l'état de l'intimé a présenté des intervalles de lucidité. Mais la preuve a démontré un caractère général de dérangement des facultés mentales. Si l'appelante voulait prétendre que, pendant ce temps, il y aurait eu des intervalles lucides où l'intimé aurait pu agir, c'était à elle à l'établir. Elle n'a signalé qu'un incident qui aurait pu nous diriger dans cette voie. C'est celui qui résulterait d'une phrase de la preuve où l'intimé raconte qu'il est allé "une fois avec un de ses beaux-frères, en machine, pour voir M. Turcotte des assurances. C'est la seule personne que j'aie été voir." Cet incident aurait pu, sans doute, être l'objet d'une investigation plus poussée. Tel qu'il est relaté, il ne permet certainement pas d'arriver à rien de concluant sur le point qui nous occupe.

Il resterait une question soulevée par l'intimé, et qui est celle-ci:

Il semble bien démontré que, pendant les trente jours qui ont suivi l'accident, l'intimé a été empêché par force majeure de donner l'avis requis; et la question qui se pose est de savoir si, une fois le délai passé, l'obligation de donner l'avis subsistait, ou si, au contraire, l'empêchement pendant la période des trente jours ne dispense pas définitivement de l'obligation d'avis.

Nous réservons notre décision sur ce point pour un cas où elle sera nécessaire au jugement de la cause. Dans le cas actuel, l'intimé a prouvé à notre satisfaction qu'il avait été empêché de donner l'avis plus tôt qu'il ne l'a fait par une raison de la nature de celles qui sont prévues par l'article 535, et que nous jugeons valable.

Etant arrivés à la conclusion que nous venons de dire, nous avons cru devoir en exposer les raisons aussi complètement que possible, car la cité de Québec a un droit absolu aux avantages que le législateur a jugé à propos de lui conférer dans l'article 535 de sa charte, et il n'appartient pas aux tribunaux d'interpréter ou d'appliquer cet article de façon à rendre ces avantages illusoires.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Chapleau & Thériault.*
Solicitors for the respondent: *Morand, Alleyn & Grenier.*

1934

*May 2.
*June 6.

THE ATTORNEY GENERAL FOR ALBERTA (INTERVENER) AND GERTRUDE MARY NEILSON, THE YOUNGER, AN INFANT, (OTHERWISE UNDERWOOD), BY HER NEXT FRIEND GERTRUDE MARY NEILSON (PLAINTIFFS) ..... APPELLANTS;

AND

WILLIAM KENNETH UNDERWOOD (DEFENDANT) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA (INTERVENER).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Constitutional law—Solemnization of Marriage Act, Alta., 1925, c. 39, s. 20, as amended in 1931, c. 16—Requirement of parental consent in certain cases as condition precedent to valid marriage—Constitutional validity—"Solemnization of Marriage in the Province" (B.N.A. Act, s. 92 (12)).

Sec. 20 of *The Solemnization of Marriage Act,* Alberta, 1925, c. 39, (requiring parental consent to marriage under a certain age), as amended in 1931, c. 16, (making the consent a condition precedent to a valid marriage except in certain circumstances) is *intra vires.* (*Kerr* v. *Kerr,* [1934] Can. S.C.R. 72).

"Solemnization of Marriage" is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The said statute, in its essence, deals with those steps or preliminaries in the province. The requirement, in the statute, of parental consent is one similar in quality to the other requirements therein concerning the banns or the marriage licences. It is one of the forms to be complied with for the marriage ceremony, and it does not relate to capacity. It is a requirement which a provincial legislature may competently prescribe in the exercise of its jurisdiction in relation to "the solemnization of marriage in the province" (*B.N.A. Act,* s. 92 (12)) and to which it may "attach the consequence of invalidity absolutely or conditionally" (*Kerr* v. *Kerr, supra,* at 75; *Marriage Reference,* [1912] A.C. 880).

It was pointed out that the judgment does not express any view as to the competency of the Dominion, in the exercise of its proper authority, to legislate in relation to the capacity to marry of persons domiciled in Canada, that question not arising in this case. Dominion legislation, as it stands, does not affect the present case.

Judgment of the Appellate Division, Alta., [1933] 2 W.W.R. 609; [1933] 4 D.L.R. 154, reversed.

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

1934

ATTORNEY GENERAL FOR ALBERTA AND NEILSON v. UNDERWOOD.

APPEAL by the Attorney General for Alberta and by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which, by a majority, affirmed, in the result, the judgment of Simmons, C.J.T.D., dismissing the plaintiff's action. The action was for a declaration adjudging that a valid marriage was not effected or entered into between the plaintiff and the defendant and annulling the marriage. The ground of decision of the Appellate Division was that subs. 3 of s. 20 of *The Solemnization of Marriage Act*, being c. 39 of the statutes of Alberta, 1925, which subs. 3 (making the consent required by s. 20 a condition precedent to a valid marriage except in certain circumstances) was enacted by *The Solemnization of Marriage Act Amendment Act, 1931*, (c. 16 of the statutes of Alberta, 1931), was *ultra vires* the legislature of the Province of Alberta.

Special leave to appeal to the Supreme Court of Canada was granted by the Appellate Division of the Supreme Court of Alberta.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported.

D. K. MacTavish for the appellants.

F. P. Varcoe K.C. for the Attorney General of Canada.

(No one appeared for the respondent.)

The judgment of the court was delivered by

RINFRET J.—The appellant, Gertrude Mary Neilson, by her next friend, her mother, brought this action for a declaration that the ceremony of marriage solemnized between her and the respondent, William Kenneth Underwood, on the 26th day of August, 1932, at the town of Okotoks, in the province of Alberta, was not valid, and to have the said marriage annulled under section 20 of *The Solemnization of Marriage Act* (c. 39 of statutes of Alberta, 1925), as amended by *The Solemnization of Marriage Act Amendment Act, 1931* (c. 16 of statutes of Alberta, 1931).

Section 20 of *The Solemnization of Marriage Act*, prior to the 1931 amendment, read thus:

20. (1) If either of the parties to an intended marriage, not being a widower or widow, is under the age of twenty-one years, then, before

(1) [1933] 2 W.W.R. 609; [1933] 4 D.L.R. 154.

a licence is issued in respect of such marriage, or, before the publication of the banns, or in other cases before any such marriage is contracted or solemnized, one of the parties to the intended marriage shall deposit with the issuer of marriage licences, or with the clergyman a consent thereto in form C of the schedule hereto, of the persons hereinafter mentioned.

(2) The persons whose consent is required are as follows, that is to say:

(a) the father and mother, or such of them as may be living, of the minor if such minor is under eighteen years of age, and the father, if living, or the mother, if living, if such minor is between the ages of eighteen and twenty-one years;

(b) If both the father and mother are dead, then a lawfully appointed guardian or the acknowledged guardian who may have brought up or may, for three years immediately preceding the intended marriage, have supported the minor.

By the Amendment Act of 1931, section 20 was amended by adding at the end thereof the following subsection:

(3) The consent required by this section shall be deemed to be a condition precedent to a valid marriage unless the marriage has been consummated or the parties have, after the ceremony, cohabited and lived together as man and wife.

The undisputed facts are the following:

On the 26th day of August, 1932, when Miss Neilson went through a form of marriage with the respondent Underwood, she was slightly over nineteen years and nine months of age, while Underwood was within a few days of his twenty-first birthday.

The father of Miss Neilson was dead. Her mother was living, and she did not give her consent to the marriage. In fact, she did not know that the ceremony was being performed.

The father and mother of Underwood were living. They were also kept in ignorance of the marriage ceremony; and accordingly neither of them gave their consent.

The parties to the marriage did not come within any of the exceptions wherein, under the Act, the consent of the parents need not be required.

The marriage has not been consummated and the parties have not, after the ceremony, cohabited and lived together as man and wife.

It may be added, in order to exclude any possible objection under the statute, that no carnal intercourse had taken place between the parties before the ceremony (subs. 2 of s. 30a, as enacted by c. 16 of the Amendment Act of 1931).

It is admitted that the marriage licence was obtained by false affidavits with regard to the age of the parties.

1934

ATTORNEY GENERAL FOR ALBERTA AND NEILSON v. UNDERWOOD.

Rinfret J.

The learned trial judge (Simmons, C.J.) dismissed the action because he was of opinion that the granting of a decree of nullity was a matter of discretion. He followed a number of Alberta cases, where it was unanimously held that the legislation, as it stood previous to the Amendment Act of 1931, was directory only, and that the absence of the parental consent did not nullify the marriage. In his view, the "discretion was not removed from the court" by the amending legislation; and, under the circumstances of this case, he thought he "would still have to exercise his discretion against the plaintiff." He would "leave it fairly open for the Court of Appeal" to deal with the matter.

The Appellate Division of the Supreme Court of Alberta was unanimously of opinion that in the enactment of the Amendment Act of 1931, "the legislature had in mind changing the law as laid down in the former decisions"; there was "no room for doubt that subs. 3 of s. 20 is mandatory in character and that, if the subsection is within the legislative competency of the Alberta legislature, this marriage must, on the facts of this case, be held to be invalid." However, the court, by a majority (Clarke and Lunney, JJ.A., dissenting), came to the conclusion that the amendment of 1931 (subs. 3 of s. 20) was in pith and substance directed, not to the solemnization of marriage, but to the capacity of minors to marry and, as such, "an encroachment upon the general power of the Dominion to exclusively make laws upon the subject of marriage, excepting only solemnization of marriage." As a result, and for that reason only, the court affirmed the judgment in the court below and dismissed the appeal.

But McGillivray, J.A., who delivered the judgment of the majority, added this to his reasons:

> In a case of such importance involving a question upon which there has been such a striking difference of judicial opinion in Canada, it may not be amiss to say that it is hoped that the Attorney General for Alberta may see fit to carry the case to a higher court.

As a consequence, special leave to appeal to the Supreme Court of Canada was granted by the Appellate Division. The Attorney General for Canada, who was not represented before the courts in Alberta, was permitted to intervene here. He supported the views of the Attorney

General for Alberta and he submitted that the provincial legislation was valid.

The real question now remaining to be considered, and the only question, is the following:

> Is the requirement as to consent, in the relevant statute, a matter having to do with the solemnization of marriage in the province (in which case it comes within the authority of the provincial legislature), or is it an encroachment upon the general legislative power of the Dominion relating to marriage, out of which the subject of solemnization of marriage "has been carved" in the distribution of legislative powers provided by the *British North America Act?*

In this court, the question of the validity of the Alberta legislation is concluded by our decision in the case of *Kerr* v. *Kerr & the Attorney General for the Province of Ontario* (1), not yet delivered at the time when judgment in the present case was pronounced by the Appellate Division. The two statutes under consideration in the respective cases are substantially similar; and it is quite clear that the same reasoning and the same ruling must apply to both. Indeed, the material enactments in *The Solemnization of Marriage Act Amendment Act, 1931,* of Alberta, appear to have been taken from the *Marriage Act* of Ontario.

The whole question depends upon the distinction to be made between the formalities of the ceremony of marriage and the status or capacity required to contract marriage. Solemnization of marriage is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The statute of Alberta, in its essence, deals with those steps or preliminaries in that province. It is only territorial. It applies only to marriages solemnized in Alberta and it prescribes the formalities by which the ceremony of marriage shall be celebrated in that province (*Brook* v. *Brook* (1)). It does not pretend to deprive minors domiciled in Alberta of the capacity to marry outside the province without the consent of their parents. Moreover, it requires that consent only under certain conditions and it is not directed to the question of personal status.

(1) [1934] Can. S.C.R. 72. (1) (1861) 9 H.L.C. 193.

1934

ATTORNEY GENERAL FOR ALBERTA AND NEILSON v. UNDERWOOD.

Rinfret J.

Under the provisions of that statute, no clergyman shall solemnize marriage, unless the parties to the intended marriage produce to him the marriage licence prescribed for by the Act, or a certificate of the due publication of banns (sec. 4). The manner in which banns of marriage shall be published and the conditions under which marriage licences are to be issued are dealt with in separate sections of the Act. And among the preliminaries required before the publication of the banns, or before the issue of the licence, or at all events before any marriage is contracted or solemnized, it is enacted by sec. 20 that if either of the parties to the intended marriage is under the age of twenty-one years, a certain consent in a certain prescribed form shall be deposited with the issuer of the marriage licence, or with the clergyman who is to solemnize the marriage. That consent is required, according to circumstances, from the father and mother, or from one of them, or from a lawfully appointed guardian, or from the acknowledged guardian. And it is expressly enacted that the consent so required "shall be deemed to be a condition precedent to a valid marriage," except in certain events not material in the premises. Under the circumstances, the parental consent is a requirement similar in quality to the other requirements concerning the banns or the marriage licences. It is one of the forms to be complied with for the marriage ceremony, and it does not relate to capacity.

It is a requirement which a provincial legislature may competently prescribe in the exercise of its jurisdiction in relation to the solemnization of marriage in the province and to which it may "attach the consequence of invalidity absolutely or conditionally" (*Kerr* v. *Kerr* (1); *Marriage Reference* (2)).

In this case, parental consent was required "as a condition of the validity of the solemnization of the marriage within the province." Such enactment being legislation within the province's authority and the required consent not having been obtained, it follows that the ceremony itself was void *ab initio* and that no valid marriage has taken place. The appellant was therefore entitled to the declaration prayed for and her action ought to have been maintained.

(1) [1934] Can. S.C.R. 72, at 75. (2) [1912] A.C. 880.

Unlike the case of *Kerr* v. *Kerr* (1), the jurisdiction of the Alberta courts to grant a declaration of nullity is not questioned. It is common ground that the jurisdictional limitations of the courts of Ontario, discussed in the *Kerr* case (1), present no problem in this appeal.

It must further be understood that our judgment does not express any view as to the competency of the Dominion, in the exercise of its proper authority, to legislate in relation to the capacity to marry of persons domiciled in Canada. In the absence of legislation by the Dominion, that question does not arise here and is fully reserved. All that we decide in regard to it is that the Dominion legislation, as it stands, does not affect the present case.

The appeal will be allowed and the judgments of the courts below will be set aside. There will be a declaration that subsection 3 of section 20 of *The Solemnization of Marriage Act,* being c. 39 of the statutes of Alberta, 1925, enacted by *The Solemnization of Marriage Act Amendment Act, 1931,* (c. 16 of the statutes of Alberta, 1931), is *intra vires* of the legislature of the province of Alberta. The action of Gertrude Mary Neilson will accordingly be maintained; and it will be declared that her pretended marriage with the respondent William Kenneth Underwood was null and void and is therefore annulled. There will be no costs to either party or to the interveners.

Appeal allowed.

Solicitor for the appellant the Attorney General for Alberta: *W. S. Gray.*

Solicitors for the appellant plaintiff: *Fenerty & McLaurin.*

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

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(1) [1934] Can. S.C.R. 72.

1934

*May 7, 8.
*June 15.

THE GOVERNORS OF DALHOUSIE COLLEGE AT HALIFAX (CLAIMANT) ..... APPELLANT;

AND

THE ESTATE OF ARTHUR BOUTILIER, DECEASED ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Contract—Consideration—Subscription to fund to help college—Whether binding.

In the course of a canvass for raising a fund to increase the general resources and usefulness of a college, B. signed a subscription as follows: "For the purpose of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and otherwise to keep pace with the growing need of its constituency and in consideration of the subscription of others, I promise to pay" $5,000 to the treasurer of the college. B. died without making any payment, and the college claimed against his estate.

Held: The subscription was not binding. The only basis for sustaining it as a binding promise could be as a contract supported by a good and sufficient consideration; and such a consideration could not be found in the subscription paper itself, or in the circumstances as disclosed by the evidence.

The words "in consideration of the subscription of others" in the subscription were insufficient to support the promise if, in point of law, the subscriptions of others could not provide a valid consideration therefor; and the fact that others had signed separate subscription papers for the same common object or were expected to do so did not of itself constitute a legal consideration.

The statement in the subscription of the purpose for which it was made, and the acceptance of the subscription by the college, did not afford a ground based on the doctrine of mutual promises for holding B.'s promise binding. A reciprocal promise on the part of the college to do the thing for which the subscription was promised could not be implied from the mere fact of the acceptance by the college of such a subscription paper from B.'s hands. And the fact, even if established, that the college made increased expenditures or incurred liabilities on the strength of the subscriptions obtained in the canvass, would not constitute a consideration so as to make B.'s subscription binding, in the absence of anything further indicating a request on B.'s part resulting in expenditures made or liabilities incurred.

Cases reviewed and discussed.

Judgment of the Supreme Court of Nova Scotia *en banc*, 6 M.P.R. 229, affirmed.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

APPEAL by the Board of Governors of Dalhousie College, Halifax, claimant, from the judgment of the Supreme Court of Nova Scotia *en banc* (1) allowing the appeal taken by the representatives of the Estate of Arthur Boutilier, deceased, from the decision of His Honour W. J. O'Hearn, Judge of Probate for the County of Halifax, dismissing the Estate's appeal from the decision of the Registrar of Probate for the County of Halifax allowing the claim of Dalhousie College for $5,000 against the said estate. The Supreme Court of Nova Scotia *en banc* dismissed the claim. The claim was founded on a subscription by the said deceased to a fund for Dalhousie College.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

G. W. Mason K.C. and *W. C. Macdonald K.C.* for the appellant

C. B. Smith K.C. for the respondent.

The judgment of the court was delivered by

CROCKET, J.—This appeal concerns a claim which was filed in the Probate Court for the County of Halifax, Nova Scotia, in the year 1931, by the appellant College against the respondent Estate for $5,000, stated as having been "subscribed to Dalhousie Campaign Fund (1920)", and attested by an affidavit of the College Bursar, in which it was alleged that the stated amount was justly and truly owing to the College Corporation.

The subscription, upon which the claim was founded, was obtained from the deceased on June 4, 1920, in the course of a canvass which was being conducted by a committee, known as the Dalhousie College Campaign Committee, for the raising of a fund to increase the general resources and usefulness of the institution and was in the following terms:

(1) 6 M.P.R. 229; [1933] 1 D.L.R. 699.

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

Crocket J.

For the purpose of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and otherwise to keep pace with the growing need of its constituency and in consideration of the subscription of others, I promise to pay to the Treasurer of Dalhousie College the sum of Five Thousand Dollars, payment as follows:

Terms of payment as per letter from Mr. Boutilier.

A. 399.

Name Arthur Boutilier.

Date June 4th, 1920.

Make all cheques payable to the Treasurer of Dalhousie College.

So far as the record discloses, the subscription was not accompanied or followed by any letter from the deceased as to the terms of payment. He died on October 29, 1928, without making any payment on account. It appears that some time after he signed the subscription form he met with severe financial reverses which prevented him from honouring his pledge. That he desired and hoped to be able to do so is evidenced by a brief letter addressed by him to the President of the University on April 12, 1926, in reply to a communication from the latter, calling his attention to the subscription and the fact that no payments had been made upon it. The deceased's letter, acknowledging receipt of the President's communication, states:

> In reply I desire to advise you that I have kept my promise to you in mind. As you are probably aware, since making my promise I suffered some rather severe reverses, but I expect before too long to be able to redeem my pledge.

The claim was contested in the Probate Court by the Estate on two grounds, viz.: that in the absence of any letter from the deceased as to terms of payment, the claimant could not recover; and that the claim was barred by the Statute of Limitations. Dr. A. Stanley MacKenzie, who had retired from the Presidency of the University after 20 years' service shortly before the trial, and others gave evidence before the Registrar of Probate. Basing himself apparently upon Dr. MacKenzie's statement that in consideration of the moneys subscribed in the campaign referred to, large sums of money were expended by the College on the objects mentioned in the subscription card, between the years 1920 and 1931, the Registrar decided that there was a good consideration for the deceased's sub-

scription, citing *Sargent* v. *Nicholson,* a decision of the Appeal Court of Manitoba (1), and *Y.M.C.A.* v. *Rankin,* a decision of the Appeal Court of British Columbia (2), and that no supplementary letter was necessary to complete the agreement. He further held that the deceased's letter of April 12, 1926, constituted a sufficient acknowledgement to take the case out of the Statute of Limitations.

An appeal to the Judge of the County Court sitting as Judge of the Probate Court was dismissed, but on a further appeal to the Supreme Court of Nova Scotia *en banc,* this decision was reversed by the unanimous judgment of Chisholm, C.J., and Mellish, Graham, Carroll and Ross, JJ., on the ground that the subscription was a mere *nudum pactum,* and that nothing was shewn either by the document itself or by the evidence which imposed any binding contractual obligation upon the deceased in connection therewith. This, I take it, to be the gist of the reasons for the judgment of the Appeal Court as delivered by the learned Chief Justice, and embodies the whole problem with which we have now to deal.

There is, of course, no doubt that the deceased's subscription can be sustained as a binding promise only upon one basis, viz.: as a contract, supported by a good and sufficient consideration. The whole controversy between the parties is as to whether such a consideration is to be found, either in the subscription paper itself or in the circumstances as disclosed by the evidence.

So far as the signed subscription itself is concerned, it is contended in behalf of the appellant that it shews upon its face a good and sufficient consideration for the deceased's promise in its statement that it was given in consideration of the subscription of others. As to this, it is first to be observed that the statement of such a consideration in the subscription paper is insufficient to support the promise if, in point of law, the subscriptions of others could not provide a valid consideration therefor. I concur in the opinion of Chisholm, C.J., that the fact that others had signed separate subscription papers for the same

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

(2) (1916) 27 D.L.R. 417; 22 B.C. Rep. 588; 10 W.W.R. 482.

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

Crocket J.

common object or were expected so to do does not of itself constitute a legal consideration. Although there have been some cases in the United States in which a contrary opinion has been expressed, these decisions have been rejected as unsound in principle both by the Supreme Court of Massachusetts and the Court of Appeals of the State of New York. See *Cottage Street M.E. Church* v. *Kendall* (1); *Hamilton College* v. *Stewart* (2); and *Albany Presbyterian Church* v. *Cooper* (3). In the last mentioned case the defendant's intestate subscribed a paper with a number of others, by the terms of which they "in consideration of one dollar" to each of them paid "and of the agreements of each other" severally promised and agreed to and with the plaintiff's trustees to pay to said trustees the sums severally subscribed for the purpose of paying off a mortgage debt on the church edifice on the condition that the sum of $45,000 in the aggregate should be subscribed and paid in for such purpose within one year. The Court of Appeals held that it must reject the consideration recited in the subscription paper, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there was no privity of contract between the plaintiff church and the various subscribers.

A perusal of the reasons for judgment of the Appeal Court of Manitoba, as delivered by Cameron, J.A., in *Sargent* v. *Nicholson* (4), already referred to, shews that that court also rejected the contention that it was a sufficient consideration that others were led to subscribe by the subscription of the defendant. In fact Cameron, J.A.'s opinion quotes with approval a passage from the opinion of Gray, C.J., in *Cottage Street M.E Church* v. *Kendall* (1), that such a proposition appeared to the Massachusetts Supreme Court to be "inconsistent with elementary principles." The decision of the Appeal Court of British Columbia in *Y.M.C.A.* v. *Rankin* (5) fully adopted the opinion of Cameron, J.A., in *Sargent* v. *Nicholson* (6), and is certainly no authority for the acceptance of other sub-

(1) (1877) 121 Mass. 528.
(2) (1848) 1 N.Y. Rep. 581.
(3) (1889) 112 N.Y. Rep. 517.
(4) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.
(5) (1916) 27 D.L.R. 417; 22 B.C. Rep. 588; 10 W.W.R. 482.
(6) 1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

scriptions as a binding consideration in such a case as the present one.

The doctrine of mutual promises was also put forward on the argument as a ground upon which the deceased's promise might be held to be binding. It was suggested that the statement in the subscription of the purpose for which it was made, viz.:" of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and otherwise to keep pace with the growing need of its constituency," constituted an implied request on the part of the deceased to apply the promised subscription to this object and that the acceptance by the College of his promise created a contract between them, the consideration for the promise of the deceased to pay the money being the promise of the College to apply it to the purpose stated.

I cannot think that any such construction can fairly be placed upon the subscription paper and its acceptance by the College. It certainly contains no express request to the College either " to maintain and improve the efficiency of its teaching " or " to construct new buildings and otherwise to keep pace with the growing need of its constituency," but simply states that the promise to pay the $5,000 is made for the purpose of enabling the College to do so, leaving it perfectly free to pursue what had always been its aims in whatever manner its Governors should choose. No statement is made as to the amount intended to be raised for all or any of the purposes stated. No buildings of any kind are described. The construction of new buildings is merely indicated as a means of the College keeping pace with the growing need of its constituency and apparently to be undertaken as and when the Governors should in their unfettered discretion decide the erection of any one or more buildings for any purpose was necessary or desirable.

It seems to me difficult to conceive that, had the deceased actually paid the promised money, he could have safely relied upon the mere acceptance of his own promise, couched in such vague and uncertain terms regarding its purpose, as the foundation of any action against the College Corporation.

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

Crocket J.

So far as I can discover, there is no English or Canadian case in which it has been authoritatively decided that a reciprocal promise on the part of the promisee may be implied from the mere fact of the acceptance by the promisee of such a subscription paper from the hands of the promisor to do the thing for which the subscription is promised. There is no doubt, of course, that an express agreement by the promisee to do certain acts in return for a subscription is a sufficient consideration for the promise of the subscriber. There may, too, be circumstances proved by evidence, outside the subscription paper itself, from which such a reciprocal promise on the part of the promisee may well be implied, but I have not been able to find any English or Canadian case where it has actually been so decided in the absence of proof that the subscriber has himself either expressly requested the promisee to undertake some definite project or personally taken such a part in connection with the projected enterprise that such a request might be inferred therefrom.

It is true that there are expressions in the judgments of the Manitoba Court of Appeal in *Sargent* v. *Nicholson* (1) and of Wright, J., of the Supreme Court of Ontario, in *Re Loblaw* (2), which seem to support the proposition that a request from the promisor to the promisee may be implied from the mere statement in the subscription paper of the object for which the subscription is promised and a reciprocal promise from the promisee to the promisor to carry out that purpose from the mere fact of the acceptance of the subscription, but an examination of both these judgments makes it clear that these expressions of opinion do not touch the real ground upon which either of the decisions proceeds.

There is no doubt either that some American courts have held that by acceptance of the subscription paper itself the promisee impliedly undertakes to carry out the purpose for which the subscription is made and treated this implied promise of the promisee as the consideration for the promise to pay. This view, however, has been rejected, as pointed out in 60 Corpus Juris, 959, on the ground that

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

(2) [1933] 4 D.L.R. 264; [1933] O.R. 764.

the promise implied in the acceptance involves no act advantageous to the subscriber or detrimental to the beneficiary, and hence does not involve a case of mutual promises and that the duty of the payee would arise from trusteeship rather than a contractual promise, citing *Albany Presbyterian Church* v. *Cooper* (1), above referred to. No suggestion of mutual promises was made in the last named case, notwithstanding that the subscription there involved was expressly stated to be for the single purpose of erecting a designated church building; neither was it made in the leading New York case of *Barnes* v. *Perine* (2), where the subscription was also stated to be for the erection of a specific church edifice.

As to finding the consideration for the subscription outside the subscription itself, the only evidence relied upon is that of Dr. MacKenzie that increased expenditures were made by the College for the purposes stated between the years 1920 and 1931 on the strength of the subscriptions obtained in the canvass of 1920. It is contended that this fact alone constituted a consideration for the subscription and made it binding. The decisions in *Sargent* v. *Nicholson* (3); *Y.M.C.A.* v. *Rankin* (4); and the judgment of Wright, J., of the Supreme Court of Ontario, in *Re Loblaw* (5), adopting the two former decisions, are relied upon to sustain this proposition as well as some earlier Ontario cases: *Hammond* v. *Small* (6); *Thomas* v. *Grace* (7); *Anderson* v. *Kilborn* (8); and *Berkeley Street Church* v. *Stevens* (9), and several American decisions.

There seems to be no doubt that the first three cases above mentioned unqualifiedly support the proposition relied upon, as regards at least a subscription for a single distinct and definite object, such as the erection of a designated building, whether or not the expenditure would not have been made nor any liability incurred by the

(1) (1889) 112 N.Y. Rep. 517.
(2) (1854) 2 Kernan's Rep. (12 N.Y. Appeals) 18.
(3) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.
(4) (1916) 27 D.L.R. 417; 22 B.C. Rep. 588; 10 W.W.R. 482.
(5) [1933] 4 D.L.R. 264; [1933] O.R. 764.
(6) (1858) 16 U.C.Q.B. 371.
(7) (1865) 15 U.C.C.P. 462.
(8) (1875) 22 Grant's Ch. Reports, 385.
(9) (1875) 37 U.C.Q.B. 9.

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

Crocket J.

promisee *but for the promise* or not. The earlier Ontario cases relied upon, however, do not appear to me to go that far. They all shew that there was either a direct personal interest on the part of the subscriber in the particular project undertaken or some personal participation in the action of the promisee as a result of which the expenditure or liability was incurred.

Regarding the American decisions, upon which *Sargent* v. *Nicholson* (1) appears to have entirely proceeded—more particularly perhaps on the dictum of Gray, C.J., in *Cottage Street M.E. Church* v. *Kendall* (2) than any other —it may be pointed out that there are other American cases which shew that there must be something more than the mere expenditure of money or the incurring of liability by the promisee on the faith of the promise. *Hull* v. *Pearson* (3), a decision of the Appellate Division of the Supreme Court of New York, in which many of the American cases are reviewed, should perhaps be mentioned in this regard. One W. subscribed a certain sum for the work of the German department of a theological seminary. There was no consideration expressed in the memorandum, and there was no evidence of a request on the part of W. that the work should be continued, or of any expenditures on the part of the theological seminary in reliance on such request. Such department had been continued, but there was no evidence that it would not have been continued as it had been for a series of years but for the subscription. It was held that the subscription was without consideration and could not be enforced. Woodward, J., in the course of his reasons, in which the full court concurred, said:

> It is true that there is evidence that the German department has been continued, but this does not meet the requirement. There is no evidence that it would not have been continued as it had been for a series of years if the subscription of Mr. Wild had not been made.

And further:

> He undoubtedly made the subscription for the purpose of aiding in promoting the work of the German department; but, in the absence of some act or word which clearly indicated that he accompanied his subscription by a request to do something which the corporation would not have done except for his subscription, there is no such request as would justify a constructive consideration in support of this promise.

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.
(2) (1877) 121 Mass. 528.
(3) (1899) 56 N.Y. Sup., 518.

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

Crocket J

These latter dicta seem to accord more with the English decisions, which give no countenance to the principle applied in *Sargent* v. *Nicholson* (1) and *Y.M.C.A.* v. *Rankin* (2) and in the earlier American cases, as is so pointedly illustrated by the judgments of Pearson, J., in *In Re Hudson* (3), and Eve, J., in *In Re Cory* (4). The head note in *In Re Hudson* (3) states:

A. verbally promised to give £20,000 to the Jubilee Fund of the Congregational Union, and also filled up and signed a blank form of promise not addressed to anyone, but headed "Congregational Union of England and Wales Jubilee Fund," whereby he promised to give £20,000, in five equal annual instalments of £4,000 each, for the liquidation of chapel debts. A. paid three instalments of £4,000 to the fund within three years from the date of his promise, and then died, leaving the remaining two instalments unpaid and unprovided for.

The Congregational Union claimed £8,000 from A.'s executors, on the ground that they had been led by A.'s promise to contribute larger sums to churches than they would otherwise have done; that money had been given and promised by other persons in consequence of A.'s promise; that grants from the Jubilee Fund had been promised to cases recommended by A.; and that churches to which promises had been made by the committee, and the committee themselves, had incurred liabilities in consequence of A.'s promise.

His Lordship held there was no consideration for the promise. "There really was," he said, "in this matter, nothing whatever in the shape of a consideration which could form a contract between the parties."

And he added:

I am bound to say that this is an attempt to turn a charity into something very different from a charity. I think it ought to fail, and I think it does fail. I do not know to what extent a contrary decision might open a new form of posthumous charity. Posthumous charity is already bad enough, and it is quite sufficiently protected by law without establishing a new principle which would extend the doctrine in its favour far more than it has been extended or ought to be extended.

In the *Cory* case (4) a gift of 1,000 guineas was promised to a Y.M.C. Association for the purpose of building a memorial hall. The sum required was £150,000, of which £85,000 had been promised or was available. The committee in charge decided not to commit themselves until they saw that their efforts to raise the whole fund were likely to prove successful. The testator, whose estate it was

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.
(2) (1916) 27 D.L.R. 417; 22 B.C. Rep. 558; 10 W.W.R. 482.
(3) (1885) 33 W.R. 819.
(4) (1912) 29 T.L.R. 18

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

Crocket J.

sought to charge, promised the 1,000 guineas and subsequently the committee felt justified in entering into a building contract, which they alleged they were largely induced to enter into by the testator's promise. Eve, J., held there was no contractual obligation between the parties and therefore no legal debt due from the estate.

Chisholm, C.J., in the case at bar, said that without any want of deference to eminent judges who have held otherwise he felt impelled to follow the decisions in the English cases. I am of opinion that he was fully justified in so doing, rather than apply the principle contended for by the appellant in reliance upon the decision in *Sargent* v. *Nicholson* (1), based, as the latter case is, upon the decisions of United States courts, which are not only in conflict with the English cases, but with decisions of the Court of Appeals of the State of New York, as I have, I think, shewn, and which have been subjected to very strong criticism by American legal authors, notably by Prof. Williston, as the learned Chief Justice of Nova Scotia has shewn in his exhaustive and, to my mind, very convincing judgment.

To hold otherwise would be to hold that a naked, voluntary promise may be converted into a binding legal contract by the subsequent action of the promisee alone without the consent, express or implied, of the promisor. There is no evidence here which in any way involves the deceased in the carrying out of the work for which the promised subscription was made other than the signing of the subscription paper itself.

I may add that, had I come to the opposite conclusion upon the legal question involved, I should have felt impelled, as Chisholm, C.J., did, to seriously question the accuracy of the statement relied upon by the appellant that " this work was done and the increased expenditures were made on the strength of the subscriptions promised," if that statement was meant to refer to all the increased expenditures listed in the comparative statements produced by Dr. MacKenzie. The statement relied on does not profess to set out verbatim the language of the witness. The record of the evidence is apparently but a brief

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

1934

DALHOUSIE COLLEGE v. BOUTILIER ESTATE.

Crocket J

summary taken down by the Registrar. That the summary is inaccurate was shewn by the admission made on the argument before us that it was not $220,000 which was subscribed in all in 1920, but $2,200,000. The statement produced of expenditures on buildings, grounds and equipment since 1920 shews a grand total for the more than ten years of but $1,491,687—over $700,000 less than the aggregate of the 1920 campaign subscriptions—and this grand total includes over $400,000 for Shirriff Hall, which it is well known was the object of a special donation contributed by a wealthy lady, now deceased, as a memorial to her father. In the light of this correction it becomes quite as difficult to believe that the College Corporation, in doing "this work" and making "the increased expenditures" did so in reliance upon the deceased's subscription, as if the aggregate of the subscriptions had been but $220,000, as the Registrar took the figures down, and the Nova Scotia Supreme Court supposed, and the total expenditures $1,491,687. This evidence would assuredly seem to shut out all possibility of establishing a claim against the deceased's estate on any such ground as estoppel.

The appeal, I think, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. C. Macdonald.*

Solicitor for the respondent: *Thomas Notting.*

IN THE MATTER OF A REFERENCE CONCERNING THE CONSTITUTIONAL VALIDITY OF SECTION 110 OF THE DOMINION COMPANIES ACT.

1934

*March 26, 27.

*June 6.

Constitutional law—Companies—Companies Act, R.S.C., 1927, c. 27, s. 110—Constitutional validity—"Incorporation of companies" (with objects not provincial)—B.N.A. Act, ss. 91, 92.

Sec. 110 of the Dominion *Companies Act,* R.S.C., 1927, c. 27, (as to directors' liability for declaring and paying dividend when company is insolvent, or when payment of the dividend renders company insolvent or impairs capital), is *intra vires* of the Parliament of Canada. The enactment is of a character that brings it within the class of topics that must be supposed to have been contemplated, in the light of

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

1934

REFERENCE re S. 110 OF THE DOMINION *Companies Act.*

existing experience, as falling within the subject of "incorporation of companies" within the meaning thereof as used in the *B.N.A. Act* (and "incorporation of companies" with objects not provincial is within Dominion jurisdiction under the terms of ss. 91 and 92 of the *B.N.A. Act*).

REFERENCE to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), of the following question:

"Is section 110 of the Dominion Companies Act, R.S.C., 1927, chapter 27, *ultra vires* the Parliament of Canada either in whole or in part and if so, in what particular or particulars or to what extent?"

On an appeal before the Court of Appeal for Ontario in *Meyer Malt & Grain Co.* v. *Coombs et al.* (1), that court had held, by a majority, against the constitutional validity of the section. When it had been attacked in that court the Attorney-General of Canada had been notified, and he intervened. An appeal from that court's decision to the Supreme Court of Canada had been entered but on settlement of the action the appeal was discontinued. In these circumstances the present reference was made.

Glyn Osler K.C. and *F. P. Varcoe K.C.* for the Attorney-General for Canada.

Charles Lanctôt K.C. and *L. St. Laurent K.C.* for the *Attorney-General for Quebec.*

I. A. Humphreys K.C. for the Attorney-General for Ontario.

The judgment of the court was delivered by

DUFF C.J.—This reference by His Excellency the Governor in Council raises the question whether s. 110 of the Dominion *Companies Act* (R.S.C., 1927, c. 27) is *ultra vires* of the Parliament of Canada, either in whole or in part. The section provides as follows:

110. If the directors of the company declare and pay any dividend when the company is insolvent, or any dividend, the payment of which renders the company insolvent, or impairs the capital thereof, they shall be jointly and severally liable, as well to the company as to the individual shareholders and creditors thereof, for all the debts of the company then existing, and for all debts thereafter contracted during their continuance in office, respectively.

(1) [1933] O.R. 259; [1933] 2 D.L.R. 374.

2. If any director present when such dividend is declared does forthwith, or if any director then absent does, within twenty-four hours after he becomes aware of such declaration and is able so to do, enter on the minutes of the board of directors his protest against the same, and within eight days thereafter publishes such protest in at least one newspaper published at the place in which the head office or chief place of business of the company is situated, or, if no newspaper is there published, in the newspaper published in the place nearest thereto, such director may thereby, and not otherwise, exonerate himself from such liability.

3. Nothing in this section shall be deemed to create any liability upon the directors of a mining company by reason of payment of dividends out of funds derived from the operations of such company, if such payment does not reduce the value of the remaining assets of the company so that they will be insufficient to meet the liabilities of the company then existing, exclusive of its nominal paid up capital.

The *Companies Act* has been treated as enacted under the powers of the Dominion Parliament embraced within the residuary clause, as well as such powers as may arise under no. 2 of s. 91, of the *B.N.A. Act.* In *John Deere Plow Co.* v. *Wharton* (1), it was held that certain provisions of the *Companies Act* (sections 5, 14, 33, 35 and 37) as well as s. 9 of the present *Interpretation Act,* are *intra vires.* The principle of that decision is, as Lord Haldane explained, that the subject matter "Incorporation of Companies with objects not provincial" is a subject which falls within the residuary clause of s. 91 because it is excluded from those embraced with s. 92 by the terms of the section itself. It is also laid down that "Incorporation of Companies" cannot be read in a manner so strict as to limit it to the subject of bringing such companies into being. It was further held that

the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade.

The question of what falls within the subject of "Incorporation of Companies" thus vested in the Parliament of the Dominion under the residuary clause, and what falls within the powers of that Parliament in relation to such companies by virtue of the trade and commerce clause (no. 2 of s. 91) is a question which in particular cases may be delicate and difficult. I think the question now raised is one which presents no very great difficulty.

(1) [1915] A.C. 330.

1934

REFERENCE *re* S. 110 OF THE DOMINION *Companies Act.*

Duff C.J.

It seems to me legitimate to glance at the state of the law with respect to the incorporation and management of companies existing in England at the time the *B.N.A. Act* was passed (*Croft* v. *Dunphy* (1).) That there may be no inaccuracy as to the state of it, I quote some passages from the 5th edition of Lord Lindley's book on the Law of Companies:

> By the common law of this country every member of an unincorporated partnership, whether it be an ordinary firm or a joint-stock company with transferable shares, is personally liable for all the debts and engagements of the partnership contracted whilst he is a member of it. (p. 245).
>
> * * *
>
> 2. With respect to the extent of the liability of the members of a company upon contracts in which it is specially stipulated that the funds of the company alone shall be answerable, and that no member shall be liable beyond the amount of his share, the limit set by contract is the limit of liability:—
>
> Where the company is an incorporated company, there never was any difficulty in giving effect even at law to all the terms of the contract; and in the case of companies registered under the Act 7 & 8 Vict., c. 110, it was held that the members were not liable to have execution issued against them upon judgments obtained against the company on a contract of the description in question; but that the property of the company was alone liable to make good the demands of the judgment creditor; and this was held at law even in cases where the subscribed capital had been exhausted but the whole capital had not been paid up.
>
> The same principle was acted on in equity, except that a Court of Equity compelled the shareholders to pay up rateably so much of the capital as had not already been subscribed. This can now be done by a properly constituted action.
>
> In all these cases, however, it must be borne in mind that the liabilities which are limited to the funds of the company, are those only which are expressly so limited by the contracts with the creditors; the liabilities to other persons are unlimited.
>
> Companies governed by the Companies Act, 1862, may, although unlimited, limit their liability by special contract, and where they do so the principles above adverted to will be applicable. But as under the Companies Act, 1862, judgments against a company cannot be enforced against its members, questions as to their individual liability can scarcely arise except when a company is being wound up. (pp. 250-251.)
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> * * *
>
> Passing now to the subject of limited liability by statute, the first point which has to be borne in mind is that the moment a society of any kind is incorporated, its members cease by common law to be in any way liable for the debts and engagements of the body corporate. Moreover, although by common law it has always been lawful for the Crown to create corporations, the Crown has no power by common law to create a corporation and at the same time to render its members individually liable for its debts, the whole of that branch of the law which relates to the liability, as distinguished from the non-liability, of the members of in-

(1) [1933] A.C. 156, at 165.

corporated companies for the debts and engagements of such companies, is of modern growth and is based upon statutory enactments. These enactments will be examined hereafter in connection with the subjects of execution and winding up, but it may be useful to state generally in the present place that—

1. The liability of the members of a company governed by the Letters Patent Act depends on the terms of its charter or letters patent, the Crown being empowered by the Act in question to limit their liability or not.

2. The liability of the members of a company governed by the Companies Clauses Consolidation Act is limited to the extent of their unpaid-up shares in the capital of the company.

3. The liability of the members of a company empowered by a special Act of Parliament to sue and be sued by a public officer depends on the terms of such Act, but will almost invariably be found to be unlimited.

4. The liability of the members of a banking company governed by 7 Geo. 4, c. 46, is unlimited.

5. Subject to the exceptions presently to be noticed, the extent of the liability of the members of a company formed and registered under the Companies Act, 1862, depends upon whether the company is registered with limited liability or not. If the company is registered with limited liability, its members are not liable beyond the amount for which they have undertaken to be responsible; but if the company is not so registered, its members are liable to the full amount of the company's debts and engagements, whatever that may be. The liability, however, of each member is merely a liability to contribute with others; and such liability can only be enforced by winding up the company. No execution can issue against a member upon a judgment obtained against the company.

The exceptions above referred to are as follows:—

1. Even if the company is registered with limited liability, the liability of the directors will be unlimited if the memorandum of association so provides.

2. If a company carries on business for six months with less than seven members, all the members cognizant of the fact are severally liable for the debts contracted by the company during that time, and may be sued accordingly.

3. The Act contains stringent provisions to compel limited companies and their officers to use the word "limited" as part of the name of the company in matters relating to its business; and persons signing or authorizing the signature on behalf of such a company of any bill of exchange, promissory note, cheque, or order for money or goods, in which the word limited is not used as directed, are themselves liable for the amount, unless the same is duly paid by the company.

4. The liability of limited banking companies issuing notes is unlimited in respect of such notes.

5. Although a company may be registered without limited liability, the liability of its members may be limited by special contract.

6. The liability of the members of companies not formed under the Act but registered under it, is as to all matters occurring after registration the same as the liability of members of companies formed and registered under the Act. But as to other matters the extent of liability is the same as if no registration had taken place. Existing companies with unlimited liability, whether registered as such under the Act of 1862 or

1934

REFERENCE *re* S. 110 OF THE DOMINION *Companies Act.*

Duff C.J.

not, may be registered as limited companies, and if so registered, the liability of their members as to matters occurring after registration becomes limited also. But banking companies existing at the date of the passing of the Act and registering under it as limited companies, are bound to give certain notices to their customers before the privilege of limited liability can be claimed as against them. (pp. 252-4.)

Legislation relating to companies, therefore, provided, broadly speaking, for the constitution of the companies; for the conditions under which membership could be acquired; for the management by directors or other managers; the terms and conditions upon which profits should be divided or dividends declared; the conditions under which the capital of the company could be increased or diminished; the responsibility of the members of the company in respect to the debts of the corporation; the responsibility of the directors in respect to such debts. It does not follow, of course, as a logical conclusion, because enactments had been passed in relation to these subjects in Great Britain and were on the statute books some years before the passing of the *B.N.A. Act,* that they are of necessity included within the subject " Incorporation of Companies " within the meaning of s. 92 (11). But they afford evidence, and such evidence could be accumulated indefinitely, that such topics naturally, if not inevitably, engage the attention of the legislature when it is dealing with the subject of the constitution of joint stock companies.

Reading the term " Incorporation of Companies " in light of the existing experience in Great Britain, as well as in this country, such subjects naturally fall within any practical scheme for the incorporation of companies. Let us consider this a little more in detail.

The limitation of the resort of the creditors of the company to the funds of the company itself; the terms and conditions of such limitation, and the terms and conditions of the liability of individual members of the company in respect to the debts of the company, are subjects which would appear to be necessary for consideration and determination.

Then, if you are to limit the recourse of the creditors to the assets of the company, inevitably arises the question, what protection is to be given as to the preservation of such assets? What protection, for example, against im-

proper division amongst shareholders under the guise of profits. So, with regard to the position of the managers—managers who are invested with powers and responsibilities. It appears to me that you are strictly within what might properly be called the defining of the constitution of the company when you are making provision for limiting the liability of shareholders in respect of the debts of the company; when you are making co-ordinate provisions for the protection of the assets of the company in the interests of the creditors of the company; when you are providing safeguards against the malfeasance of the managers and, particularly, when, in the interests of persons dealing with the company, you are providing safeguards against the improper or colourable employment by the managers or the shareholders of their powers, in wasting the assets of the company.

It seems to me to follow from all this that s. 110, as we have it before us, is an enactment of a character that brings it within the class of topics that the legislature must be supposed to have contemplated as falling within the subject of "Incorporation of Companies" as used in the *British North America Act.*

The question submitted is answered in the negative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Quebec: *Charles Lanctôt.*

Solicitor for the Attorney-General of Ontario: *W. B. Common.*

IN THE MATTER OF A REFERENCE CONCERNING THE CONSTITUTIONAL VALIDITY OF THE COMPANIES' CREDITORS ARRANGEMENT ACT.

1934
*March 27, 28, 29.
*June 6.

Constitutional law—The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36 (Dom.)—Constitutional validity—"Bankruptcy and Insolvency" (B.N.A. Act, s. 91 (21)).

The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36, is *intra vires* of the Parliament of Canada. The matters dealt with come within the domain of "bankruptcy and insolvency" within the intendment of s. 91 (21) of the *B.N.A. Act.*

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

1934

REFERENCE *re* COMPANIES' CREDITORS ARRANGEMENT ACT.

The Act discussed with regard to its aim, its features, its comparison with existing bankruptcy or insolvency legislation, and the history of bankruptcy and insolvency law.

REFERENCE to the Supreme Court of Canada for hearing and consideration pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35) of the following question:

Is *The Companies' Creditors Arrangement Act, 1933,* 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

L. E. Beaulieu K.C. and *F. P. Varcoe K.C.* for the Attorney-General for Canada.

C. Lanctôt K.C. and *L. St. Laurent K.C.* for the Attorney-General for Quebec.

I. A. Humphries K.C. for the Attorney-General for Ontario.

The judgment of Duff C.J. and Rinfret, Crocket and Hughes JJ. was delivered by

DUFF C.J.—The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Under the *Bankruptcy Act,* as it now exists, proposals for compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. This, however, was not always the case. Under the *Bankruptcy Act* of 1919, a proposal for composition or arrangement could be made prior to an assignment or receiving order.

The *Winding-up Act* contains brief provisions, in sections 65 and 66, which, in substance, differ very little indeed from the legislation now before us; although this, no doubt, is subject to the important qualification, that the provisions of the *Winding-up Act* apply only in the case of a company which is in course of being wound up. Similar provisions affecting the subject matter of this legislation are to be found in Canadian legislation before and after Confederation.

The powers conferred upon the court under the *Companies' Creditors Arrangement Act, 1933,* come into operation when a compromise or arrangement is proposed between a "company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or which is deemed insolvent within the meaning of the *Winding-up Act,*" and its "unsecured creditors or any class of them." The important difference, as already observed, between the provisions of the *Companies' Creditors Arrangement Act* and those of the *Bankruptcy Act* itself in relation to compromises and arrangements is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under the *Bankruptcy Act* or the *Winding-up Act.* The Act, however, creates powers, which can be exercised in case, and only in case, of insolvency .

Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation. As Lord Cave impliedly states in *Royal Bank of Canada* v. *Larue* (1), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament."

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

The argument mainly pressed upon us in opposition to the validity of the legislation was that

> It does not endeavour to treat equally all contracts of debts between the debtor and his creditors but allows the interest of some of them to be sacrificed in the interest of the company and of other classes of creditors.

(1) [1928] A.C. 187.

1934

REFERENCE *re* COMPANIES' CREDITORS ARRANGEMENT ACT.

Duff C.J.

We think an adequate answer to this objection is put forward in the argument on behalf of the Attorney-General for the Dominion. Apart altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders. We think it is not unimportant to note the circumstance to which our attention was called by counsel for the Attorney-General for the Dominion that the court may order shareholders to be summoned although they are not authorized to vote.

The judgment of Lamont and Cannon JJ. was delivered by

CANNON J.—This is a reference by the Governor General in Council submitting for hearing and consideration of this Court the following question:

Is *The Companies' Creditors Arrangement Act, 1933*, 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

This Act is designed to apply to insolvent or bankrupt companies; and it is contended on behalf of the Dominion that Parliament could pass this legislation under section 91, par. 21, which gives it paramount jurisdiction to make laws concerning bankruptcy and insolvency. The provinces represent that in enacting it Parliament disregarded their exclusive jurisdiction under section 92, par. 13, in relation to property and civil rights in the province.

The whole argument before us was finally directed to one point: Are the proceedings contemplated by the Act, in pith and substance, *bankruptcy* or *insolvency* enactments within the fair and ordinary meaning of these words? One of the features which distinguishes this Act from the *Bankruptcy Act* now in force is that, under the latter, a

composition or arrangement cannot be proceeded with before a receiving order or assignment has been made. Another difference is that under the *Bankruptcy Act* the secured creditor is dealt with on the footing that he may realize his security or value or surrender the same; it is only in respect of what he claims apart from the security that he is affected by the composition or arrangement. It was pointed out also that similar provisions giving binding effect to this approval by a certain majority of creditors are found in our legislation before and after Confederation.

The Insolvent Act of 1864, 27-28 Vict., ch. 17, sec. 9;

The Insolvent Act of 1869, Canada, 32-33 Vict., ch. 16, secs. 94 *et seq.;*

The Insolvent Act of 1875, Canada, 38 Vict., c. 16, secs. 54 *et seq.*

As far as Lower Canada is concerned, it may be of interest to note that chapter 87 of the Consolidated Statutes of Lower Canada, 1859, allowed the issue of a *capias* if the debtor "had refused to compromise or arrange with his creditors, or to make a *cession de biens,*" and provides that the debtor may be discharged if, when the affidavit for *capias* was made, he had "not refused to compromise or arrange with his creditors."

Moreover, I find that, before and since Confederation, arrangements with the creditors have always been of the very essence of any system of bankruptcy or insolvency legislation. Civil rights and the sanctity of contracts are certainly affected by clause 5 under which a minority of creditors would be bound by the vote of a majority in number representing three-fourths in value of creditors present and voting, either in person or by proxy, if the agreement or compromise to which they agreed be sanctioned by the court. I find that this feature existed long before Confederation and was at that time generally accepted.

Pardessus, Droit Commercial, vol. 3, éd. 1843, p. 92, no. 1232, says:

1232. Les créanciers d'un failli ont presque toujours intérêt à faire avec lui un arrangement quelconque, plutôt que d'éprouver les lenteurs et les embarrass d'une union qui finit souvent par consumer la fortune du débiteur. Mais, comme rarement tous sont d'accord, et qu'il est naturel de présumer qu'un grand nombre prendra les arrangements les plus convenables à l'intérêt commun, on a cru devoir faire céder la volonté de la

1934

REFERENCE *re* COMPANIES' CREDITORS ARRANGEMENT ACT.

Cannon J.

minorité à celle de la majorité; les créanciers présents ont donc été admis à décider pour les absents.

Cette minorité, ces absents, doivent au moins avoir l'assurance que de mûres réflexions ont dirigé ceux dont le voeu doit devenir une loi pour eux. Tel est l'objet des règles prescrites pour la validité du concordat.

Under number 1236, classes or categories having different interests are already recognized by this author, and he adds (No. 1237):

Le concordat est valablement consenti par la majorité des créanciers présents, pourvu que les sommes dues aux personnes qui forment cette majorité égalent les trois quarts de la totalité des créances vérifiées et affirmées, ou admises par provision, dues à des créanciers ayant droit de prendre part à la délibération du concordat.

Therefore, the very clause objected to in our Act of 1933 seems to be copied from the law of bankruptcy as it existed in France in 1843, when this work was published.

Under our system and the English *Bankruptcy Act* of 1914, bankruptcy legislation deals with the proceedings necessary for the distribution, under judicial authority, of the property of an insolvent person among his creditors. It assumes the commission of an "act of bankruptcy" followed by a petition to the court for a receiving order for the protection of the estate. The property of the debtor then vests in an official receiver. The debtor must submit a statement of affairs to the official receiver who calls a meeting of the creditors. The debtor is examined; and *if no composition or scheme of arrangement is approved,* he is adjudged bankrupt; and his property becomes divisible among his creditors and vests in a trustee.

Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation and were incorporated in our *Insolvent Act of 1864;* and such a deed of composition and discharge could be validly made either before, pending or after proceedings upon an assignment, or for the compulsory liquida-

tion of the estate of the insolvent. What was considered as being within the scope of the word "insolvency" when it was used in section 91 of the *B.N.A. Act* is to be found in the preamble of the 1864 Insolvency Act, which reads:

> Whereas it is expedient that provision be made for the settlement of the estates of insolvent debtors, for *giving effect to arrangements between them and their creditors*, and for the punishment of fraud.

See also: *Cushing* v. *Dupuy* (1); *Royal Bank of Canada* v. *Larue* (2).

I therefore reach the conclusion that arrangements as provided for by this Act are and have been, before and since Confederation, an essential component part of any system devised to protect the creditors of insolvents and, at the same time, help the honest debtor to rehabilitate himself and obtain a discharge.

I would, therefore, answer the question submitted to us in the negative.

The question submitted is answered in the negative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Quebec: *Charles Lanctôt.*

Solicitor for the Attorney-General of Ontario: *I. A. Humphries.*

1934
* March 13.
* June 6.

EVA WALLACE BAKER, EXECUTRIX OF THE ESTATE OF ELIZABETH M. WEEKS (DEFENDANT) ..... APPELLANT;

AND

CARRIE DUMARESQ (PLAINTIFF)... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Trust—Accounts—Testator's widow appointed executrix and given "the right to use such part of the income and principal of my estate as may reasonably be necessary for her support and maintenance"—Action by residuary legatee for accounting as to widow's use of estate—Extent of widow's right to encroach upon corpus—Reference to Master to take an account—Widow's dealing with the property—Method of fixing income of estate and of fixing allowance for support and maintenance—Authority of Master—Whether right on appeal to object to method adopted by Master in view of conduct at hearing—Right of appeal to Supreme Court of Canada from dismissal by Court of Appeal of appeal from judgment dismissing appeal from Master's report.

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* PRESENT:—Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

(1) (1880) 5 App. Cas. 409. (2) [1928] A.C. 187.

1934

BAKER
v.
DUMARESQ.

By his will W. appointed his widow to be executrix and left her "the right to use such part of the income and principal of my estate as may reasonably be necessary for her support and maintenance." W. died in 1919 and his widow died in 1931. W.'s residuary legatee sued the widow's executrix for an accounting of W.'s estate. The trial judge held that it was for the court to determine what was reasonably necessary for the widow's support and maintenance and her right to encroach upon the corpus of the estate was limited in amount to what the court deemed reasonably necessary; and he made a reference to the Master to take an account and to ascertain what amount of W.'s estate remained or ought to be in the hands of the widow's executrix. Accounts were filed before the Master but vouchers were lacking; also the Master was of opinion that the widow had brought herself within the law as to liability and onus for mixing trust property with one's own (*Lupton* v. *White*, 15 Ves. 432); and he did not go through the accounts, though he referred to them on occasions during the hearing. He held that a certain passing of accounts by the widow on February 16, 1922, was binding upon the parties, found the amount in her hands when she came to Toronto in September, 1922, and, in view of the investments at the latter date, fixed 6% as a fair rate at which to fix her income from the property, and, on evidence, fixed amounts per year (with certain items added) to be allowed her for reasonable support and maintenance, and made his report on that basis. The widow's executrix appealed from his report to a Judge, and then to the Court of Appeal for Ontario, the appeals being dismissed, and she then appealed to this Court.

Held that, while it is not for the Master, as a rule, without further direction, to apply the principle as to liability and onus for mixing trust property with one's own (*Lupton* v. *White, supra,* at 436), appellant must, on the record of the hearing, be taken, to the extent stated *infra,* to have agreed on the method of procedure adopted by the Master, and, to such extent, could not now object thereto (*In re Pratt,* 12 Q.B.D. 334, at 341); but this agreement applied only to the period after the widow came to Toronto in September, 1922, and only to the method in calculating a reasonable allowance for support and maintenance; the receipts, therefore, should be taken from the accounts (not by fixing a percentage as aforesaid); and the widow should have received credit for all sums shown by the accounts to have been expended for her reasonable support and maintenance from February 16, 1922, aforesaid, until she arrived in Toronto in September, 1922; from that time appellant was bound by the method adopted by the Master of ascertaining reasonable annual amounts for support and maintenance regardless of the accounts.

Held, further, that it was proper for the widow to purchase and maintain a property in Toronto as a home, and it was not necessary for her to live alone in it or to live in an apartment; but this real property (purchased in the widow's name), and certain furniture, were purchased with funds of W.'s estate and were assets of that estate passing to W.'s residuary legatee.

Held, further, that there was jurisdiction to entertain this appeal. *Hendrickson* v. *Kallio,* [1932] O.R. 675; *Supreme Court Act* (R.S.C. 1927, c. 36; s. 2 (*b*), defining "final judgment"); and Ontario Cons. Rule 506, referred to.

In the result, the appeal was allowed and the matter referred back to the Master to take the accounts in accordance with the judgment of this Court.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing her appeal from the judgment of Garrow J. dismissing her appeal from the report of the Master.

The plaintiff is a sister of, and the sole surviving residuary legatee under the will of, John W. Weeks, late of Sydney, Nova Scotia, where he died on January 25, 1919. The defendant is the executrix of the will of Elizabeth M. Weeks, who was the widow of the said John W. Weeks and executrix of his estate and who died at Toronto, Ontario, on February 24, 1931.

The will of the said John W. Weeks provided as follows:

I appoint my wife, Elizabeth M. Weeks, sole Executrix of this my last Will.

I give, devise and bequeath all my property real and personal of every kind and description and wheresoever situate unto my said wife during her life.

I authorize and empower my said Executrix to sell and dispose of any part of the real or personal property of my estate in her discretion, and to execute the necessary conveyance and assignments of the same.

My said Executrix shall have the right to invest the moneys of my estate in first mortgages of real estate, bank stock, Government and Municipal bonds or such other safe and sufficient security as may deem advisable. My said Executrix shall have the use of all my property real and personal during her lifetime. She shall have the right to use such part of the income and principal of my estate as may reasonably be necessary for her support and maintenance wherever she may choose to reside. My Executrix shall also have the right to use such part of the moneys of my estate as may be necessary for the upkeep and other purposes of my estate. After her death I direct that the balance of my estate remaining in her hands shall be divided between my brother, the Rev. William W. Weeks, and my sister, Carrie Dumaresque. Should my brother, William W., predecease my said sister, the whole of said balance shall go to my said sister and her heirs. In the event of the death of my said sister, her heirs shall take her share of my estate.

In the action the plaintiff complained of the use made by the said Elizabeth M. Weeks of the capital and income of the estate of the said John W. Weeks, and claimed from defendant an accounting of said estate.

The action was tried before Wright J., who held that, under the will of John W. Weeks, his widow had only the right to encroach upon the corpus or capital of his estate for her reasonable support and maintenance in excess of

1934

BAKER v. DUMARESQ.

what the income of the estate might furnish her with; that it was for the court to determine what was reasonably necessary for her support and maintenance, and her right to deal with or encroach upon the corpus of the estate was limited in amount to what the court deemed reasonably necessary for that purpose; that the object of the will was to provide for her support and maintenance out of the estate without regard to any private means that she might have of her own. He made a reference to the Master of the Court at Toronto to take an account of the estate of John W. Weeks and to ascertain what amount of said estate remained or ought to be in the hands of the executrix of the widow's estate.

The Master found that the accounts of the estate of John W. Weeks were passed by his widow (executrix) in the province of Nova Scotia on February 16, 1922, and that that audit should be treated as binding on the parties; that the assets then amounted to $13,415.08, and that the widow afterwards received and got in certain proceeds which brought the total to $20,494.03, which was the amount she had when she came to Toronto, Ontario, in September, 1922. In the course of his reasons he said:

> In September, 1922, $8,500 was invested in mortgages bearing 7%; $4,000 invested at 8%; $1,250 in bonds at 5½%. Balance owing on Reside sale $5,525 at 7%. The foregoing investments were good trustee investments. The said Elizabeth M. Weeks was a trustee as well as executrix and she should have continued the investments in trustee investments. During the period from 1922 to the time of her death such investments would have brought here easily on an average of 6%. * * * I am, therefore, of opinion, and so hold, that the said Executrix could have kept this money out on good trustee investments at 6%. The executrix, not having kept the Estate in her hands, after coming to Toronto, properly employed there is no fixed rate of interest chargeable under all the circumstances against her, *Toronto General Trusts Co.* v. *Hogg* (1). But, as I say, looking at the rate of interest on the investments she then had and what she could have obtained, 6% is a just and fair rate by which to fix her income. I think allowing the deceased Elizabeth M. Weeks say $294.03 moving from Sydney to Toronto and to settle in any apartment house, there would be in capital account $20,200 on her arrival in Toronto. This, I hold, is my starting point.
>
> I cannot concede to the argument of Mr. Tansey that Elizabeth M. Weeks had a right under the terms of the Will of the late John W. Weeks to buy real property if in her discretion she found it necessary, etc. The will of the late John W. Weeks * * * gives his executrix ample authority to sell any part of the real or personal property of his Estate in her dis-

(1) [1932] Ont. R. 641, at 645.

cretion. But nowhere is there any authority to purchase real estate. Here authority to invest the moneys of his Estate (that means proceeds of real estate sold) in first mortgages of real estate, bank stock, government municipal bonds, or such other safe and sufficient security as she may deem advisable. These latter words would follow the ejusdem generis rule and be interpreted similar securities. Buying land in her own name was not investing money in first mortgages in real estate. First mortgages are usually only 50% to 60% of the value of the lands. Also, as I have stated, she was a trustee and bound to invest in trustee securities.

There was no evidence tendered to show it would be more costly to live in one of the many beautiful comfortable well heated single woman's apartments than to buy a large house such as 73 Dewson street, so I cannot accede to Mr. Tansey's argument as to the purchase of this property. I see no authority for her to do so and I hold that by the will and the Trustee Act she should not have done so.

The income on the principal of the Estate of $20,200 would have yielded say $1,200 a year. Now, then, in the words of the judgment and the said Will would that sum be an amount reasonably necessary for her support and maintenance. If so, then she had no right to encroach on the corpus. If not sufficient what would be the yearly encroachment? Having found Mrs. Weeks' income on $20,200 would be in round numbers $1,200, what should she be allowed for reasonable necessary support and maintenance?

He discussed the evidence at length and found that from October, 1922, to October, 1926, the sum of $1,300 a year was ample for the widow's reasonably necessary support and maintenance, and $2,000 a year for the remaining years of her life, in addition to certain allowances for doctors, hospitals and nurses. He found that the amount that should be in the estate of John W. Weeks (and therefore in the hands of defendant as executrix of his widow's estate) at the date of his widow's death was $13,363.38 less the funeral expenses and reasonable expenses for monument.

The reasons of the Master are further stated and quoted from in the judgment now reported.

An appeal by the defendant from the Master's report was dismissed by Garrow J. and an appeal by the defendant from the judgment of Garrow J. was dismissed by the Court of Appeal for Ontario. The defendant appealed to the Supreme Court of Canada. The questions for determination on the appeal are sufficiently stated in the judgment now reported.

H. F. Parkinson K.C for the appellant.

H. J. McLaughlin K.C. for the respondent.

1934

BAKER v. DUMARESQ.

The judgment of the court was delivered by

HUGHES J.—This action was tried before the late Mr. Justice Wright, who held that according to the true construction of the will of John W. Weeks, Clergyman, deceased, the widow, the late Elizabeth M. Weeks, was entitled to encroach upon the corpus of the estate for the amount reasonably necessary for her support and maintenance, and the learned trial judge further directed a reference to the Master of the Supreme Court of Ontario to take an account of the said estate, and to ascertain what amount remained or ought to be in the hands of the executrix of the estate of the late Elizabeth M. Weeks, and reserved the question of costs and further directions until the Master should have made his report.

The late Reverend John W. Weeks died at the City of Sydney, in the Province of Nova Scotia, on or about the 25th day of January, 1919. The widow moved to the City of Toronto in September, 1922, and died there, on or about the 24th day of February, 1931.

The Master found that the accounts of the estate had been passed by the widow before the Registrar of the Court of Probate of the County of Cape Breton on or about the 16th day of February, 1922. The respondent contended that the receipts in the hands of the widow when she came to Toronto were $20,925.64, while the appellant contended that the amount was only $19,450.64. The Master held that the audit of the accounts in Cape Breton was binding upon the parties and that the total receipts in the hands of the widow when she came to Toronto were $20,494.03. From this sum, the Master deducted $294.03 for moving expenses, leaving a balance in September, 1922, of $20,200, and this, the Master said, was his starting point. Accounts were prepared and filed before the Master, although vouchers were lacking. The Master said in his reasons that in September, 1922, $8,500 was invested in mortgages bearing 7% interest, $4,000 invested at 8%, $1,250 in bonds at 5½%, and a balance owing on a real estate sale carried interest at 7%. These, the Master held, were trustee investments and it was the duty of the widow to continue them in trustee investments. He considered that in view

of the investments the widow had in September, 1922, 6% was a just and fair rate at which to fix her income, although it was not established that she actually received that amount. The Master then proceeded to inquire whether $1,200 per year would be reasonably sufficient for the support and maintenance of the widow, and said that, if so, she had no right to encroach on the corpus; and, if not sufficient, he should ascertain what the amount of the yearly encroachment should be. The appellant called two witnesses to prove a reasonable amount for support and maintenance and the respondent called three witnesses. These witnesses testified mostly as to the cost of their own support and maintenance. From an analysis of the evidence of these witnesses, with some references to the accounts, the Master found that from October, 1922, to October, 1926, $1,300 per annum was a fair and reasonable amount to allow the widow for her support and maintenance. In the same way, the Master found that $2.000 a year was a reasonable sum for the remaining years. The Master then proceeded to summarize the accounting as follows:

Shortage on income	$3,866 67
Shortage on interest on income as it depreciated	700 00
Additional allowances for doctors, nurses and hospital	1,534 95
Nurses for last illness	735 00
	$6,836 62

The Master, therefore, found that the corpus should have been encroached upon only by the above total, and that the amount that should be in the hands of the appellant was $20,200 less $6,836.62, namely, $13,363.38. In his reasons, the Master said:

I have not dealt with the accounts as filed; they were not proved before me. No vouchers were presented for payment and I do not think that anything can be gained in an endeavour to reconcile the accounts kept by the deceased, Elizabeth M. Weeks, and her niece, Mrs. Baker. The moment Mrs. Weeks departed from her duty as trustee to keep the estate invested in trustee investments and followed that up by dealing with the bonds, buying and selling them as her own; that is, buying bonds from the estate and putting them in her own name, she quite fully brought herself within the law as laid down in Halsbury, volume 28, page 208, and *Lupton* v. *White* (1); *Cook* v. *Addison* (2). Even apart from these cases, the purchases of the Dewson street property prevented

(1) (1808) 15 Ves. 432. (2) (1869) L.R. 7 Eq. 466 at 470

1934

BAKER v. DUMARESQ.

Hughes J.

one from determining how much of the estate of John W. Weeks was in existence at the death of his executrix, so that I have not audited the accounts that were filed with me. Neither counsel made any attempt to prove them before me and the whole matter was tried before me by showing what the estate was and what would be a proper amount reasonably necessary for the support and maintenance of Elizabeth M. Weeks, and I have determined the matter on that basis. * * * I, therefore, find that the amount that should be in the estate of the late John W. Weeks is $13,363.38 less the funeral expenses and reasonable expenses for monument.

Counsel for the appellant contended before us that the Master did not carry out the judgment of the learned trial judge, and that he did not take an account of the estate, and that the Master had no authority to fix the income of the widow at so much per annum, or to fix a sum for support and maintenance at so much per annum, but that the Master should have gone over the accounts, item by item, and made his report; or, if it was not possible to make a report from the accounts, he should have so stated.

In *Lupton* v. *White* (1), *supra*, the Lord Chancellor said, page 436:

If the result is, that the Master cannot take the account, it is clearly not for him, without a farther direction, to apply the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have been before that unauthorized mixture upon his part. There may be cases, in which the Master may charge parties upon that principle; but it must be under the direction of the Court; who will judge whether the case is proper. I agree entirely with the Master, that under these circumstances he cannot take such an account as this Decree calls for. The consequence is, that upon farther directions it must either be referred back to the Master, with a direction to guide him as the mode of charging the defendants, where he cannot take the account satisfactorily; or an issue must be directed; taking care not to overlook the principle I have mentioned, which throws the proof upon the defendants.

Counsel for the respondent, however, urged before us that the parties proceeded before the Master and expressly or impliedly consented to the method of procedure. Before any evidence was taken, the Master said:

It is agreed between counsel that I fix the amount of property she had when she came to Toronto, decide on the contentions of both parties as submitted to me to-day, and then proceed to find out what the reasonable support and maintenance of the deceased was in Toronto; subject, however, to my disposing of the contention of Mr. McLaughlin that certain expenditures made by the deceased, Mrs. Weeks, were not proper expenditures for her support and maintenance.

(1) (1808) 15 Ves. 432.

A little later, counsel for the appellant said:

I understand, sir, that the method on which your Lordship wants us to approach this subject is not so much in regard to the accounts which have been kept, as to ascertain what would be reasonable and necessary under the circumstances for her support and maintenance?

To this the Master replied:

Yes. For instance, Mr. Tansey, I suppose you could find in Toronto fifty widows of clergymen who would know definitely what it cost them to live in as respectable a condition as the widow of such a clergyman should keep up. I know several myself, but I do not know anything about what it costs them. It is up to you to prove that.

Counsel for the appellant then called the appellant and among other questions asked her: "Now, Mrs. Baker, getting to the question of expenses. Taking the ordinary expenses over a term of years, that is, from 1922 until the time of her death, just ordinary expenses, what would you say was a fair average a year for Mrs. Weeks herself?" To this, the appellant answered: "I should say about $2,000. I did not make it up at all."

A little later the Master asked the appellant concerning some question of income. "Do your accounts shew that? Do you know that?" To which the appellant answered, "Yes." In fact the accounts were referred to on many occasions. The appellant then called Frances Lorway and among many questions, stated to her as follows: "I want you to give the Court, as nearly as possible, first, what is your ordinary and average rate of expenses in living in Toronto." The respondent then called three witnesses who testified, among other things, as to living costs in Toronto.

In *In re Pratt* (1), Bowen, L.J., said:

There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction." You ought not to lead a tribunal to exercise jurisdiction wrongfully.

It will be observed, however, that the statement of the Master as to the agreement between the parties on the method of procedure referred only to the period after the late Elizabeth M. Weeks came to Toronto, namely, in the month of September, 1922, and, secondly, that it referred to the method to be pursued in calculating a reasonable allowance for support and maintenance only.

(1) (1884) 12 Q.B. Div. 334, at 341.

1934

BAKER v. DUMARESQ.

Hughes J.

As indicated in the foregoing, the accounts were passed on or about February 16, 1922. The receipts to that date were $16,500 and the disbursements were $3,084.08, leaving a balance on hand of $13,415.08. To this sum the Master added the following sums as receipts between February 16, 1922, and the arrival of the widow at Toronto:

Proceeds of sale	46	Rigby	Road....	$5,825 00
"	"	"	Victory Bond	300 00
"	"	"	Automobile	600 00
"	"	"	Furniture	328 95
"	"	"	Acousticon	25 00

These sums made a total of $20,494.03, and the Master found that the widow had these receipts belonging to the estate when she arrived in Toronto in September, 1922. As before stated, the Master said in his reasons: "I have not dealt with the accounts as filed; they were not proved before me." It is clear, however, that the receipts should be taken from the accounts; and it is also clear that the late Elizabeth M. Weeks should have received credit for all sums shewn by the accounts to have been expended for her reasonable support and maintenance from February 16, 1922, until she arrived in Toronto. From that time, the appellant was bound by the method of procedure adopted by the Master of ascertaining reasonable annual amounts for her support and maintenance regardless of the accounts. So far as income was concerned, however, this should have been ascertained from the accounts for the whole period after February 16, 1922, that is, both before and after the widow arrived in Toronto.

We are further of opinion that it was proper for the late Elizabeth M. Weeks to purchase and maintain the property known as 73 Dewson street as a home, and that it was not necessary for her to live alone in it or to live in an apartment unless she so desired. This real property, however, and certain furniture, were purchased with funds of the estate of the late John W. Weeks, and these are assets of that estate passing to the respondent under his will.

1934

BAKER v. DUMARESQ.

Hughes J.

On the question of jurisdiction to entertain this appeal, we were referred to Consolidated Rule 506, which provides as follows:

> Every report or certificate of a Master shall be filed and shall be deemed to be confirmed at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.

In *Hendrickson* v. *Kallio* (1), it was held by the Court of Appeal of Ontario that an order made by a single judge of the Supreme Court dismissing an appeal from the report of a special referee to whom the trial of an action for an accounting had been referred, pursuant to sections 66-71 of the *Judicature Act,* was a final order, because it determined the merits of the action and the real rights of the parties. In his judgment, at page 679, Mr. Justice Middleton distinguished the cases of *Clarke* v. *Goodall* (2), *Dunn* v. *Eaton* (3) and *Hesseltine* v. *Nelles* (4). The latter cases were, however, before the 1920 Amendment to the *Supreme Court Act* which defines "final judgment" as any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding.

We are of opinion, therefore, that there is jurisdiction to entertain this appeal.

The appeal will, therefore, be allowed; but, under all the circumstances, without costs here and before the Court of Appeal and before the late Mr. Justice Garrow, and the matter will be referred back to the Master to take the accounts in accordance with the above judgment

Appeal allowed, without costs.

Solicitors for the appellant: *Lamport, Ferguson & Co.*

Solicitors for the respondent: *McLaughlin, Johnston, Moorhead & Macaulay.*

(1) [1932] O.R. 675.
(2) (1911) 44 Can. S.C.R. 284.
(3) (1912) 47 Can. S.C.R. 205
(4) (1912) 47 Can. S.C.R. 230.

1934

* May 7.
* June 6.

J. LEWIS & SONS, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

STANLEY E. DAWSON AND FRED. W. DAWSON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Will—Construction—Description of devised property—Falsa demonstratio.

A testator's real estate consisted of a farm at Cape John upon which he and his family resided and a wood lot about 50 miles therefrom. He had a wife and four children. By his will he gave his wife the third part of his real estate and personal property for her life; then, by clause 2 (the construction of which was in question) he gave to his younger son, W., "all my real estate consisting of the farm on which I now reside, situated at Cape John and also all my personal property subject to his mother's claim and also to" arrangements for building a house and for carrying on the work of the farm for the maintenance of the family until W. reached 21 years of age, but "in the event of his dying before he comes to that age, then all my real estate and personal property shall go to my oldest son L., he at the same time assuming all the responsibilities and liabilities involved in these arrangements." By the subsequent clauses the testator gave to his son L. and to his daughter M. each a sum to be paid by W. "after he comes into possession of the property" and to the testator's daughter N. a sum to be paid by W. after N. reached the age of 21.

Held: The words in clause 2 giving to W. "all my real estate consisting of the farm on which I now reside, situated at Cape John" should, in view of their context and the other provisions of the will, be construed as a gift of all the testator's real estate, including the wood lot as well as the farm; the words "consisting of the farm," etc., being rejected as a mere *falsa demonstratio.*

Slingsby v. *Grainger,* 7 H.L. Cas. 273, discussed and distinguished.

Judgment of the Supreme Court of Nova Scotia *en banc,* 7 M.P.R. 255, affirmed.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1) reversing (Hall J. dissenting) the judgment of Graham J. (2).

The question was one of title to land, the parties respectively claiming through deeds from different grantors, and the rights of these grantors depended upon the proper

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) 7 M.P.R. 255; [1934] 2 D.L.R. 153.

(2) 7 M.P.R., at 256-259.

construction of a will. The material facts of the case, the provisions of the will in question, and the question for determination, are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

J. L. Ralston K.C. for the appellant.

G. F. Henderson K.C and *D. K. MacTavish* for the respondents.

The judgment of the Court was delivered by

CROCKET J.—This action was brought against the two appellants and one, Edwin A. Rice, for partition of a lot of woodland containing 400 or 500 acres, situate at Middle Stewiacke, Colchester Co., Nova Scotia.

The appellant claimed that it owned in fee simple a nine-twelfths undivided interest in this wood lot, having acquired title thereto by a series of deeds from the oldest son and two daughters of one, Alfred Archibald, who died in the year 1875. The respondents claimed that they were the owners of the entire lot under a succession of deeds from the only other child of Alfred Archibald, his youngest son, to whom they alleged his father devised it by his last will and testament executed on August 24, 1875.

It is admitted that Alfred Archibald was seized in fee of the lot at the time of the execution of his will and at the time of his death. The whole question involved in the appeal is as to whether, upon the construction of the will, the wood lot was devised to the testator's youngest son, or whether there was an intestacy with respect to it.

The testator owned in addition to the wood lot in question a farm at Cape John, Pictou Co., upon which he and his family resided, which with the wood lot, distant, the trial Judge states, about 50 miles from the farm, comprised the whole of his real estate. The testator left surviving him his widow, two sons and two daughters, the name of the oldest son being Leander Gordon, and the name of the youngest Walter Henry.

The learned trial Judge held that there was an intestacy in respect of the wood lot and that as a result the plaintiff by its deeds acquired a nine-twelfths undivided interest in it, while the defendants through their deeds

1934

J. LEWIS & SONS, LTD. v. DAWSON.

Crocket J.

from the youngest son acquired an undivided interest in the remaining three-twelfths. The trial judgment was reversed on appeal to the Supreme Court *en banc* per Ross and Carroll, JJ., who held that all the testator's real estate was devised to the youngest son, Walter Henry. Hall, J., agreed with the learned trial Judge, Graham, J., that the devise to Walter Henry did not cover the wood lot.

By para. 1 of his will the testator gave and bequeathed to his wife the third part of his real estate and personal property during the period of her natural life. Para. 2 with which the dispute is principally concerned reads as follows:

> I give and bequeath to my youngest son Walter Henry all my real estate consisting of the farm on which I now reside, situated at Cape John and also all my personal property subject to his mother's claim and also to the following arrangements, viz: That a house is to be built as soon as convenient, part of the material of which is already prepared, and the work of the farm is to be carried on as before for the maintenance of the family until the said Walter Henry shall arrive at the age of twenty-one. But in the event of his dying before he comes to that age, then all my real estate and personal property shall go to my oldest son Leander Gordon, he at the same time assuming all the responsibilities and liabilities involved in these arrangements.

Para. 3 gives and bequeaths to the testator's oldest son, Leander Gordon, the sum of $500 "to be paid to him by his brother Walter Henry after he comes into possession of the property." Para. 4 gives and bequeaths to the testator's oldest daughter, Margaret, the sum of $200 which was also "to be paid to her by her brother Walter Henry after he comes into possession of the property." Para 5 gives and bequeaths to the testator's youngest daughter, Nettie, the like sum of $200 which was "to be paid to her by her brother Walter Henry after she arrives at the age of twenty-one." A codicil executed a few weeks later, merely changed the amounts of the legacies to the daughters from $200 to $100 each.

The words which create the difficulty are the words by which the testator described the land devised to Walter Henry, viz: "all my real estate consisting of the farm on which I now reside, situated at Cape John." This phrase, standing by itself, is capable of two different meanings: first, that the subject of the devise was all the testator's real estate and that this consisted only of the farm on

which he then resided situated at Cape John; and, second, that the subject of the devise was only that portion of his real estate which consisted of the farm. If the first be adopted as the intended meaning, the general words "all my real estate" would obviously be the governing words of the devise and the subsequent words, in that view, might be disregarded as a mere *falsa demonstratio* in the light of the admitted fact that the testator at the time was seized in fee, not only of the farm at Cape John, but of the wood lot at Middle Stewiacke. If, on the other hand, the phrase be read in the suggested alternative sense, no question of *falsa demonstratio* arises, for in this view there is no repugnance or inconsistency between the two expressions "all my real estate" and "consisting of the farm on which I now reside," etc.

In support of the latter construction the learned counsel for the appellant primarily relies upon the language of the phrase itself. He argues that the word "all" is applicable to the whole phrase and not merely to the words "my real estate," and that the words "consisting of the farm," etc., consequently form a necessary part of the description of the intended devise and limit the meaning of the whole description to the farm. Secondarily, he contends that there is nothing in any of the other provisions of the will which in any way modifies or alters the meaning of the phrase as indicated upon its face.

If the phrase alone be considered, dissociated from its context and all other provisions of the will and having regard only to the admitted fact that the farm did not in truth comprise all the testator's real estate, we should not have hesitated to accede to the argument that it ought to be construed in a sense which does not import a false or erroneous description rather than in a sense which does. The decisive question, however, is: what was the testator's real intention respecting this devise, as indicated, not by the quoted phrase itself, but as indicated by its context and the terms of the will as a whole? It may be that, looking at the phrase itself, it should be treated *prima facie* as embodying but one complete description limiting to the farm only the land intended to be given, seeing that such a construction eliminates all repugnance and inconsistency

1934

J. LEWIS & SONS, LTD. v. DAWSON.

Crocket J.

between the general words "all my real estate" and the qualifying words "consisting of the farm," etc., and yet that, when its immediate context and the other provisions of the will as a whole are considered, such a construction of the isolated phrase may be found to be entirely out of accord with other provisions of the will upon which it bears and which bear upon it, and out of accord with the testator's true intention as evidenced by the entire will.

When the immediate context and the other provisions of the will are examined, it is seen that the gift to Walter Henry comprises not only "all my real estate consisting of the farm," etc., but also "all my personal property"; that the whole is subject to the antecedent gift to his mother, viz: "the third part of my real estate and personal property" for the term of her natural life, and to the specified stipulations as to the building of a house and the continuation of the work on the farm as before for the maintenance of the family until Walter Henry attains the age of 21; that the subject-matter of the gift-over to Leander Gordon, which is only to take effect in the event of Walter Henry not attaining the age of 21 and is also described as "all my real estate and personal property," is subject to his assumption of "all the responsibilities and liabilities involved in these arrangements"; and that the two legacies to Leander Gordon and Margaret (the oldest daughter) for $500 and $200 respectively are to be paid by Walter Henry "after he comes into possession of the property" and the other $200 legacy to Nettie (the youngest daughter) "after she arrives at the age of twenty-one."

These provisions, we think, make it perfectly clear, not only that the will was intended to make complete provision for the testator's wife and all his children, but to dispose of his entire estate—real estate and personal property alike—for that purpose, regardless of whether the farm constituted all the testator's real estate or not. The description of the subject-matter of the gift to the testator's wife is unmistakably incapable of any other meaning on its face than that it embraces one-third of *all* the testator's real estate and personal property of whatever it consisted. Similarly, the description of the subject-matter of the gift-over to Leander Gordon is incapable of any other meaning

on its face than that it embraces *all* the testator's real estate and personal property, of whatever it consisted, subject, of course, to the antecedent gift to his mother and his assumption of the responsibilities and liabilities attached to the principal gift to Walter Henry. To construe the particular words "consisting of the farm," etc., as denuding the general words "all my real estate" of the comprehensive sense which they undoubtedly bear in respect of both the gift to the testator's wife and the gift-over to Leander Gordon and read them as a cutting down of the description of the subject-matter of the principal gift to Walter Henry out of which the gift-over to Leander Gordon entirely proceeds, rather than as a mere declaration as to what all his real estate did consist of, seems to me to be repugnant, not only to the grammatical and obvious meaning of the words "all my real estate" themselves, but repugnant to the real intention of the testator as evidenced by the terms of the whole will.

The significant linking together of the three gifts in para. 2 itself points directly to the conclusion that the words "all my real estate" are to be understood in the same sense in regard to each. The provisions for the payment by Walter Henry of the three legacies afford additional evidence to the same effect, for it is impossible to believe that the testator could have intended that his youngest son, who was clearly charged with the responsibility for carrying on the work of the farm as before for the maintenance of the entire family until he should attain the age of 21, and with the payment of the three legacies provided as a further bounty to the oldest son and the two daughters after he should come into possession of the property, should take less from the principal gift to him than the older son would take from the gift-over in the event of the former's death before attaining his majority. Such a construction obviously entails an intestacy as to all real estate, other than the farm, in the one case and not in the other—a construction which can only be justified by clear and unambiguous language.

We think, therefore, that the majority judgment of the Court of Appeal correctly construes the words "all my real estate" as the leading words of the phrase in ques-

1934

J. LEWIS & SONS, LTD. v. DAWSON.

Crocket J.

tion, affording a complete description of what the testator really had in his mind as the subject-matter of the devise to Walter Henry, and that the addition of the particular words relied upon by the appellant are not in truth a necessary part of that description but an independent and erroneous declaration that all the testator's real estate consisted of the farm on which he resided. In other words, that the expression "all my real estate" is to be read in its natural grammatical sense and not as "all *that portion of* my real estate consisting of the farm," etc.

In *Slingsby* v. *Grainger* (1), upon which the appellant's counsel so strongly relied, there was no such collocation of language as that contained in the will in the case at bar, though there was a gift and a gift-over which related one to the other. In that case both gifts were entirely of personal property, which was composed of consols, reduced annuities and bank stock. The testatrix by her will, which she wrote herself, left to her brother

> everything I may be possessed of at my decease for his life; and should he marry, and have children of his own, to those children after; but should he die a bachelor, I leave the whole of my fortune now standing in the Funds to E.S.

The question, not dissimilar to the question now involved, was whether E.S. took the whole fortune of the testatrix or only that part of it which was then standing in the funds. The case was considered by Lord Chancellor Chelmsford and Lords Cranworth, Wensleydale and Kingsdown. Lords Cranworth and Wensleydale agreed with the Judges of the Court of Appeal that the words "now standing in the Funds" excluded the bank stock and limited the bequest only to that portion of the fortune of the testatrix which answered the description of "now standing in the Funds." The Lord Chancellor and Lord Kingsdown expressed great doubt upon the point but stated that, in view of the fact that Lords Cranworth and Wensleydale agreed with the view of the Appeal Court, they would not dissent. The headnote of the case enters them, however, as *dubitante*. Lord Cranworth in his reasons himself stated that the portion of the argument which had had most weight with him was that founded on the principle of *falsa demonstratio,* and in this connection said:

(1) (1859) 7 H.L. Cas. 273.

I certainly should have entirely acceded to that at once if the expression, "my fortune," had not been so connected with "now standing in the Funds" as to make the latter a part of the description of the former. If it had been, I wish to dispose of the whole of my fortune to my niece, which fortune is now standing in the Funds, that I should have taken to be a mere *falsa demonstratio* that would not have affected the generality of the first gift.

He also discussed the argument that the subject-matter of the gift and the gift-over must be the same, and in this connection said:

Now, I do not think that is a fair argument, more particularly when I observe that the testatrix has used different words: instead of saying, "I leave everything that I may be possessed of at my death" the expression [in the gift-over] is, "I leave my fortune now standing in the Funds." It would seem, therefore, that she meant something different because she has expressed it differently. At all events, I do not think it is a necessary conclusion that she meant her god-daughter to have everything that she clearly intended her brother to have if he married and had children.

Lord Wensleydale said:

If we may speculate on what the testatrix may probably have intended to say, we should possibly be right in conjecturing that she meant the whole of her fortune (with the exception of the small legacies specifically mentioned), to be enjoyed by the appellant in the event of the testatrix's brother dying a bachelor. But she has not said so. She has left to him everything she may be possessed of at her decease for his life, and should he die a bachelor, then not the whole she shall be possessed of, but "the whole of my fortune now standing in the Funds," making a distinction between that and the whole of her property.

I think it impossible to construe this bequest of "all my fortune," and the addition "now in the Funds," as a *falsa demonstratio*, as it would probably have been a bequest of all my fortune distinctly, with an addition such as this, "and that fortune is now in the Funds."

It will be noticed that in the case cited the words relied upon as words of restriction or limitation were used in relation to the subsequent gift-over and not in relation to the antecedent principal gift upon which it entirely depended, while in the case now under consideration the critical phrase occurs in the description, not of the subsequent gift-over, which comprises all the real estate and personal property of the testator, but of the prior gift, upon which the gift-over depends, and that the qualifying words were added to a descriptive expression which was not identical with that used in describing the antecedent gift, while in the present case precisely the same words are used in relation to both the prior gift and the subsequent gift-over, apart from the alleged qualifying words themselves.

1934

J. LEWIS & SONS, LTD. v. DAWSON.

Crocket J.

Neither the case of *West* v. *Lawday* (1), nor *In re Brockett* (2), nor any of the other cases referred to by the appellant's counsel, presents any such significant features as those pointed out in the will which we are now called upon to interpret.

We have, therefore, concluded that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Patterson.*

Solicitor for the respondent: *G. H. Vernon.*

1934

*May 15.
*June 15.

DELCO APPLIANCE CORPORATION (DEFENDANT) ..... } APPELLANT;

AND

WILLIAM DUNBAR SELBY AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Lease—Transfer—Right of renewal—Exercise by transferee—Notice to landlord—Liability of principal lessee for rent for the period of the lease renewed.

The Selby estate (respondents) leased to the Delco Appliance Corporation (referred to in the judgment as Delco Company) (appellant) a store on St. Catherine Street West, Montreal. The lease was dated the 6th day of April, 1927, and made for the term of five years, from the first day of May, 1927, subject, however, to the right of renewing the lease for a further period of five years from the expiration thereof. The material parts of the lease are as follows: "5. The lessee shall have the right to transfer its right in the present lease or sublet any part or portion of the above leased premises, subject however to the lessee continuing at all times responsible for the due fulfilment of all its obligations under the present lease. * * * Right of Renewal. The lessee will have the right of renewing the present lease for a further period of five years from the expiration hereof, for the rental of sixteen thousand dollars per annum during the said additional period of five years, and subject otherwise to all the other terms and conditions of the present lease, provided it gives the lessors notice in writing not later than the first of November nineteen hundred and thirty-one that the lease is so renewed." On the 12th day of November, 1930, the Delco Light Com-

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) (1865) 11 H.L. Cas. 375. (2) [1908] 1 Ch. 185.

pany transferred and made over unto one Joseph Ostro "all the unexpired term to be accounted and reckoned as and from the first day of January (1931) of that certain lease" * * * and specifically the right "of renewing the said lease for a further period of five years on giving to the lessor notice in writing prior to the first day of November, nineteen hundred and thirty-one." On March 12, 1931, Ostro wrote to the appellant company, giving it notice that he intended "to exercise the option mentioned in the lease and to remain in possession * * * of the premises * * * for a further period of five years from the 1st of May, 1932." On April 13, 1931, Ostro, by notarial deed, which he caused to be signified upon the respondents, declared and notified them that he exercised the right of renewal. On April 18, 1931, the appellant company evidently unaware that Ostro had already done it wrote to him acknowledging receipt of his letter of the 12th of March, 1931, and advising him of the necessity of giving himself notice to the respondents as to the exercise of the right of renewal. On the 30th of October, 1931, the appellant company, being aware of some financial embarrassment of Ostro, had a notarial document served on the respondents to the effect that the appellant "disavowed the action of Ostro in renewing the lease for a further period of five years." The respondents, on November 6, 1931, advised the appellant that they held it responsible for the fulfilment of its obligations under the lease for the renewal period of five years. On August 5, 1932, the Selby estate brought action, both by principal and incidental demands, against the Delco company, claiming rental for the premises for the months of May, June, July and August, 1932, altogether a sum of $5,333.32, which was contested by the Delco company, but the Superior Court and the Court of King's Bench unanimously maintained the action.

Held, affirming the judgment of the Court of King's Bench (Q.R. 56 K.B. 263), that, under the circumstances of this case contained in the headnote and more fully stated in the judgment now reported, the respondents' action should be maintained. Among the rights, derived from the contract which the Delco company was expressly authorized to transfer, was comprised the right of renewal. To the right of renewal was attached the condition that it shall be "subject otherwise to all the other terms and conditions of the present lease." And among the other terms and conditions to which the right of renewal was so made subject, there was the condition that, if the right of transfer is exercised by the Delco company, it shall be "subject, however, to (the company) continuing at all times responsible for the due fulfilment of all its obligations under the present lease" (or contract); one of the obligations being, of course, the payment of the rent. From the moment that the Delco company assigned to Ostro its right of renewal, the assignment necessarily carried with it, on the part of the company, the liability for the rent during the last period of five years, if the renewal was duly effected by Ostro. Now, the notice of renewal given by Ostro to the respondents, which did not require to be accepted by them, was sufficient to bind them and to effect a renewal of the lease *ipso facto*.

Under the terms of the original contract, in order to renew the lease, the Delco company had to give the Selby estate a notice in writing not later than the 1st November, 1931. The right of renewal was expressly transferred to Ostro. The transfer carried with it the right by Ostro

1934

DELCO APPLIANCE CORP. v. SELBY.

to request the Delco company itself to give the notice in writing if that were required to insure the renewal. Ostro, in due time, notified the Delco company of his intention to exercise the option. The legal result was that, by force of the terms of the transfer, the Delco company was bound to carry out its obligation to have the lease extended and to give the notice itself if it were necessary.

The question whether the transfer of the lease and the rights thereunder is the transfer of " droit de créance " requiring service upon the Selby estate before Ostro could acquire possession available against the estate, is a question solely for the Selby estate itself. It might have been raised by that estate, but it was not open to the Delco company, who was bound to make good the transfer to Ostro (Arts. 1570 C.C. & seq.).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Duclos J., and maintaining the respondents' action for rent.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgment now reported.

John T. Hackett K.C. and *G. B. Foster K.C.* for the appellant.

J. A. Mann K.C. for the respondents.

The judgment of the Court was delivered by

RINFRET J.—The Selby estate (respondents) leased to the Delco Light Company (appellant) a store on St. Catherine street west, Montreal.

The lease was dated the 6th day of April, 1927, and was made for the term of five years, from the first day of May, 1927, subject, however, to the right of renewing the lease for a further period of five years from the expiration thereof.

The material parts of the lease, which it is necessary to consider for the purposes of our decision, were agreed to as follows:

5. The lessee shall have the right to transfer its right in the present lease or sublet any part or portion of the above leased premises, subject however to the lessee continuing at all times responsible for the due fulfilment of all its obligations under the present lease.

* * *

(1) (1934) Q.R. 56 K.B. 263.

Right of Renewal

The lessee will have the right of renewing the present lease for a further period of five years from the expiration hereof, for the rental of sixteen thousand dollars per annum during the said additional period of five years, and subject otherwise to all the other terms and conditions of the present lease, provided it gives the lessors notice in writing not later than the first of November nineteen hundred and thirty-one that the lease is so renewed.

On the 12th day of November, 1930, the Delco Light Company transferred and made over unto one Joseph Ostro

all the unexpired term to be accounted and reckoned as and from the first day of January (1931) of that certain lease, etc.

The pertinent parts of that transfer read as follows:

The said lease shall expire on the thirtieth day of April nineteen hundred and thirty-two with the right unto the said party of the second part of renewing the said lease for a further period of five years on giving to the lessor notice in writing prior to the first day of November nineteen hundred and thirty-one.

Consideration

The present lease is thus made for and in consideration of the sum of two thousand five hundred dollars ($2,500.00) which the said party of the first part acknowledges to have received from the said party of the second part at the execution hereof, whereof quit.

And in further consideration the said party of the second part binds and obliges himself to pay to the said William Dunbar Selby et al. at the office of Frank H. Hopkins in the city of Montreal as the said William Dunbar Selby et al. may indicate in writing, an annual rent of fourteen thousand dollars ($14,000.00) until the thirtieth day of April nineteen hundred and thirty-two, and in the event of the said party of the second part availing himself of the right to renew the said lease for a further period of five years to pay an annual rental of sixteen thousand dollars ($16,000.00) during the said term, which said rental is payable in and by equal consecutive monthly payments on or before the tenth day of each month.

The said party of the second part declares to have taken communication of the lease above mentioned and binds and obliges himself to fulfil to the exoneration of the party of the first part all the clauses and conditions of the said lease.

The delay to give notice of renewal expired on the 1st of November, 1931. On March 12, 1931, Ostro wrote to the Delco company, in accordance with the terms of the lease and of the transfer thereof,

I hereby give you notice that I intend to exercise the option mentioned in the said lease and to remain in possession as lessee of the premises therein described for a further period of five years from the 1st of May, 1932.

On the 13th day of April, 1931, Ostro made a notarial declaration of renewal of the lease, wherein he

1934

DELCO APPLIANCE CORP. v. SELBY.

Rinfret J.

doth hereby declare to avail himself of the right to renew said lease for a further period of five years, as stipulated in said lease, and doth hereby renew said lease for a further period of five years and he has requested us, said notary, to notify said lessors accordingly.

The lessors therein referred to were the Selby estate; and the notary duly served on them a copy of that declaration.

Shortly after this had been done, Mr. A. N. Taylor, real estate section, on behalf of the Delco Company, acknowledged receipt of the letter addressed by Ostro to the company, on the 12th day of March, 1931, giving notice that he intended "to exercise (his) option to extend the lease." Mr. Taylor added:

> Lest there may be a possible misunderstanding on the subject, I write to call your attention to the provision in the assignment of the lease to you whereby the right to renew this lease for a further period of five years is expressly assigned to you and that it will be necessary for you to give the notice provided for in the lease to effect such extension, there being no right reserved in the Delco-Light Company to give such notice.

On May 28, 1931, Mr. F. H. Hopkins, representing the Selby estate, wrote a letter to Mr. E. A. Lowden, c/o Frigidaire Corporation, Toronto. In a word, the explanation for addressing the letter in that way was that Frigidaire Corporation had taken over the lease from the Delco company. The Frigidaire Corporation administered the affairs of the Delco company in Canada. They were both owned by the same corporation (General Motors), and they had the same general manager (Mr. Shannon). As the appellant relied for his argument on this letter of May 28, 1931, we think, in all fairness, it ought to be set out in full:

> When I was sick at home just recently a declaration of renewal of lease dated April 13, 1931, by Joseph Ostro, no. 3341, was left at my house, wherein, by virtue of the lease between the Selby estate and your company, that is the Delco Light Company, dated the 6th of April, 1927, under no. 22957, of R. H. Barron's minutes, the lessee therein, being the Delco Light Company, had the right, under a special clause of right of renewal therein inserted, to renew said lease for a further period of five years, that is, from the 1st of May, 1932, until the 30th of April, 1937, inclusive, for the rental of $16,000.00 per annum.
>
> I cannot understand why this was sent to me as the estate and myself personally have never recognized Joseph Ostro in any particular in connection with the lease which we have with your company, nor do we at this time, but I presume you were sent a similar notice, and that this is simply to confirm the fact that in your lease with him, which you had with you when you saw the writer at the beginning of your transaction with Ostro, that you had made a lease with him for the full

period including the option as covered in your lease with the Selby estate, and that you had made arrangements with the Bank of Montreal to take care of the payments to the Selby estate throughout this entire period to the 31st of April, 1937.

I would have written you earlier on this had I not been laid up and away from the office, and I am dropping you this note in case you have not been sent a copy of this notice, as this estate has no interest in the notice whatever, which was drawn up by Paul Labadie, N.P., under his number 3341, dated April 13, 1931.

To this letter came a reply from Mr. Lowden, Canadian manager for both the Delco company and the Frigidaire company. The reply was dated June 2, 1931, and the first paragraph thereof reads as follows:

Thanks for your letter of May 28. Mr. Ostro has already served us with a paper, of which I attach a copy, and I have written the head office of the Frigidaire Corporation arranging to have the transfer made from the Delco-Light Company to the Frigidaire Corporation, and also have asked the head office to proceed with the necessary papers for the renewal of the second five-year period according to Mr. Ostro's request, as this is in accordance with our agreement with him.

Our object in referring to Mr. Lowden's letter is only to show that Mr. Lowden, as manager of the appellant company in Canada, transmitted to Mr. Hopkins, representing the Selby estate, a copy of the notice of renewal sent by Ostro to the Delco company. Further, he did so in terms conveying to the Selby estate that Ostro's notice had the approval of the company and was "in accordance with our agreement with him."

We do not lose sight of the fact that Mr. Lowden's authority was disputed by the appellant. There is no controversy on the point that he was acting as manager in Canada for both the Delco company and the Frigidaire company. But it is stated that, as such, he had no power to bind the Delco company to a lease involving a total liability of $80,000. We may assume that this was true. This was not, however, what Mr. Lowden was doing by sending with his approval a copy of Ostro's notice of renewal.

The liability of the Delco company for the first five years' period of the lease, and the further liability for the subsequent five years resulting from the renewal, were both covered, as we will show presently, by the original contract and by the transfer to Ostro, the validity whereof is not even questioned. Incidentally, it may be pointed out, the transfer to Ostro was signed and executed on behalf of the appellant by Mr. M. A. Morison; and when

1934

DELCO APPLIANCE CORP. v. SELBY.

Rinfret J.

Mr. Morison was asked under whose authority he executed the transfer, he stated he had received such authority and instructions from Mr. E. A. Lowden.

When Mr. Lowden, on June 2, sent Ostro's notice of renewal to the Selby estate and gave it the stamp of approval of the Delco company, he was not thereby involving that company into a new liability; he was merely acting in accordance with the terms of the transfer to Ostro and, as we will see later, fulfilling one of the obligations the company had undertaken towards its assignee. He was doing something which the company was bound to do. We have no doubt that his authority to do at least that cannot, in the premises, be challenged by the appellant.

As a consequence of the initial letter from Mr. Hopkins, a certain correspondence was subsequently exchanged between the latter and Mr. Lowden, in the course of which Mr. Lowden undoubtedly put on the lease and the transfer a construction hardly to be reconciled with the stand now taken by the Delco company in the present litigation. As this judgment develops, it will be noticed that our interpretation of the two documents is substantially in agreement with that of Mr. Lowden. Since, however, his authority to engage the liability of the company for the last period of five years was not admitted, and since, in our view of the case, his participation in the matter could not affect the rights of Ostro, or of the Selby estate, we do not intend, with regard to that point, to base our decision on the letters written by Mr. Lowden. We will, therefore, omit referring to them, as it would only obscure the sequence of the essential facts.

On June 18, 1931, Mr. A. N. Taylor, of the real estate section, apparently apprehending that his letter of April 18 might not be fully understood, again wrote to Ostro; and from that letter we extract the following paragraphs:

> The original lease has been assigned to you and with it the right to an extension if you elect to have the lease extended. Consequently, this notice should be given by you and any new lease which may be entered into for the extended period should be between you and the landlord. Neither the Delco-Light company nor the Frigidaire Sales Corporation should be in any way a party to the lease or assume any disability in connection with the same.
>
> I am sending a copy of this letter to Mr. Salisbury of the Frigidaire Sales Corporation and will ask that if there is any misunderstanding of the matter by either of you that I be communicated with further.

This will again show the close connection, at least in relation to the lease of the premises on St. Catherine street, between the Delco company and the Frigidaire Sales Corporation. It may be noted here that the authority of Mr. Taylor, in all matters concerning this case, is admitted; and, in fact, invoked by the appellant.

On the 30th day of October, 1931, the Delco-Light Company caused to be served upon Ostro and the Selby estate respectively a protest reciting the facts as it understood them, stating that Ostro was then

> in default in payment due the (Delco company) of the rent for the month of October, 1931; and

and that the company

> disavows the purported renewal made by the said Joseph Ostro of the said lease * * * and hereby notifies the said lessors that the company will not be responsible for the rental of the said premises after the 30th day of April, 1932.

Whereupon, on November 6, 1931, the Selby estate wrote to the Delco company, advising them that

> in view of the exercise of the right of renewal for a further period of five years, from the 1st of May, 1932, of the lease from the Selby estate to the Delco company, dated 6th April, 1927, which right of renewal has been exercised both notarially and by correspondence, the Selby estate look to the Delco company and all concerned as being responsible for the fulfilment of the obligations incurred by reason of this renewal.

The Delco company was further advised in the same letter that the protest served on the 30th October, 1931, was of no force and effect, and did not in any way alter the situation or relieve the Delco company of its liability.

Under the above circumstances, the Selby estate brought action, both by principal and incidental demands, against the Delco company, claiming rental for the premises for the months of May, June, July and August, 1932, altogether a sum of $5,333.32, which was contested by the Delco company, but which the Superior Court and the Court of King's Bench unanimously maintained.

The Delco company now brings the whole matter by way of appeal to this court and argues that the trial court and the appeal court both erred in failing " to take into account the true character of the rights and obligations of the appellant by reason of the assignment and renewal clause of the lease "; in failing " to take into consideration the true character of the assignment by appellant to Joseph Ostro "; in failing " to take cognizance of the Selby estate's refusal to recognize Ostro's alleged renewal for the added

1934

DELCO APPLIANCE CORP. v. SELBY.

Rinfret J.

term of five years, which estopped respondents from invoking same at a later date"; in failing "to observe * * * that the contract was only with Delco Light Company, and that any option of renewal binding upon it should come from it."

The appellant again raised the matter of the authority of Lowden; but we have already stated why we did not deem it necessary to discuss that question.

Our views must first be stated in respect to the terms of the lease and of the assignment thereof to Ostro, as well as to the rights and obligations deriving therefrom with regard to all parties concerned.

The Delco company was expressly given "the right to transfer its right in the present lease." It was also given "the right of renewing the present lease for a further period of five years" at a higher rental per annum, but "subject otherwise to all the other terms and conditions of the present lease."

The appellant attempted to distinguish between its obligations during the first five years of the lease (which, according to it, were alone designated under the expression "present lease") and its obligations during the subsequent five years, in respect of which the company urged the court to decide that they did not come under the designation of the "present lease," but really constituted a new lease. The argument was stated as follows: The right of renewal was not a right of extension of the existing lease, but a right to have a new lease. The Delco company was responsible for all its obligations under "the present lease" (i.e., for the first five years); but it had no obligations under the new lease, if Ostro availed himself of the right of renewal which had been transferred to him.

We are unable to accede to the proposition that, in the notarial document signed by the appellant and the respondents on the 6th day of April, 1927, the expression "present lease," wherever found, refers only to the first five years and not to the renewal period. The expression, we think, throughout the document, and particularly in the material sections of it dealing with the right to transfer and the right of renewal (above set out), has reference to the document itself in full, and that is to say: to the whole of the contract between the parties.

Among the rights, derived from the contract, which the Delco company was expressly authorized to transfer was comprised the right of renewal. To the right of renewal is attached the condition that it shall be "subject otherwise to all the other terms and conditions of the present lease." And among the other terms and conditions to which the right of renewal is so made subject, there is the condition that, if the right of transfer is exercised by the Delco company, it shall be "subject, however, to (the company) continuing at all times responsible for the due fulfilment of all its obligations under the present lease" (or contract); one of the obligations being, of course, the payment of the rent.

From the moment that the Delco company assigned to Ostro its right of renewal, the assignment necessarily carried with it, on the part of the company, the liability for the rent during the last period of five years, if the renewal was duly effected by Ostro.

It was under those conditions that the Delco company expressly transferred to Ostro its right of renewing the lease; and again we are unable to agree with the appellant in its interpretation of the terms of that transfer. It was not, as the appellant contends, a transfer whereby the

> appellant divested itself of all and any interest, intention and power to exercise the right of renewal on its own behalf and gave such right as it might in the premises to Ostro.

The appellant could not have divested itself in that absolute way without the consent of the Selby estate. Under its contract with the estate, the appellant had been given the right of renewal to which certain conditions were essentially attached and without which the right of renewal itself would not have existed. It was that right with all its conditions which the appellant transferred to Ostro. For that transfer, it stipulated and was paid a substantial consideration in money. It is not necessary to enter here into the discussion whether a transfer of that character is a sublease or an assignment. Laurent (vol. 25, no. 188) says that, so far as the legal effects are concerned, the two words are synonymous and that: "La tradition ignore la différence que l'on veut établir entre sous-louer et céder son bail" (p. 215). The view of the transaction most favourable to the appellant is to treat it as an assignment of its right of renewal. The assignment could

1934

DELCO APPLIANCE CORP. v. SELBY.

Rinfret J.

be made only with all the conditions and obligations attached thereto. It would be a fallacy to say that, after the transfer, the Delco company ceased to have any interest whatever in the exercise of the right of renewal. It had ceded or sold that right for a consideration. It was bound, therefore, to make good the transfer; and that carried with it the obligation towards Ostro of doing and making all that would be necessary to insure the exercise by Ostro of the right of renewal and to keep the lease alive for the subsequent five years. That was part of the bargain for which the Delco had been paid. It followed that if, under the terms of the lease with the Selby estate, it was a condition that the notice required to exercise the right of renewal should be given by the principal lessees, the Delco company, that company, having bargained with Ostro to make good to him its right of renewal, became bound to itself give the required notice, if that were necessary to enable Ostro to exercise the option assigned to him.

It should further be said that we must also disagree with the appellant when it states that all that Ostro got by the transfer from the Delco company was

> a mere right of offer of renewal * * * depending upon whether or not he was, in the opinion and consideration of the respondents, a desirable person.

The contention put forward by the appellant was that the right of renewal, in so far as the appellant was concerned

> was an open offer, but not so as to Ostro, in regard to whom the respondents had an opportunity to accept or reject his notice.

Such a contention is not in accord with the true legal relations resulting from the contracts between the parties. The Delco company had an absolute right of renewal, a right which could be exercised by the mere giving of a notice in writing to the Selby estate not later than the 1st of November, 1931. This did not require any new agreement or the signature of any new document between the Selby estate and the company. There was not to be a new lease. The original contract contains the whole of the agreement of the parties with regard to it; and, as held both by the trial judge and by the Court of King's Bench, the renewal would be effected by the sole fact that, and as soon as, the lessee sent the notice therefor to the lessors. It was that absolute right which was transferred by the Delco company to Ostro; and, through the transfer, Ostro

acquired a right of renewal just as complete and as extensive as the right of renewal which the Delco company itself had been given by the Selby estate.

This was an absolute right of renewal which (provided the conditions were fulfilled) was not in any way subject to the acceptance or the control of the Selby estate. If the notice in writing was given, the renewal took place *ipso facto*. The Selby estate became bound by it, and the lease was automatically extended for the further period of five years stipulated therein. The whole matter was entirely left at the option of the lessee; and the lessor was powerless to repudiate the option, if it was exercised within the terms of the lease. As soon as it was so exercised, and without anything more being required, the lease with all its conditions became extended for the further period agreed upon, and the Selby estate was bound to respect it.

It follows that, as stated by Mr. Justice St. Jacques:

Les propriétaires ne pouvaient pas refuser à Ostro l'exercice de ce droit; ils avaient donné leur consentement d'avance, et ils ne pouvaient rien faire pour se délier.

A similar observation was made by Mr. Justice Bond.

But it must also be added that the Selby estate was bound by the notice of renewal only within the terms of the contract, to wit: with the express condition that the Delco company would remain obligated to pay the rent; and that obligation was part of its undertaking towards Ostro as a consequence of the transfer for which it received the lump sum of $2,500.

After what we have said so far, the only question remaining to be considered is whether the right of renewal was properly exercised and whether, as a consequence, the lease of the store premises was extended for the further period of five years, for the rent of which, in the present case, the respondents try to have the appellant held responsible.

Under the terms of the original contract, in order to renew the lease, the Delco company had to give the Selby estate a notice in writing not later than the 1st November, 1931. The right of renewal was expressly transferred to Ostro. The transfer carried with it the right by Ostro to request the Delco company itself to give the notice in writing, if that were required to insure the renewal. Ostro, in due time, notified the Delco company of his intention

1934

DELCO APPLIANCE CORP. v. SELBY.

Rinfret J.

to exercise the option. The legal result was that, by force of the terms of the transfer, the Delco company was bound to carry out its obligation to have the lease extended. However, it is unnecessary to go so far in the present case, for Ostro did not wait for the Delco company to give the required notice. He himself caused a notarial declaration of renewal to be served upon the estate. This, further, was in accord with the advice given to him on behalf of the Delco company by Mr. Taylor, whose authority is not disputed. In Mr. Taylor's two letters (April 18th and June 18th, 1931), Mr. Taylor took the stand that it would be necessary for Ostro to give the notice. It happened that that was precisely what Ostro had already done. It is true that Mr. Taylor also contended that no right was reserved in the Delco company to give such notice, or that neither the Delco company, nor the Frigidaire company should be in any way a party to the lease, or assume any disability in connection with the same.

A clear distinction, however, must be made between the two contentions put forward by Mr. Taylor on behalf of the company. The advice to Ostro that he should himself send the notice remains as a fact which the company may not be allowed to dispute in the stand it is now taking in the present case. But the contention that the right to renew the lease was not reserved in the Delco company and that it should not in any way be a party in the lease or assume any liability in connection with it was a contention of law to which the courts below refused to accede; and, on that point, we find ourselves in full accord with them. Having regard to the terms of the transfer, and to the advice given to Ostro by Mr. Taylor on behalf of the Delco company, we fail to see how the company may be heard to say that the notice given by Ostro was not an effective notice to renew the lease within the terms of the contract between the parties. It may be that the Selby estate might have questioned the right of Ostro to give that notice. It is impossible for us to understand how the appellant can do so.

It was said that the transfer of the lease and the rights thereunder was the transfer of a " droit de créance " which should be assimilated to the sale of rights of action against third persons covered by Art. 1570 & seq. of the Civil Code, the consequence being that, as the transfer to Ostro had

not been served upon the Selby estate, Ostro had no possession available against that estate.

This objection, in our view, is not open to the Delco company. We are willing to assume, for the purposes of the argument, that, as Laurent puts it (vol. 25, no. 200):

En principe, il n'intervient aucun lien juridique entre le bailleur principal et le sous-preneur;

and that, as a consequence, the sub-tenant has no direct right of action against the principal lessor.

We may assume also that the Selby estate was not bound to recognize the possession or the status of Ostro; and this may have been true both under the civil code (Art. 1571) and under its contract with the Delco company, whereby the latter remained responsible for the due payment of the rent, notwithstanding any transfer to Ostro. In our view, that was exactly what Mr. Hopkins, writing on behalf of the Selby estate, wished to convey to the Delco company when he sent his letter of May 28, 1931. We think Mr. Justice St. Jacques, in the Court of King's Bench, correctly stated the meaning and purport of that letter in the following passage of his reasons for judgment:

Le sens véritable de cette lettre est que les propriétaires voulaient bien prendre leurs précautions vis-à-vis le locataire originaire, et ne rien faire qui pût être interprété, en quoi que ce soit, comme novation de l'obligation que ce locataire avait assumée pour toute la durée du bail.

The letter was not, as urged by the appellant, a repudiation of Ostro's notice. In our view, it showed the contrary intention, for it draws the attention of Mr. Lowden to the fact that Ostro's notice must have been given as a consequence of the lease made

with him for the full period, including the option as covered in your lease with the Selby estate;

and that, as a result, the Delco company has no doubt

made arrangements with the Bank of Montreal to take care of the payments to the Selby Estate throughout this entire period to the 31st of April, 1927.

The letter, therefore, clearly contemplates the new situation created by the notice from Ostro as having the effect of prolonging the lease for the subsequent period of five years. That being the construction put by all courts upon that letter, perhaps it is unnecessary to point out that the letter was addressed to Mr. Lowden and that, if the appellant is unwilling to assume responsibility for the letters written by Mr. Lowden, it should not be permitted to rely upon part only of the correspondence exchanged between

1934

DELCO APPLIANCE CORP. v. SELBY.

Rinfret J.

Mr. Hopkins and Mr. Lowden. If the letter is used for the limited purpose of showing the opinion of Mr. Hopkins after he received the notice from Ostro, we do not think it is of much consequence. If Mr. Hopkins intended to repudiate the notice, the proper way, if not the only way, was to communicate that intention to Ostro, which he did not do. Under all the circumstances, we think the letter of May 28 was certainly open to the construction put upon it by the two courts; and its purpose was not the repudiation of Ostro's notice; but, on the contrary, an assertion of the Selby estate's right against the Delco company, as a consequence of the right of renewal exercised by Ostro.

The notice of renewal did not require to be accepted by the Selby estate. In the circumstances of the present case, the notice given by Ostro was sufficient to bind the Selby estate and to effect a renewal of the lease, as provided for in the contract between the appellant and the respondents. At all events, the appellants cannot be heard to contend otherwise.

The action of the respondents was therefore rightly maintained and the appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hackett, Mulvena, Foster, Hackett & Harmen.*

Solicitors for the respondents: *Mann & Mackinnon.*

1934

* May 17
* June 15.

IN THE MATTER OF THE ESTATE OF EDWARD H. KEATING, DECEASED

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Administration and distribution of estate—Postponement of conversion into money of testator's shares of stock in company—Shares apparently unsaleable and no dividends received—Ultimate realization on shares on liquidation of company—Rights as between tenants for life and remaindermen as to moneys realized—Manner of distribution among shareholders of moneys received by company for its assets—Directions of will.

K. died in 1912. In his will, after certain bequests, he devised and bequeathed the remainder of his property to his trustee to carry out the trusts of the will, which included conversion into money "in such manner and at such times as he may deem proper," direction to invest and power to change investments, direction for payments

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

to K.'s widow out of income for maintenance, direction for division, after the widow's death (which occurred in 1916), of the balance of the net income of the estate among his children, and, by para. 14, direction that the capital of the estate be kept intact until at least one year after the death of K.'s last surviving child or of K.'s last surviving grand-child which might be living at K.'s death, whichever event should last happen, and then that the whole estate be distributed in a manner set out.

The estate left by K. included 250 ordinary shares of the capital stock of a company, of the par value of £10 each. No dividends were paid and the shares were apparently unsaleable, until an expropriation of the company's property which was followed in 1920 by a voluntary liquidation of the company for the purpose of distributing its assets, which apparently consisted wholly of the sum awarded for the expropriation and interest thereon. This interest was distributed on account of the arrears of dividends accumulated on the company's preference shares. The principal sum awarded was distributed "by way of return of capital" *pro rata* among the preference and ordinary shareholders pursuant to a direction of the court in England. In the years 1920-1922 the trustee of K.'s estate received from the company's liquidator sums aggregating $20,212.78.

Appellant, one of K.'s children, contended that the said sum of $20,212.78 received by the trustee should be apportioned between capital and income in accordance with the rule laid down in *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; that the postponement of conversion of the shares was for the benefit of the estate—for the benefit both of the remaindermen and of the life tenants; and the said rule should be applied, so as to do justice as between life tenants and remaindermen, by dividing the funds received in such a way that they would respectively be in the same position as if it had been possible to convert the shares to advantage on the testator's death or within one year thereafter; that even if the sums when received by the trustee were capital realizations, that fact would not exclude the application of the equitable principle invoked.

Held: (1) The adjudication of the English court that the principal sum of the award should be distributed "by way of return of capital," etc., was not conclusive upon the parties to this appeal, as that direction was made on an originating proceeding to determine the respective rights of the preference and ordinary shareholders upon the winding up of the company, and was not also a determination of the respective rights of the life tenant and reversioner under the will of any shareholder.

(2) The sums when received by the trustee were clearly capital realizations (*In re Armitage*, [1893] 3 Ch. 337; *Inland Revenue Commissioner* v. *Burrell*, [1924] 2 K.B. 52; *Hill* v. *Permanent Trustee Co. of New South Wales Ltd.*, [1930] A.C. 720). The will itself excluded the application of the rule invoked. The application thereof asked for by appellant would effect a reduction of capital and be contrary to the said express direction in para. 14 of the will. The sums in question must remain in their entirety as part of the capital of the estate.

Judgment of the Court of Appeal for Ontario, [1934] O.R. 71, affirmed in the result.

1934

In re KEATING ESTATE.

APPEAL (on leave granted by the Court of Appeal for Ontario) by C. Sedley Keating, one of the children of Edward H. Keating, deceased, from the judgment of the Court of Appeal for Ontario (1), dismissing (Middleton, J.A., dissenting) his appeal from the judgment of Jeffrey J. (on motion for determination of a question arising in the administration of the estate of said deceased), holding that the whole of certain sums of money realized by the executor of the estate of the said deceased out of 250 shares of the common stock of the Halifax Graving Dock Co. Ltd., part of the assets of the said estate, (said sums being realized upon the winding-up of the company), should be credited to capital only.

The appellant is one of the beneficiaries under the will of the said deceased, being entitled as life tenant to a share in the net income from the residuary estate after the payment of certain legacies and annuities. He claimed that the moneys realized as aforesaid should be apportioned as between income and capital in accordance with the rule in *In re Earl of Chesterfield's Trusts* (2). This claim was rejected by the judgments appealed from.

The material facts of the case are sufficiently stated in the judgment now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

R. L. Kellock for the appellant.

McGregor Young K.C. for infant respondents and respondent charities.

K. F. MacKenzie K.C. for the executor and trustee of the deceased's estate.

The judgment of the court was delivered by

HUGHES J.—The late Edward H. Keating died on the 17th day of June, 1912. Among the assets which passed to the trustee were 250 ordinary shares of the capital stock of the Halifax Graving Dock Company, Limited, of the par value of £10 each. This company was an English company incorporated about the year 1886. In 1890 preference stock was created, amounting to 7,400 5% cumulative

(1) [1934] O.R. 71; [1934] 1 D.L.R. 510.

(2) (1883) 24 Ch. D. 643.

shares of the par value of £10 each. When the company went into liquidation, as hereinafter mentioned, there were 7,400 preference shares outstanding and 7,365 ordinary shares of the same par value. The company carried on the business of a dry dock until an explosion occurred on the 6th day of December, 1917, when the property was severely damaged. About the time the repairs were completed, namely in May, 1918, the property was expropriated by the Dominion Government.

Compensation amounting to about $1,400,000 was awarded to the company by the Exchequer Court of Canada on July 6, 1920, with interest at 5% from the date of expropriation. Thereafter the company went into voluntary liquidation for the purpose of distributing its assets, which apparently consisted wholly of the moneys received from the expropriation proceedings. No dividends had been paid on either preferred or ordinary shares of the company, and apparently there was no accumulated income available for distribution as dividends, as the only income distributed on the liquidation was the interest received from the Dominion Government upon the award. This interest was distributed on account of the arrears of dividends accumulated upon the preference shares. The principal amount of the award was distributed "by way of return of capital" *pro rata* among the preference and ordinary shareholders pursuant to a direction of the court in England.

Upon the distribution of the assets, the Royal Trust Company, executor and trustee of the estate of the late Edward H. Keating, received from the liquidator the sum of $20,212.78 in the following amounts at the following times:

Nov. 13, 1920	$ 9,250 00
May 23, 1921	10,029 37
Oct. 19, 1921	905 25
Apr. 19, 1922	28 16

It should also be mentioned that in the inventory filed by the trustee on the application for letters probate, the shares were listed as of no value. They were then unsaleable, and continued to be apparently unsaleable and of no value until the expropriation.

By his last will and testament, the testator made certain specific bequests and then devised and bequeathed the

1934

In re KEATING ESTATE.

Hughes J.

whole of the remainder of his real and personal property to the trustee to carry out the trusts created by the will.

Some of the remaining provisions are very important.

4. In trust that the said trustee may sell, collect and convert into money all such parts of my estate as shall not consist of money in such manner and at such times as he may deem proper.

5. I direct that after paying my just debts and funeral expenses all moneys belonging to my estate not already well invested are to be invested by my trustee for the benefit of my estate and in such securities as he may consider proper and best and that the said trustee may from time to time at his discretion vary or transpose any investments for others which may be deemed preferable.

6. I direct that my said wife is to be paid monthly out of the net income from my estate the sum of three hundred and fifty dollars or four thousand two hundred dollars per annum during her lifetime for her use and maintenance and for the maintenance of my unmarried daughter Jessie and that this is to be a first charge against the revenues of my estate after paying the annuities in the next succeeding clause 7.

* * * *

8. After the death of my said wife if she survives me or after my death if I survive her I direct that the following disposition is to be made, viz.,

* * * *

10. I direct that the balance of the net income of my estate after deducting the annuities and amounts reserved in the three preceding clauses, 7, 8, and 9, is to be divided equally among my surviving children, Jessie, Heloise, Agnes and Sedley, and paid in monthly or quarterly instalments subject to the following express provision and stipulation, viz., that if in any year the share coming to my daughter Jessie under such division should amount to less than two thousand dollars per annum I direct that she is to receive that amount (viz: $2,000) in full per annum until her marriage and that the remaining balance only is in that event to be equally divided between Heloise, Agnes and Sedley my intention being that she is to be assured and is to receive at least $2,000 per annum for her sole use and enjoyment until her marriage.

* * * *

14. I direct that the capital of my said estate shall be kept intact and only the income derived therefrom distributed as I have in this my last will and testament directed until at least one year after the death of my last surviving child or of my last surviving grand-child which may be living at the time of my death which ever event shall last happen—when I direct that the whole of my said estate shall be distributed amongst my next-of-kin as provided by "The Statute of Distribution" or any other law providing for the devolution of estates in force in the Province of Ontario in so far and providing that my said next-of-kin are my own lineal descendants. In the event of there being no lineal descendants of my own then living I direct that the whole of my said estate shall in that case be distributed equally among the following charitable institutions or among so many of them as may then exist, viz:

The Toronto Dispensary for the relief of the Sick Poor.
The Nursing Mission (Hayter Street), Toronto.
The Nursing Mission (Beverley Street), Toronto.
The West End Creche, Toronto.
The Sick Children's Hospital, Toronto.

The Home for Incurable Children, Toronto.
The Children's Aid Society, Toronto.
The Association for the Relief of the Poor, Halifax, N.S.
The Benevolent Fund of the Canadian Society of Civil Engineers, Montreal.
The Benevolent Fund of the Institution of Civil Engineers, London, G.B.

15. I appoint the Royal Trust Company of Canada my executor and trustee for the purposes aforesaid and I request that a copy of this my will be furnished to each of my children as soon as it can conveniently be done after my death.

The testator's widow died on December 3, 1916.

The appellant contends that upon the true construction of the last will and testament of the deceased the said sum of $20,212.78 received by the trustee should be apportioned between capital and income in accordance with the rule laid down in *In re Earl of Chesterfield's Trusts* (1). An application was made by the appellant and Heloise J. Macklem before Mr. Justice Jeffrey by way of originating notice for determination of the question. Mr. Justice Jeffrey held that the whole sum should be credited to capital only. From this order an appeal was taken to the Court of Appeal for Ontario and the Court of Appeal, by a majority judgment, dismissed the appeal.

From this order the appellant, C. Sedley Keating, now appeals to this Court.

In *In re Earl of Chesterfield's Trusts* (1), it was decided that where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and de-

(1) (1883) 24 Ch. D. 643.

1934

In re KEATING ESTATE.

Hughes J.

ducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income.

It was contended by the respondents that the adjudication of the court in England that the principal amount of the award should be distributed "by way of return of capital" *pro rata* among the preference and ordinary shareholders was conclusive and binding upon the parties to the appeal. That direction, however, was made on an originating proceeding to determine the respective rights of the preference and ordinary shareholders upon the winding up of the company, and was not also a determination of the respective rights of the life tenant and reversioner under the will of any shareholder.

In *Hill* v. *Permanent Trustee Company of New South Wales, Limited* (1), a company sold substantially the whole of its lands and other assets and ceased to carry on business. In 1926 a dividend was declared and paid as "a distribution of capital assets in advance of the winding up." No question arose in the appeal as to that dividend. In November, 1927, the company declared and paid a dividend, stating that it was paid out of the sale of breeding stock. Upon an originating summons issued by trustees, who held over two-thirds of the shares issued, the Supreme Court held that the dividend should be treated as capital of the trust estate. Upon appeal to the Privy Council, it was held that the dividend should be treated as income of the trust estate. In delivering the judgment of the Judicial Committee, Lord Russell of Killowen said, at page 729:—

> These being the relevant facts of the case the point for decision is capable of statement thus: Is the sum of £19,380 "net income or profits to be derived from such investment or investments," or is it "capital of my said trust estate?"
>
> The question which thus arises is one which may frequently occur when investments, representing a settled trust fund, include shares in a limited company which are not restricted to a fixed rate of dividend. So long as such a company is a going concern and is not restricted as to the profits out of which it may pay dividends, it may distribute as dividends to its shareholders the excess of its revenue receipts over expenses properly chargeable to revenue account. The balance to the credit of profit and loss account may in many cases be divided as dividend even if the company's capital account is in debit; and such

(1) [1930] A.C. 720.

a distribution by way of dividend would, prima facie, be "income or profits" of the trust share, and belong to the tenant for life; it would not be "capital of my trust estate." On the other hand, if the company instead of distributing the same balance as dividends, resolved upon liquidation, the shareholder would be repaid his share capital and in addition the share of surplus assets in the liquidation attributable to his shares. The moneys received by the shareholder in the liquidation may be swollen by reason of the fact that the company has in its possession undivided profits, but no part thereof would belong to a tenant for life as income; it would all be corpus of the trust estate.

From this it would appear that moneys paid in respect of shares in a limited company may be income or corpus of a settled share according to the procedure adopted, i.e., according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding up. Each process might appear to involve some injustice, the former to the remainderman, the latter to the tenant for life.

And at pages 730 and 731:—

A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only * * * If such moneys or any part thereof are to be treated as part of the corpus of the trust estate there must be some provision in the trust deed which brings about that result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.

And at page 734:—

Their Lordships desire to say a word in reference to *In re Armitage* (1). * * * The legal position in that case was quite plain. The old company had sold its assets (including accumulated profits) to the new company for a price which produced surplus assets in the winding up of the old company to the amount of £9 5s. 6d. for each share of the old company upon which only £8 per share had, in fact, been paid up. Upon no theory could it be said that any part of the £9 5s. 6d. was payable to the tenant for life. The moneys paid were all surplus assets distributed in a winding up and took the place in the trust estate of the shares themselves. The difference between the £9 5s. 6d. and the £8 was a profit to the trust estate, just as if the shares had been sold and had realized £9 5s. 6d. per share; but no part of the £9 5s. 6d. was income of the tenant for life.

In *In re Armitage; Armitage* v. *Garnett* (1), a testator gave his estate upon the usual trusts for conversion and investment, with a power to postpone conversion and a direction that during the interval all income produced by the property in its actual state should be treated as income

(1) [1893] 3 Ch. 337.

1934

In re KEATING ESTATE.

Hughes J.

for the purposes of his will. He bequeathed one-third of the residue to A. for life and after her death upon further trusts. Part of the residue consisted of £10 shares in a company with £8 per share paid up. Some years after the testator's death, the company was wound up and reconstituted and the new company paid for the testator's shares £9 5s. apiece, being £1 5s. per share more than had been paid up. This excess arose from two funds, one of which consisted of profits which the directors had retained to meet contingencies. It was held, on appeal, that the right of the tenant for life of shares is only to receive dividends and bonuses in the shape of dividends declared during his life, and that the £1 5s. per share, though it was profits, was not income to which the tenant for life was entitled but must go to capital. Lord Justice Lindley said, pages 345 and 346:

> The company was wound up, and the assets of the company were distributed amongst the registered shareholders * * * Those undivided profits of course could have been divided as dividends if the company had so thought fit. * * * The moment the company got into liquidation there was an end of all power of declaring dividends and of equalizing dividends, and the only thing that the liquidator had to do was to turn the assets into money, and divide the money among the shareholders in proportion to their shares. * * * What does a man mean when he leaves shares to a tenant for life? He means that that tenant for life shall have the income arising from the shares in the shape of dividends or bonuses declared during the lifetime of the tenant for life. He does not mean that the tenant for life shall receive profits in any other sense. He does not mean him to have such profits, for example, as arise by a realization of shares; he never dreamed of such profits going to the tenant for life. * * * This conclusion is completely in accord with *Bouch* v. *Sproule* (2), which at least, after reviewing a great mass of conflicting cases, established the rational principle that what a tenant for life is to take under an ordinary bequest of shares is what is declared as dividends or bonuses in the shape of dividends during the lifetime of that tenant for life.

Lopes, L.J., was also of opinion that as the company was voluntarily winding up and had not previously declared dividends in respect of the excess, the latter was not income but capital and did not go to the tenant for life. A. L. Smith, L.J., agreed with Lord Justice Lindley.

The appellant pointed out that the shares of the Halifax Graving Dock Company, Limited, were retained by the trustee until the receipt by him of the proceeds of the shares in the winding-up, and that it was for the benefit

(2) (1887) 12 App. Cas. 385.

of the estate that the conversion of the shares should be postponed rather than that they should have been sold at a sacrifice in the years 1912 or 1913. He urged that the postponement was for the benefit of the remaindermen as well as for the benefit of the life tenants, and submitted that the rule set out in *In re Earl of Chesterfield's Trusts* (1) was evolved for the purpose of doing justice as between life tenant and remainderman, by dividing the funds received in such a way that they would respectively be in the same position as if it had been possible to convert the shares to advantage on the death of the testator or within one year thereafter.

Now there is no doubt that the sums of money received by the trustee, when received, were capital realizations. *In re Armitage; Armitage* v. *Garnett* (2); *Inland Revenue Commissioner* v. *Burrell* (3); and *Hill* v. *Permanent Trustee Company of New South Wales Ltd.* (4). The appellant, however, contends that, although the sums when received by the trustee may have been capital realizations, there is nothing in that fact to exclude the application of the equitable principle illustrated by *In re Earl of Chesterfield's Trusts* (1). In my opinion, however, the will itself excludes the application of the rule. By paragraph 14 of the will, the testator directs that the capital of the estate is to be kept intact, and only the income derived therefrom distributed until at least one year after the death of the last surviving child or of the last surviving grand-child living at the death of the testator, whichever event may last happen. The application of the rule asked by the appellant would effect a reduction of capital and would, in my opinion, be contrary to the express direction of the testator as set out in paragraph 14 of the will.

I am, therefore, of opinion that the sums in question must remain in their entirety as part of the capital of the estate, as was held by Mr. Justice Jeffrey and by the majority of the Court of Appeal.

The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

(1) (1883) 24 Ch. D. 643.
(2) [1893] 3 Ch. 337.
(3) [1924] 2 K.B. 52.
(4) [1930] A.C. 720.

1934

In re KEATING ESTATE.

Hughes J.

Solicitors for the appellant: *Mason, Foulds, Davidson, Carter & Kellock.*

Official Guardian (for infant respondents): *McGregor Young.*

Solicitor for the Public Trustee (representing respondent charities): *C. M. Garvey.*

Solicitors for the respondent The Royal Trust Company (executor and trustee of the will of deceased): *MacKenzie & Saunderson.*

1934

* May 11
* Oct. 24.

IN THE MATTER OF THE BEQUESTS OF THE WILL OF JESSIE GRAY, DECEASED.

THE UNITED CHURCH OF CANADA....APPELLANT;

AND

THE PRESBYTERIAN CHURCH IN CANADA ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Will—Identity of object of gift—Gift to certain funds "of the Presbyterian Church in Canada"—Will made before, but testatrix dying after, the passing and coming into force of The United Church of Canada Act (Dom., 1924, c. 100).

By her will, made in 1921, G. gave a sum to "the Home Mission Fund of the Presbyterian Church in Canada" and a sum to "the Foreign Mission Fund of the Presbyterian Church in Canada." When she made her will she was a member of a congregation of the Presbyterian Church in Canada, at Hopewell, Nova Scotia. That congregation entered the United Church of Canada in 1925, when *The United Church of Canada Act* (Dom., 1924, c. 100) came into force. G. remained a member of the congregation until her death in 1929. The Supreme Court of Nova Scotia *en banc* held (6 M.P.R. 465, affirming judgment of Graham J., *ibid*) that the gifts should be paid to the Home and Foreign Mission Funds respectively, of the Presbyterian Church in Canada (that is, the continuing Presbyterian Church in Canada, so called, not merged in nor associated with the United Church of Canada) (hereinafter called the "Continuing Presbyterian Church"). The United Church of Canada (but no other parties interested) appealed to this Court. It claimed that the Presbyterian Church in Canada, as it existed before the said Act, became a constituent part of the United Church of Canada without the loss of its identity, and that the gifts in question should pass to the United Church of Canada.

* PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

Held: The United Church of Canada was not entitled to the gifts (*Fraser* v. *McLellan,* [1930] Can. S.C.R. 344); and its appeal failed.

This Court expressed no opinion on the question of the right of the Continuing Presbyterian Church to the gifts as against other parties interested, as residuary legatees or as next of kin; that question (which the appellant church had no status to raise) not being before it.

Therefore the said decision of the Supreme Court of Nova Scotia *en banc,* in the result remained undisturbed.

APPEAL (by leave of the Supreme Court of Nova Scotia *en banc*) by The United Church of Canada from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming (Hall J. dissenting) the judgment of Graham J. (2), holding that certain bequests in the will of Jessie Gray, deceased, should be paid to the Home Mission Fund and the Foreign Mission Fund, respectively, of the Presbyterian Church in Canada (that is, the Continuing Presbyterian Church in Canada, so called, not merged in nor associated with the United Church of Canada).

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

W. N. Tilley K.C. and *G. W. Mason K.C.* for the appellant.

Glyn Osler K.C. and *E. M. Macdonald* for the respondent.

The judgment of Duff C.J. and Lamont J. was delivered by

LAMONT, J.—On July 7, 1921, Jessie Gray, a resident of Hopewell, in the County of Pictou and Province of Nova Scotia, made her last will and testament. By that will she left bequests as follows:—

"To the Home Mission Fund of the Presbyterian Church in Canada"..... $500 00

"To the Foreign Mission Fund of the Presbyterian Church in Canada"..... 500 00

She died on the 12th day of September, 1929.

(1) 6 M.P.R. 465; [1933] 2 D.L.R. 400.

(2) 6 M.P.R. 465, at 466-470; [1932] 3 D.L.R. 250.

1934

In re the Will of Jessie Gray, deceased.

THE UNITED CHURCH OF CANADA *v.* THE PRESBYTERIAN CHURCH IN CANADA.

Lamont J.

At the date of the will and for many years previous thereto Jessie Gray was a member of the St. Colomba congregation of the Presbyterian Church in Canada, at Hopewell. That congregation voted to enter the United Church of Canada, and entered that church on June 10, 1925, when *The United Church of Canada Act* (Statutes of Canada, 1924, chapter 100) came into force. Jessie Gray remained a member of the said congregation up to the date of her death.

On the 31st day of December, 1931, the executors named in the will took out an originating summons calling upon The United Church of Canada; The Presbyterian Church in Canada, not merging in nor associated with The United Church of Canada (hereinafter called "The Continuing Presbyterian Church"); and a number of others who were beneficiaries under the will, to cause an appearance to be entered for them, respectively, to the summons, which was an application for an order to determine whether the bequests above mentioned should be paid to The United Church of Canada or The Continuing Presbyterian Church, or, if to neither, how otherwise.

The matter came on for hearing before Mr. Justice Graham, of the Supreme Court of Nova Scotia, who held that the bequests should be paid to The Continuing Presbyterian Church. On appeal to the Supreme Court, *en banc,* that court affirmed the decision of Mr. Justice Graham (Hall J. dissenting). The United Church, by leave, now appeals to this Court.

The United Church bases its claim to the bequests upon *The United Church of Canada Act,* which was assented to on July 19, 1924, but did not come into force generally until June 10, 1925.

The various sections of the Act received consideration from this court in the case of *In re Estate of Eliza Patriquin, deceased—Fraser* v. *McLellan* (1). In that case Eliza Patriquin bequeathed $100 to the Trustees of the Tatamagouche Presbyterian Church, and the residue to the Tatamagouche Presbyterian Church. The will was made January 5, 1924, and Eliza Patriquin died May 2, 1926. The will was, therefore, made before the Union, and she died subsequent thereto. On June 10, 1925, the Tatamagouche

(1) [1930] Can S.C.R. 344.

1934

In re the Will of Jessie Gray, deceased.

THE UNITED CHURCH OF CANADA *v.* THE PRESBYTERIAN CHURCH IN CANADA.

Lamont J.

Presbyterian Church became part of The United Church of Canada, and an application was made to this court for an order declaring that The United Church was entitled to both bequests. It was held by this court that, as both the bequest and the residue were to benefit the Tatamagouche Presbyterian Church, and that, as that congregation had been divided, the congregation of The United Church was no longer identical with the congregation which it had been Eliza Patriquin's intention to benefit, and, therefore, The United Church was not entitled to receive the bequests.

I agree with my brother Crocket, whose judgment I have had an opportunity of reading, that, in view of the principle laid down in the *Tatamagouche* case (1), The United Church, in the case before us, is not entitled to receive the bequests. Although in the *Tatamagouche* case (1) the bequests were to a congregation and in the present case are to "Funds," yet the funds which the testatrix intended to augment were funds controlled and administered by the Presbyterian Church in Canada. Both funds were then managed by boards or committees which were appointed by the General Assembly and which acted under such regulations as the Assembly from time to time adopted. Can it be said that funds which, although intended for missionary purposes, are controlled and administered by the General Council of The United Church, are the funds which the testatrix desired to augment by her bounty? In view of the decision in the *Tatamagouche* case (1), it seems to me the answer must be in the negative.

As to the claim of the Continuing Presbyterian Church. As the case was framed and as the parties went to trial there were three parties before the court: there were the two churches and one of the next of kin, and the court was called upon to decide whether or not either church or the next of kin was entitled. Both of the Nova Scotia courts decided in favour of the Presbyterian Church. From the judgment of the Supreme Court of Nova Scotia *en banc,* neither the Trustees who took out the originating summons, nor the next of kin, has appealed. The only party disputing the claim of the Continuing Presbyterian Church is The United Church of Canada. Under the pro-

(1) [1930] Can. S.C.R. 344.

1934

In re the Will of Jessie Gray, deceased.

THE UNITED CHURCH OF CANADA *v.* THE PRESBYTERIAN CHURCH IN CANADA.

Lamont J.

ceedings taken here, all we have to do is to determine the right of The United Church to the bequests. That claim failing, the Continuing Presbyterian Church is entitled to maintain its judgment. It is entitled to maintain it, not on the ground that it has been established that it is the same entity as the Presbyterian Church in Canada prior to the Union—on that question I express no opinion—but because The United Church, which is the only one in a position to dispute its right to the bequests, has no claim whatever thereto. Whether under the Act the Continuing Presbyterian Church would be entitled as against the next of kin is a question which is not before us. As Lord Herschell said in *Cox* v. *Hakes* (1),—

> The function of a Court of Appeal is to deal with the judgment before it for review, and not to pronounce opinions on a point of law which may remove a difficulty from the path of a litigant in future proceedings.

The appeal should, therefore, be dismissed with costs.

The judgment of Rinfret, Cannon, Crocket and Hughes JJ. was delivered by

CROCKET, J.—The claim of the appellant, The United Church of Canada, to these bequests rests entirely on its submission that the Presbyterian Church in Canada, as it existed before the coming into force on June 10, 1925, of *The United Church of Canada Act,* Statutes of Canada, 1924, c. 100, became a constituent part of the ecclesiastical corporation constituted by that statute under the name of The United Church of Canada without the loss of its identity and that it therefore still existed as before within the new corporation.

In *Fraser* v. *McLellan* (2), *in re* the Estate of Eliza Patriquin, deceased, who had made a will before *The United Church of Canada Act* came into effect, leaving a bequest to the Tatamagouche Presbyterian Church at Tatamagouche, N.S., this Court unanimously decided that that congregation, having become a part of The United Church of Canada under the provisions of *The United Church of Canada Act,* which purported to merge the Presbyterian Church in Canada, The Methodist Church and The Congregational Churches of Canada, in the new corporation constituted by that statute, was not the same entity to

(1) (1890) 15 App. Cas. 506, at 533-4.

(2) [1930] Can. S.C.R. 344.

which the testatrix made her bequest and therefore could not take it. In delivering the judgment of the court Smith, J., said:—

> The sole question for determination is whether or not that congregation, under the circumstances that have since arisen, comes now within the description in the will or has become something so different that it does not now answer to the description.

And, after pointing out that The United Church of Canada was incorporated by *The United Church of Canada Act* as "an entirely new and distinct legal entity":

> It cannot be said that a congregation of The United Church of Canada at Tatamagouche is the same religious organization as was within the contemplation of the testatrix in making this bequest to the Tatamagouche Presbyterian Church.

This decision is conclusive, so far as this Court is concerned, as to the appellant The United Church of Canada's claim that it is entitled to the bequests now in question on the ground that "the Presbyterian Church in Canada is a constituent part of such Church without loss of identity," which must mean that the Presbyterian Church in Canada still exists as the same entity as formerly within the fold of the United Church. Upon no other ground could it possibly be contended that the Home and Foreign Missions Funds of the United Church of Canada are the Home and Foreign Mission Funds of the Presbyterian Church in Canada as the last named church existed before *The United Church of Canada Act* came into force. To hold that the several church organizations described in that Act as the negotiating churches, viz., the Presbyterian Church in Canada, The Methodist Church, The Congregational Union of Canada and The Congregational Union of Nova Scotia and New Brunswick, were all constituted a single church under the new name of The United Church of Canada without loss of their identity, would necessarily imply, not only that each continued to exist within the new church corporation as a distinct and separate body as formerly, but that each retained the right to control its own internal affairs within The United Church without reference to the others, which was clearly never intended by the incorporating Act.

The appellant, The United Church of Canada, having no right or interest itself in these bequests, it follows, in my opinion, that it has no status on this appeal to chal-

1934

In re the Will of Jessie Gray, deceased.

THE UNITED CHURCH OF CANADA *v.* THE PRESBYTERIAN CHURCH IN CANADA.

Crocket J.

lenge the right of the respondent, The Presbyerian Church in Canada, to receive them as against any other party or persons. The executors of the will, upon whose application the originating summons was issued for the determination of the questions therein framed, have not appealed from the judgment of the Supreme Court of Nova Scotia *en banc*. Neither have any of the residuary legatees or next of kin, the only parties, other than the Presbyterian Church in Canada and The United Church of Canada, who could in any possible contingency be entitled to receive the moneys bequeathed to the Home Mission Fund and the Foreign Mission Fund of the Presbyterian Church in Canada, and all of whom, as it seems, were duly cited to appear in the action and thus afforded an opportunity of being heard upon the question of the possible lapsing of the bequests because of there being no Home Mission Fund or Foreign Mission Fund of the Presbyterian Church in Canada, as contemplated by the testatrix,—which is obviously the only ground upon which they or any of them could become entitled to share in the bequeathed moneys. Both the trial court and the Supreme Court of Nova Scotia *en banc* decided that the bequests should be paid to the Home Mission Fund and the Foreign Mission Fund respectively of the Presbyterian Church in Canada, as designated in the two questions, viz., " the Presbyterian Church in Canada (that is, the continuing Presbyterian Church in Canada, so called, not merged in nor associated with the United Church of Canada)", or in other words to the two designated funds of the Presbyterian Church in Canada as it now exists and functions. The decision of the Supreme Court of Nova Scotia must be taken, so far as that court is concerned, to have been conclusive of the whole action and the questions for the determination of which it was brought, not only as between the Presbyterian Church in Canada and The United Church of Canada, but as between either of these churches and the residuary legatees and next of kin. It excludes the residuary legatees and next of kin of the testatrix, so far as these bequests are concerned, just as conclusively as it excludes The United Church—precisely as it would have excluded both the Presbyterian Church in Canada and the residuary legatees and next of kin had the decision been

in favour of The United Church. Leave to appeal from this judgment to this Court was granted only to The United Church of Canada, which is the only appellant here represented, though Isabella Munro, one of more than twenty nieces and nephews, named as residuary legatees in the will, appealed in her own behalf from the judgment of Graham, J., to the Supreme Court of Nova Scotia, as well as The United Church, and was heard by separate counsel before that Court. The sole question, therefore, for determination before this Court on the present appeal is as to whether the appellant, The United Church of Canada, is itself entitled to the bequests, which the testatrix made to the Home and Foreign Mission Funds of the Presbyterian Church in Canada. This question having been decided against the appellant in accordance with the decision in the Tatamagouche case (1), and no appeal having been taken from the judgment of the Supreme Court of Nova Scotia *en banc* by either the executors of the will or any of the residuary legatees or next of kin, who were content to accept that judgment, it cannot now, in my opinion, be disturbed on this appeal at the instance of a body which could have no possible concern with any controversy, if there were any, between the Presbyterian Church in Canada and the executors of the will or any of the residuary legatees or next of kin.

The fact that *The United Church of Canada Act* carried or purported to carry into the new church corporation thereby constituted the "Board of the Presbyterian College, Halifax," or any other holding corporation, which had previously been charged with the administration of the property and moneys given or bequeathed to the Home and Foreign Mission Funds of the Presbyterian Church in Canada, as the latter church formerly existed and functioned, and that this particular Board or any other holding corporation still existed at the time of the death of the testatrix in September, 1929, for the purpose of administering, not the Home and Foreign Mission Funds of the Presbyterian Church in Canada as formerly, but the Home and Foreign Mission Funds of the newly constituted United Church of Canada, manifestly could not bring the latter

(1) [1930] Can. S.C.R. 344.

1934

In re the Will of Jessie Gray, deceased.

THE UNITED CHURCH OF CANADA *v.* THE PRESBYTERIAN CHURCH IN CANADA.

Crocket J.

funds within the description of the former, as used in the will, unless the Presbyterian Church in Canada itself continued to exist within the new church corporation as formerly without loss of its identity. It comes back to the question of identity precisely as in case of a congregation of The United Church and a Presbyterian congregation in communion with the Presbyterian Church in Canada, as Smith, J., pointed out in delivering the judgment already referred to in *Fraser* v. *McLellan* (1), in considering the $100 bequest to "The Trustees of the Tatamagouche Presbyterian Church." He said:

> The bequest of $100, therefore, is to a corporation which, perhaps, continues to exist, but it is nevertheless necessary to consider, even if that be so, whether or not it is a corporation for carrying into effect the object that the testatrix had in view, namely, to hold or expend the bequest for the benefit of the "Presbyterian Church at Tatamagouche." It would seem that the same principle should be applied as in the case of the other bequest.

The church or congregation there described had become a church or congregation of The United Church of Canada. The clear ground of the decision was that The United Church of Canada did not answer the description of the Presbyterian Church in Canada as the latter church existed before *The United Church of Canada Act* came into effect.

We are not called upon to consider and consequently express no opinion as to whether the judgment of the Supreme Court of Nova Scotia is right or wrong as between the Presbyterian Church in Canada and the residuary legatees or next of kin.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *E. M. Macdonald, Jr.*

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(1) [1930] Can. S.C.R. 344.

1934

POOLE & THOMPSON LIMITED (DEFENDANT) ..... APPELLANT; * Oct. 24 * Nov. 20.

AND

WILFRED McNALLY (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

Motor vehicles—Negligence—Highway Traffic Act, P.E.I., 1930, c. 1, s. 65—Construction—Onus of proof—Contributory negligence—Conduct of case at trial as affecting right on appeal to complain of non-direction to jury—Liability of owner of motor car—Nature of presumption under s. 65 (2).

The judgment of the Supreme Court of Prince Edward Island *en banc*, 7 M.P.R. 346, affirming (on equal division of the court) judgment against appellant, as owner of a motor car, for damages for injury to plaintiff, who, it was alleged, was struck by the car through negligent driving thereof by one S., was affirmed.

It was held that there was sufficient evidence to warrant the jury's finding that the said car was the one which struck the plaintiff.

Appellant contended that there was evidence of contributory negligence as to which the trial judge should have instructed the jury. *Held:* (1) A conclusive answer was found in the terms of s. 65 (1) of the Prince Edward Island *Highway Traffic Act* (placing the onus of proof that the damage "did not arise through" the negligence of the owner or driver upon the owner or driver); the submission of the question to the jury would have been irrelevant and futile; the most a finding of contributory negligence could have proved would be that the injury was not entirely or solely caused by S.'s negligence, and this would not have been enough to discharge the onus imposed by s. 65 (1) (the construction and effect of s. 65 (1), and its application with regard to a finding of contributory negligence, discussed). (2) On the evidence such finding could not reasonably have been made. (3) Although contributory negligence had been pleaded, yet, at the trial, the whole defence was that said car was not the one which struck the plaintiff, that it was elsewhere at the time of the accident, and there was no suggestion of reliance upon the question of contributory negligence nor any request to direct the jury upon it; therefore appellant could not now complain of non-direction to the jury upon it.

In s. 65 (2) of said Act (providing that, in an action for damage sustained by reason of a motor vehicle upon a highway, a person driving it with the consent, expressed or implied, of the owner, "shall be deemed to be" the agent or servant of the owner and to be employed as such and "shall be deemed to be" driving it in the course of his employment) the words "shall be deemed to be" must be construed as creating a conclusive, not a rebuttable, presumption.

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* PRESENT:—Duff C.J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

1934

POOLE & THOMPSON LTD. v. MCNALLY.

APPEAL (by special leave granted by the Supreme Court of Prince Edward Island *en banc*) from the judgment of the Supreme Court of Prince Edward Island *en banc* (1) dismissing (on equal division of the court) the present appellant's appeal from the judgment of Saunders J., upon the verdict of a jury, that the plaintiff (respondent) recover the sum of $1,500 against the defendants in the action.

The action was against one Sentner and the present appellant company for damages for injury caused to the plaintiff by being struck by a motor car, alleged by the plaintiff to have been driven by the defendant Sentner (whose negligent driving was alleged to have caused the accident) and to have been owned by the defendant company (the present appellant).

The material facts of the case and questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

T. A. Campbell K.C. and *D. L. Mathieson* for the appellant.

J. J. Johnston K.C. for the respondent.

The judgment of the court was delivered by

CROCKET, J.—This is a running down case which was tried in the Supreme Court of Prince Edward Island before Mr. Justice Saunders and a jury.

The respondent, McNally, a fireman in the employ of the Canadian National Railways, was driving his own automobile to Kensington on the night of July 13, 1932, accompanied by a Mr. and Mrs. Paquet and a girl friend of the latter. When approaching the town his left rear tire went down. He pulled over to his right side of the road, stopped his car close to the ditch, dimmed his headlights and got out with Paquet to replace the injured tire. Paquet went behind the car to jack up the rear axle while McNally proceeded to remove the nuts on the rear left wheel. While so engaged another car came along from the direction of the town at a high rate of speed and ran down and demolished a horse drawn unlighted wagon proceeding in the same direction on the other side of the road a few feet

(1) (1934) 7 M.P.R. 346.

ahead of the parked car. After smashing the wagon the running down car careened across the road, struck McNally, threw him forward into the gutter and proceeded on its way until it disappeared in the darkness and fog which prevailed at the time, without its identity being recognized by any of the persons left at the scene of the accident.

McNally was found lying on his back unconscious. One of his arms and five ribs were broken and he suffered other injuries, which confined him to a hospital for over two months and incapacitated him for his employment for over six months.

Subsequent investigation having revealed the fact that a young man named Sentner had borrowed a used Ford coach from the appellant company at Charlottetown, had driven the borrowed car to Kensington with two other men to attend a public dance on the night of the accident and had run down a wagon at the same place while driving out of Kensington with his two companions with whom he had been drinking, the respondent brought this action against Sentner as the driver and the appellant as the owner of the car which had caused his injuries, to recover damages for these injuries and the loss of wages resulting therefrom.

S. 65 (1) of the Prince Edward Island *Highway Traffic Act* provides:—

> When loss or damage is sustained by any person by reason of a motor vehicle upon a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver shall be upon the owner or driver.

And s. 65 (2):—

> In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle upon a highway, every person driving such motor vehicle who is living with and as a member of the family of the owner thereof and every person driving such motor vehicle with the consent, expressed or implied, of the owner thereof shall be deemed to be the agent or servant of the owner of such motor vehicle and to be employed as such and shall be deemed to be driving such motor vehicle in the course of his employment, but nothing in this sub-section shall relieve any person deemed to be the agent or servant of the owner and to be driving such motor vehicle in the course of his employment from the liability of such damages.

In virtue of these statutory provisions it was only necessary for the plaintiff, in order to maintain his action against both defendants, to prove that his injuries were caused up-

1934

POOLE & THOMPSON LTD. v. MCNALLY.

Crocket J.

on a highway by a motor vehicle of which the appellant was owner and which Sentner was driving at the time with the appellant's consent. It was then for the defendants to prove that McNally's injuries did not arise from the negligence or improper conduct of Sentner. No serious question seems to have been raised on the trial as to the appellant's ownership of the Ford coach which Sentner drove to Kensington on the night in question, or as to his having obtained the appellant's permission to use it for that purpose, so that practically the whole issue in controversy between the parties on the trial, as it was conducted, was as to whether this was the car which had struck McNally.

The learned trial Judge directed the jury that this was the crucial point in the case and summed up very clearly and completely the evidence of Sentner and all other defence witnesses which had been adduced in an effort to prove that, notwithstanding the undisputed fact that he had run down a wagon in the same locality on the night in question and continued on his way without stopping, there was no other car parked on the roadside opposite the wagon at the time and that he had neither struck McNally nor in any manner come in contact with his car. The jury returned a verdict for the plaintiff against both defendants, assessing the damages at $1,500.

The defendant, Poole & Thompson, Limited, moved the Court *en banc* to set aside the verdict against it and enter judgment in its favour. Sentner did not join in this motion, which was heard before Chief Justice Mathieson and Mr. Justice Arsenault, the main grounds argued being that there was not sufficient evidence of the identity of the car to reasonably warrant the verdict, that the appellant was not legally liable for the damage upon a proper construction of s. 65 (1) of the *Highway Traffic Act*, and that there was evidence of contributory negligence and the learned trial Judge had not instructed the jury upon this question.

The learned Chief Justice held, as to the evidence concerning the identity of the car, that there was nothing on this ground to support the verdict but conjecture, and was of opinion also that the evidence established contributory negligence on the part of the plaintiff which would debar him from recovering. For these two reasons he thought

the appeal should be allowed and judgment entered for both defendants.

Mr. Justice Arsenault, on the other hand, held that there was sufficient evidence of the identity of the car to support the verdict and no evidence of contributory negligence on the part of the plaintiff which would have justified the learned trial Judge in leaving that question to the jury, even had counsel representing the defendants separately not failed, as they did, to request that he do so. His Lordship fully discussed the construction of s. 65 (2) of the *Highway Traffic Act,* which the learned Chief Justice in his view of the case had not considered it necessary to do, and held that its effect was to render the appellant liable for any damage which Sentner had caused while driving its car, even though he may not in point of fact have been driving the car as its *agent* or *servant* in the usual sense of these words. He, therefore, held that the appeal should be dismissed.

The result of this division of opinion was that the verdict of the jury and the trial judgment entered thereon stood.

The Supreme Court of the Province having granted special leave to appeal to this Court, we are now called upon to pronounce upon substantially the same questions as those argued in the provincial Court *en banc.*

After as careful an examination of the two opposing judgments as I have been able to make and of all the relevant evidence to which we have been referred on the question of the identification of the motor car that struck the plaintiff, I feel bound to say that I concur in the opinion of Mr. Justice Arsenault that there was sufficient evidence to warrant the verdict for the respondent upon this question—the only issue the jury was required to determine.

It was an issue upon which the jury might well enough have found either way upon a consideration of the whole evidence, and depending in its final analysis upon the credibility of Sentner's story that, although he had run down and smashed the wagon and continued on his way without stopping, he did not strike the plaintiff's or any other car, and that no car was parked at the time at or near the spot where he had run down the wagon.

1934

POOLE & THOMPSON LTD. v. MCNALLY.

Crocket J.

Much stress was laid upon the fact that no marks were found on the borrowed car after it was returned to the appellant's garage to indicate that it had been damaged in any way on its left side, though its front iron bumper had been broken and removed and laid inside the car. The defence sought to account for the breaking of the bumper by the fact that it had been welded and that the impact with the wagon was sufficient to break it. The bumper, however, was not broken at the weld, and, as there was indisputable testimony that the rear bumperette on the McNally car had been caught and bent straight back on its left side, breaking the iron arm by which it was attached to the frame of the car, and also that the running down car was, immediately after passing the McNally car, observed to be throwing up gravel and heard to be making a clicking noise as it passed over the railway crossing a short distance beyond and Sentner himself admitted that he had afterwards been held up by its dragging and finally catching behind the front wheel, the probability would seem to lie on the side of the inference that it was broken by striking the rear bumperette of the McNally car rather than by striking the rear wheels of a light wooden carriage, as contended. If there were nothing else I should think that this evidence alone would have afforded abundant justification for the jury's verdict.

With regard to the contention that there was evidence of contributory negligence as to which the learned trial Judge should have instructed the jury, it seems to me a conclusive answer to it is found in the terms of s. 65 (1) of the *Highway Traffic Act* above quoted.

That enactment, as the present Chief Justice of this Court (then Duff, J.), construing an identically similar section in the Manitoba *Motor Vehicle Act* in *Winnipeg Electric Co.* v. *Geel* (1), clearly pointed out, creates against the owner or driver of a motor vehicle, by reason of which loss or damage has been proved to have been sustained by any person upon a highway, a rebuttable presumption of negligence, which must be disproved before either can escape liability therefor. The presumption thus created can be rebutted only by proof that the injury claimed for "did not arise through the negligence or improper conduct of the owner or driver." The onus of proving that

(1) [1931] Can. S.C.R. 443.

fact is explicitly placed on the owner or driver. The result is that, once it is proved in any action that the plaintiff was in fact injured upon a highway by a motor vehicle, he is, under the provisions of s. 65 (1), entitled to judgment against the driver, at least, of the motor vehicle by which he was so injured if upon the whole case there is no such evidence as would reasonably warrant a finding that the injury did not arise through the driver's negligence or improper conduct.

Applying the enactment in this sense to the case at bar, what would have been the result if the question of contributory negligence had been submitted to the jury and the jury had found that there had been some negligence on the part of the plaintiff which materially contributed to cause the injury? Would such a finding have established the fact that the plaintiff's injury did not arise through Sentner's negligence or improper conduct within the meaning of s. 65 (1)? It would assuredly not have established that there was no negligence or improper conduct on the part of Sentner which contributed to cause the injury. On the contrary, it would have established that the injury was caused in part by the negligence of the plaintiff and in part by the negligence of Sentner, or, in other words, that the real proximate and direct cause of the injury was the combined negligence of the two and that neither could by the exercise of due care have avoided it. The most a finding of contributory negligence on the part of the plaintiff could be said to prove, had such a finding been made, would be that the injury was not entirely or solely caused by Sentner's negligence or misconduct. This in my opinion would not have been enough to discharge the onus stated in the subsection. Proof that his negligence or improper conduct did not entirely or solely cause the injury claimed for, is not proof that the injury "did not arise through" his negligence or improper conduct, which is the fact the subsection explicitly enacts must be proved in order to rebut the statutory presumption which it creates, unless indeed these controlling words of the subsection are construed to mean "did not entirely or solely arise through" the negligence or improper conduct of the owner or driver. I cannot think, having regard to the reason and purpose of the enactment and the context in which the words are used, that they are reasonably capable of any such con-

1934

POOLE & THOMPSON LTD. v. MCNALLY.

Crocket J.

struction. The submission of the question of contributory negligence to the jury would, therefore, have been quite irrelevant and futile.

Apart from this consideration, however, I agree with the opinion of Mr. Justice Arsenault that in the circumstances disclosed by the whole evidence a finding of contributory negligence could not reasonably have been made against the plaintiff.

Another consideration which, I think, would completely dispose of this ground of appeal is that, notwithstanding both defendants in their separate statements of defence pleaded contributory negligence, the whole defence on the trial was in reality an alibi: that the Sentner car was not near the scene of the accident when McNally was injured, but in Kensington. Their counsel accordingly did not suggest at any stage of the trial that they were relying in any way upon the question of contributory negligence and made no request to the learned Judge to give any direction to the jury in reference to it. Having thus themselves to all intents and purposes abandoned that plea, they surely cannot now be heard to complain that the learned trial Judge should have directed the jury upon it.

As to the contention that the words "shall be deemed to be," as used in s. 65 (2), should be construed as creating only a rebuttable and not a conclusive presumption, I am of opinion that they must be construed in the latter sense. It is manifest from the whole language of this subsection that the intention of the Legislature was to make every owner of a motor vehicle responsible for any loss or damage resulting from its operation on a highway, provided that such loss or damage occur while it is being driven by a person with his consent, express or implied. To give the words "shall be deemed to be" only a *prima facie* effect, as if the words "until the contrary be shown" immediately followed them, would defeat the clear intent of the section.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *D. L. Mathieson.*

Solicitor for the respondent: *J. B. Johnston.*

1934

LEAH RIACH AND ETHA RIACH (DEFENDANTS) ..... APPELLANTS; *May 22, 23. *Oct. 2.

AND

DUNCAN FERRIS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Propounding for probate—Facts to be established—Allegation of fraud and undue influence—Onus of proof

If a party propounding a will for probate has satisfied the court that the testator executed it with due formalities, and that when he did so he was of sound and disposing mind and memory, had full knowledge and appreciation of its contents, and actually comprehended what he was doing, the party propounding has fulfilled the onus upon him; he does not have to go farther and disprove or negative the alleged exercise of undue influence or fraud; it is for the party impugning the will to satisfy the court of the exercise of undue influence or fraud.

Barry v. *Butlin*, 2 Moore P.C. 480, *Fulton* v. *Andrew*, L.R. 7 H.L. 448, *Tyrrell* v. *Painton*, [1894] P. 151, and other cases, reviewed and discussed.

As to the will in question, *held*, that, in view of the evidence of the attesting witnesses to the will and of certain physicians, which evidence appeared clearly to have been accepted without question by the trial judge, and there being nothing to cast any well-grounded suspicion upon that evidence, it must be taken that the testator was of sound and disposing mind and memory, and was fully aware of what he was doing, when he executed the will, and that the will was consequently entitled to probate, failing affirmative proof of the allegation that he was prevailed upon to execute it by fraud and undue influence; and that the evidence relied on to establish that allegation was wholly insufficient to warrant an affirmative finding.

Per Duff C.J.: Wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed (*Tyrrell* v. *Painton*, [1894] P. 151, at 159-160.)

APPEAL from the judgment of the Court of Appeal for Ontario.

The plaintiff (the present respondent) propounded for probate an alleged will of William Everton Wright, deceased, made on March 1, 1932. Objections were made to the granting of probate. The cause was removed from the Surrogate Court of the County of Essex into the Supreme Court of Ontario. The plaintiff sought to estab-

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

1934

RIACH v. FERRIS.

Duff C.J.

lish the will. His action was dismissed by Raney J. The plaintiff appealed to the Court of Appeal for Ontario. That court made an order that the costs of the trial and appeal be taxed, and that, upon payment by the defendants (other than one Barbara Brown, who was the main beneficiary under the will and was, upon consent, made a party defendant by order of the Court of Appeal) to the plaintiff of the amount thereof within ten days after taxation, the judgment of Raney J. be set aside and a new trial be had, but, in default of such payment of costs being made, that the plaintiff's appeal be allowed and that it be declared that the will was well proved and ought to be established, and that probate be granted. From that judgment an appeal was brought to this Court.

The material facts of the case and the questions for determination are sufficiently stated in the judgment of Crocket J., now reported. The appeal to this Court was dismissed with costs.

S. L. Springsteen for the appellants.

J. M. Baird K.C. for the Official Guardian (representing the infant, Wilda Yager), supporting the appeal.

R. S. Rodd for the respondent.

DUFF C.J.—I entirely agree in the conclusions of my brother Crocket as well as in the reasons by which those conclusions are supported. My purpose in adding what I am now saying is merely to note that the law is well established and well known and that, as applicable to this appeal, it is best, as well as completely, stated in this passage from the judgment of Lord Davey (then Davey L.J.) in his judgment in *Tyrrell* v. *Painton* (1):

> * * * the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.

CROCKET J. (Duff C.J., and Rinfret, Lamont, Cannon and Hughes JJ. concurring)—This appeal arises out of a petition presented by the respondent Ferris in the Surrogate Court of the County of Essex, Ontario, for the granting to him, as the sole executor named therein, of probate

(1) L.R. [1894] P. 151, at 159-160.

1934

RIACH v. FERRIS.

Crocket J.

of the alleged last will and testament of William E. Wright, deceased, late of the city of Windsor. Wright died on April 8, 1932, without issue, leaving surviving him as his nearest of kin his brother George Wright and the latter's daughter Wilda, who had been legally adopted a few weeks after her birth by the testator and his wife but had left the testator's home in the autumn of 1930, seven or eight months after her adopted mother's death, to pursue a nurse's training course when sixteen or seventeen years of age, and later—in January, 1932—while employed as a domestic servant, married a young man named Yager in the State of Michigan. The will, of which the respondent sought probate, was executed on March 1, 1932, presumably when Wright was unaware of Wilda's marriage, and left or purported to leave all his real and personal estate, valued by the executor at $6,000 real and $330 personal property, to one Barbara Brown, of the City of Detroit, in the State of Michigan, described therein as the testator's cousin, subject to the payment of a legacy of $500 to his "adopted daughter Wilda Norena Wright, of Windsor, Ontario." On February 20, 1930, a few weeks after his wife's death, Wright executed a will leaving a duplex house and lot on Hall Ave., which was subject to a mortgage for $5,820, to two of his deceased wife's sisters, Leah Riach and Etha Riach, share and share alike, and the entire residue of his estate, real and personal, to his said adopted daughter, Wilda Norena Wright, provided she should live to attain the age of twenty-one years, and, in the event of her not doing so, leaving all to the said Leach Riach and Etha Riach in equal shares. On July 27, 1931, he made a second will, revoking that of February 20, 1930, and leaving his whole estate to Leah Riach and Etha Riach in equal shares, subject to the payment of a legacy to his adopted daughter of $200.

The Misses Riach entered a caveat objecting to the probate of the will of March 1, 1932, on the ground of mental incapacity on the part of the testator and undue influence and fraud on the part of Barbara Brown. The usual citations having been issued, the proceedings were removed, on the respondent's application, from the Surrogate Court to the Supreme Court for trial. The removal order directed that the respondent be made plaintiff and

1934

RIACH v. FERRIS.

Crocket J.

the four appellants defendants in the action, but Miss Brown, the principal beneficiary, was omitted as a party.

The action was tried before the late Mr. Justice Raney, who refused to order the will to probate and dismissed the action with costs.

At the opening of the hearing before the Court of Appeal for Ontario of the plaintiff's appeal from the trial judgment, attention having been called to the omission of the principal beneficiary as a party to the action, the plaintiff's counsel stated that he appeared for her as well as for the executor, and consented that an order should be made adding Miss Brown as a party defendant as though she had originally been made a party by the removal order. The appeal was then argued, and, though the argument seems to have occupied three days, judgment was pronounced *instanter* at its conclusion, so that we have before us only the formal order of the court without any of the reasons therefor. By the formal order Miss Brown was directed to be added a party defendant as though she had been declared to be one originally in the removal order; the costs of the trial and of the appeal were directed to be taxed and upon payment thereof by the defendants, other than Miss Brown, to the plaintiff within ten days after taxation, the trial judgment was ordered to be set aside and a new trial held; otherwise the plaintiff's appeal was to be allowed and the will of March 1, 1932, declared to be well proved, with a direction to the proper court to grant probate thereof to the plaintiff as the executor named therein, with costs of the trial and of the appeal to be paid by the defendants, other than Miss Brown, to the plaintiff forthwith. From this judgment the appellants now appeal to this Court.

It is quite apparent from his written opinion that the learned trial judge's refusal to admit the impugned will to probate was entirely grounded upon the fact that the evidence for the defence had raised in his mind some suspicion as to the genuineness of the will and that the plaintiff had failed to discharge the onus which His Lordship held rested upon him to remove such suspicion under the authority of the two rules laid down by Baron Parke in *Barry* v. *Butlin* (1), as expounded in *Fulton* v. *Andrew*

(1) (1838) 2 Moore P.C. 480.

(1), and in *Tyrrell* v. *Painton* (2). Though he does not precisely state what this suspicion was, the last two paragraphs of his reasons for judgment clearly indicate that it entirely concerned the conduct of the beneficiary, Miss Brown, and the question of the exercise of undue influence and fraud by her, as alleged in the statement of defence. Notwithstanding His Lordship's statement that the question he was discussing was not the question of the proof of undue influence but the question of judicial suspicion, within the language of Lord Lindley, as quoted by him from *Tyrrell* v. *Painton* (3), he immediately adds:—

> Such a suspicion having been raised by the evidence for the defence, the onus was upon the plaintiff to remove it. The plaintiff did not discharge that onus.
>
> If Miss Brown had taken the witness stand she might have admitted the truth of all the items in the evidence which went to raise suspicion in the mind of the Court, and yet she might conceivably have convinced the Court that there was no fraud or coercion on her part within the definition of undue influence. She might, for instance, have convinced the Court that everything she did was within the limits of legitimate persuasion. But the executor Plaintiff—and I must assume Miss Brown concurring—preferred to leave the judicial suspicion where the evidence for the defence left it. They must take the consequences.

Not only does His Lordship here distinctly state that the suspicion he entertained had been raised by the evidence for the defence, but he quite as distinctly says that had Miss Brown taken the witness stand she might have admitted the truth of all the items in that evidence which went to raise that suspicion and yet have convinced him that everything she did was within the limits of legitimate persuasion, but that the plaintiff and Miss Brown had chosen to leave that suspicion where the evidence for the defence left it and that they must therefore take the consequences. No finding is made one way or the other, either upon the issue as to Wright's testamentary capacity at the time of the execution of the will or as to the question of his having actually comprehended what he was doing when he did execute it. Neither is any finding made one way or the other as to the question of the testator having executed the will with full knowledge and appreciation of its contents and effect but as the result of the

(1) (1875) L.R. 7 H.L. 448. (2) L.R. [1894] P. 151.
(3) L.R. [1894] P. 151, at 157.

1934

RIACH v. FERRIS.

Crocket J.

exercise upon him of undue influence or fraud by or in behalf of Miss Brown.

The soundness, therefore, of the trial judgment turns entirely upon the question of the *onus probandi* and the validity of the learned trial judge's obvious assumption that under the three cases above cited the burden lay upon the plaintiff, not only to prove that Wright was of sound and disposing mind and memory and actually comprehended what he was doing when he executed the will, but to prove, as well, that he was not induced to execute it by undue influence or fraud.

After reviewing what he regarded as the salient facts of the case and stating that the facts as found by him brought the case within the principle of the rules laid down by Baron Parke in *Barry* v. *Butlin* (1), His Lordship quotes these rules as follows:—

(1) The onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator, and

(2) If a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

Then he quotes the dictum of Lord Hatherley, regarding Baron Parke's second rule, from *Fulton* v. *Andrew* (2) as follows:—

There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, * * * and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. * * * But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

and adds that these

rules of law have since been observed in a line of cases of the highest authority. And under later cases there has been a further expansion, so that, as pointed out by Lord Justice Lindley in *Tyrrell v. Painton* (3), "The rule in *Barry* v. *Butlin* (4) is not confined to the single case in which a will is prepared by or on the instructions of the person taking large

(1) (1838) 2 Moore P.C. 480.
(2) (1875) L.R. 7 H.I. 448, at 471-2.
(3) L.R. [1894] P. 151, at 157.
(4) (1838) 2 Moore P.C. 480.

benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever their nature may be it is for those who propound the will to remove such suspicion."

It will be observed that in neither of Baron Parke's two rules nor in neither of the respective dicta of Lord Hatherley and Lindley, L.J., as quoted, is there any specific mention of the question of procuring the execution of a will by fraud or misrepresentation or undue influence of any kind, and that, apart from Lord Hatherley's statement regarding the throwing upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will, the onus of shewing the righteousness of the transaction, the only expressions which can be relied upon to support the proposition that the onus resting upon a party propounding a will includes the negativing of undue influence, in a case where circumstances exist which create suspicion, are the expressions "that the instrument so propounded is the *last will of a free and capable testator,*" and "that the paper propounded does *express the true will of the deceased.*" Both these expressions no doubt imply, not only that the testator was of sound and disposing mind and memory at the time he executed the will, but that he actually comprehended what he was doing when he executed it. Though it may be that they on their face comprise freedom from fraud and duress, we do not think that the three cases from which His Lordship quoted can properly be said to establish the principle that the *onus probandi* resting upon a party propounding a will for probate extends in all cases, where circumstances of suspicion are disclosed, to the disproof or negativing of an allegation or suspicion of undue influence or fraud. For instance, Baron Parke himself says in *Barry* v. *Butlin* (1):

The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases the *onus* is imposed on the party propounding a will. It is in general discharged by proof of capacity and the fact of execution, *from which the knowledge of and assent to the contents of the instrument* are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in

(1) (1838) 2 Moore P.C. 480, at 484, 485, 491.

1934

RIACH v. FERRIS.

every case and under all circumstances to create a contrary presumption and to call upon the Court to pronounce against the will unless additional evidence is produced *to prove the knowledge of its contents by the deceased.*

Crocket J.

And, again:—

All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction *that the instrument did express the real intentions of the deceased.*

And, after reviewing the salient facts:—

We think, therefore, on the whole, that the evidence of the *factum,* coupled with the strong probabilities of the case, is sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favour, especially when made by persons of weak capacity. The undue influence and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility, *are insinuated but not proved.*

Whitehead's [one of the beneficiaries] authority and power over his master [the testator] is, no doubt, sufficiently established; but that such authority and power were in any way exercised to procure this will to be made *is only conjecture;* and there *is nothing like proof* of authority or control of any kind on the part of Butlin or Percy [the other two beneficiaries].

Fulton v. *Andrew* (1), notwithstanding the oft quoted dictum of Lord Hatherley, will be found to be of practically the same effect when the complete exposition of that case by Lord Chancellor Cairns and the other law lords taking part is closely examined. That was a case, where a jury had found that the testator knew and approved of the contents of the will generally, but that he did not know and approve of the contents of the residuary clause, by which, after a number of bequests to relatives and friends, the residue was left to the two executors, both of whom had been instrumental in the framing of the will, and with reference to which there was a discrepancy between the instructions for the will and the will itself. It was contended that the learned trial judge misdirected the jury upon the latter issue in telling them that they were to take this discrepancy into consideration and,

(1) (1875) L.R. 7 H.L. 448.

having done so, to determine whether the testator had known and understood the residuary clause; that he ought to have told them that they ought to consider simply whether the testator at the time of executing his will was unconscious of and did not approve of the residuary clause owing to mental prostration as alleged in the defendant's particulars. The Judge of the Court of Probate, who had directed that the two questions of fact indicated and others, which are not now relevant, should be tried by a jury at the Assizes, made absolute a rule to enter the verdict for the propounders of the will, and granted probate of the whole will. It was ordered, on appeal to the House of Lords, that probate of the will should be recalled and another order made granting fresh probate of the will, omitting the residuary clause. The decision turned entirely on two questions: 1st, whether, where a will is read over to or by a testator of sound and disposing mind and memory, and he duly executes it, it must be taken that he knew and approved of its contents; and, 2nd, whether with respect to the finding on the residuary clause it was contrary to the evidence. It had been contended that an absolute and fixed rule of law had been established by a series of cases that proof of the reading of a will by or to a competent testator and his execution thereof was always conclusive of knowledge and approval of its contents, and that no evidence against that presumption could be received. Lord Cairns said, as to this, that he thought

> it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, * * * unless the Legislature has, in the shape of an Act of Parliament, distinctly imposed that rule.

After citing Baron Parke's dictum containing the two rules above set forth, he quoted from Lord Penzance's charges to the jury in *Atter* v. *Atkinson* (1), and *Guardhouse* v. *Blackburn* (2). In the first of these cases Lord Penzance said to the jury:—

> Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, *and the question whether he knew and approved of* the contents is answered.

(1) (1869) L.R. 1 P. & D. 665. (2) (1866) L.R. 1 P. & D. 109.

1934

RIACH
v.
FERRIS.

Crocket J.

Commenting upon Lord Penzance's qualification that there must be no fraud, Lord Cairns says:—

> If Your Lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared, for their own benefit, a will disposing in their favour of a large portion of the property of the testator; and if you submit that case to a jury, it may well be that the jury may consider that there was a want, on the part of those who propounded the will, of the execution of the duty which lay upon them, *to bring home to the mind of the testator the effect of his testamentary act;* and that that failure in performing the duty which lay upon them, amounted to a greater or less degree of fraud on their part. The qualification of Lord Penzance in the charge I have read may entirely apply to such a case.

Among the statements quoted from the charge in *Guardhouse* v. *Blackburn* (1) are the following:—

> Although the testator knew and approved the contents, the paper may still be rejected *on proof establishing beyond all possibility of mistake* that he did not intend the paper to operate as a will.
>
> Although the testator did know and approve the contents, the paper may be refused probate *if it be proved that any fraud has been purposely practised* on the testator in obtaining his execution thereof.
>
> Subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof.

Regarding these directions Lord Cairns says:—

> It appears to me that, consistently with the rules mentioned by Lord Penzance, the jurors here *may not have been satisfied* that there was a proper reading of the will to the testator, *or may have been satisfied,* after hearing all the facts submitted to him by Mr. Justice Mellor, that there was on the part of those who propounded the will such a dereliction of duty, such a failure of duty on their part, as amounted to that degree of fraud to which Lord Penzance refers in the rules I have mentioned.

Lords Chelmsford, Hatherley and O'Hagan all entirely agreed with the Lord Chancellor's observations. Nothing, apart from the dictum of Lord Hatherley, is to be found in the entire report of this case to support the proposition that any further onus lies upon a party propounding a will for probate, than to satisfy the court that the testator was of sound and disposing mind and memory and that he knew and approved of its contents when executing it. There is no suggestion anywhere in the Lord Chancellor's speech that, once it appears that a competent testator formally executed a will with full knowledge of its con-

(1) (1866) L.R. 1 P. & D. 109, at 116.

tents, the party propounding it must also prove that he was not induced to execute it by any undue influence or fraud. The whole report of the case points quite the other way. Lord Hatherley himself, who fully concurred, as stated, in all the Lord Chancellor had said, added the following observation:—

> One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read over to him, there is a very strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside any instrument so executed.

That portion of Lord Justice Lindley's dictum in *Tyrrell* v. *Painton* (1), which is above quoted, may perhaps well bear the construction, which the learned trial judge has placed upon it. When, however, it is considered in the light of the language immediately following, it will be seen that what this eminent Lord Justice of Appeal had in his mind, when he spoke of the onus lying upon those who propounded the will "to remove such suspicion," was the suspicion that the testator did not know and approve the contents of the will. His words are:—

> to remove such suspicion, *and to prove affirmatively that the testator knew and approved of the contents of the document,* and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.

Clearly there is no suggestion in this dictum, when considered in its entirety, that any further onus lies upon a party propounding a will than to prove the testamentary capacity of the deceased and that when the testator executed the instrument he fully realized what he was doing. The dictum, of course, assumes that all the formalities required by law have been duly complied with. Indeed, it is as positively stated as it could well be that, once it is affirmatively proved that the testator, being, of course, of sound and disposing mind and memory, did know and approve of the contents of the will, the onus is placed on those who oppose its admission to probate to prove that, notwithstanding the fact that the testator fully knew and appreciated what he was doing when he executed the will, he was induced to do so by some fraud or undue

(1) L.R. [1894] P. 151, at 157.

1934

RIACH v. FERRIS.

Crocket J.

influence having been practised upon him. Moreover, in another passage of his reported opinion he says:—

> Now, in my opinion, this will of the 9th [which the defendants were propounding in their counter-claim as the true last will of the deceased] was executed under such suspicious circumstances that he [the President of the Probate, Divorce and Admiralty Division of the High Court, before whom the trial took place] ought to have said: "Do the defendants affirmatively establish to my satisfaction that the testatrix *knew what she was doing when she executed this will?*

The President, he pointed out, had only addressed himself to the question of fraud and held that the burden of proving that lay on the plaintiff (the party opposing the will) and that he had not discharged himself of that burden, so that in that case, as in the case at bar, there was no finding as to whether the testatrix knew what she was doing when she executed the will, though in the case cited the trial judge held that fraud had not been proved, while in the present case the trial judge, as already pointed out, makes no finding one way or the other upon either question. Had the *Tyrrell* case been tried by a jury, Lord Justice Lindley adds:—

> The question for the jury would be, did the testatrix know and approve of that will, and the jury should be told that it was for J. Painton [the defendant who sought its admission to probate] to prove that she did.

Assuming that in the case in behalf of a plaintiff seeking to establish the validity of a will, there may be such circumstances of apparent coercion or fraud disclosed as, coupled with the testator's physical and mental debility, raise a well-grounded suspicion in the mind of the court that the testator did not really comprehend what he was doing when he executed the will, and that in such a case it is for the plaintiff to remove that suspicion by affirmatively proving that the testator did in truth appreciate the effect of what he was doing, there is no question that, once this latter fact is proved, the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator. This, it seems to me, is the real effect of the three cases upon which the learned trial judge relied, and is precisely the principle stated by Lord

1934

RIACH v. FERRIS.

Crocket J.

Chancellor Cranworth in *Boyse* v. *Rosborough* (1), and distinctly approved by the Judicial Committee of the Privy Council in *Craig* v. *Lamoureux* (2), in which latter case the judgment of the majority of this Court (Fitzpatrick, C.J., dissenting) (3), in which *Barry* v. *Butlin* (4), *Fulton* v. *Andrew* (5) and *Tyrrell* v. *Painton* (6) were all considered, was reversed. The exact language of the Lord Chancellor in stating this principle in *Boyse* v. *Rosborough* (1) is set out in the syllabus of the Privy Council's decision in *Craig* v. *Lamoureux* (2) as follows:—

> When once it is proved that a will has been executed with due solemnities by a person of competent understanding, and *apparently* a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges.

This point Lord Cranworth, in *Boyse* v. *Rosborough* (1), said was beyond dispute, notwithstanding he had suggested that a will, which had been executed under coercion or the influence of fear or in consequence of impressions created in the testator's mind by fraudulent representations, could not in contemplation of law, though it might with strict metaphysical accuracy, be properly described as a true expression of the testator's will. It should perhaps be added that, in that case as in the present, undue influence was the point on which the defendants really relied on the trial and on the appeal, and that the deceased's alleged mental infirmity was put forward rather as tending to shew the probability that such influence might have been successfully exercised than as being such as would of itself invalidate the will.

While the trial judge in the present case, as pointed out, made no specific finding that the testator did know what he was doing when he executed the will, it is perfectly clear from his review of the facts that he accepted without question the testimony of both the subscribing witnesses to the will—Miss Burns and Mr. Taylor. Miss Burns was a stenographer who had been employed for 15 years in the office of Mr. Baker, a Windsor conveyancer, who did Wright's conveyancing business and who, it seems, had prepared his previous wills of February 20, 1930, and July 27, 1931. Wright, who had suffered for some months from

(1) (1857) 6 H.L.C. 1, at 49.
(2) [1920] A.C. 349, at 356.
(3) 49 Can. S.C.R. 305.
(4) (1838) 2 Moore P.C. 480.
(5) (1875) L.R. 7 H.L. 448.
(6) L.R. [1894] P. 151.

1934

RIACH v. FERRIS.

Crocket J.

high blood pressure and Bright's disease, became seriously ill late in December, 1931, and was confined to bed and under the care of Mrs. McLaughlin, a practical nurse, for five or six weeks until February 8. According to Mrs. McLaughlin's testimony, which the trial judge accepted, he had experienced frequent and various illusions during this period, and the learned trial judge found that his mental condition, when he was under Mrs. McLaughlin's care, was one of intermittent dementia. He recovered, however, from this acute illness and was able to be up and about more or less from the time Mrs. McLaughlin left until a day or two before his death. It appears that some time before Mrs. McLaughlin's employment Wright had consulted Baker about changing his will and communicated to him some instructions therefor, but that Baker had himself died while Wright was confined to bed. After his recovery from the illness referred to, some time in February, he went to Baker's office where Miss Burns was still employed, and requested her to draw a new will. Although after some hesitation she promised to do so, she decided, apparently after Wright had left her, to have the will drawn by a barrister, and arranged with Mr. Taylor, a practising barrister in Windsor, to draw it for him. She sent to him a written memorandum with the instructions she had taken from Wright. Mr. Taylor accordingly drafted the will for her and when it was ready brought it to her office for execution by Wright. He swore that he read the will over to Wright, whom he had not previously known, and that he seemed to understand it thoroughly—as thoroughly as any testator that he ever drew a will for, and that he had not any idea at all that the man was ill; that he shewed no appearance whatever of any mental incapacity; that he was standing up all the time he was in the office and seemed absolutely intelligent; and that he had no hesitation whatever in saying he knew exactly what he was talking about. Miss Burns corroborated Mr. Taylor's statement as to the reading over of the will and as to the filling in by Mr. Taylor in her and Wright's presence of a blank which had been left in the typewritten copy as prepared by Mr. Taylor for the name of the executor. An examination of the original will itself confirms Miss Burns' testimony as to the latter fact.

In addition to the evidence of the two subscribing witnesses to the will, two physicians, who had attended Wright at different times, not only during the period when he was confined to bed in January and the early part of February, but afterwards, testified in the plaintiff's case that in their opinion Wright at all times when they saw him was of sound and disposing mind and memory—fully capable of making a will. A local alienist, who had been called in to examine Wright at Mrs. McLaughlin's suggestion, after consultation with his attending physician and with a brother of the Misses Riach, and who had talked with Wright for over an hour, also testified that in his opinion Wright was perfectly sane.

The evidence of both attesting witnesses to the will and of these physicians having been accepted without question by the learned trial judge and there being nothing discoverable in the entire case to cast any well-grounded suspicion upon it, we are of opinion that it must be taken that Wright was of sound and disposing mind and memory when he executed the will of March 1st, and that he was fully aware of what he was doing when he did execute it, and that that will was consequently entitled to be admitted to probate, failing affirmative proof of the defendants' allegation that he was prevailed upon by fraud and undue influence on the part of Miss Brown to execute it.

As to this allegation we think that the evidence upon which the defendants relied to establish it is wholly insufficient to warrant an affirmative finding.

For these reasons the appeal from the judgment of the Court of Appeal reversing the judgment of the learned trial judge must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Benjamin H. Yuffy.*

The Official Guardian, representing the infant, Wilda Yager.

Solicitor for the respondent: *J. E. Taylor.*

INDEX

ASSESSMENT AND TAXATION— *Continued*

particularly considered).—2. The fact that s. 9 (2) of the Act deals with clubs, and makes liable to a business assessment "every proprietory or other club in which meals are furnished * * *" does not necessarily exclude all clubs from the operation of s. 9 (1) (*j*), making liable for business assessment every person carrying on any of certain specified businesses "or any business not before * * * specially mentioned". The question of whether or not respondent came within s. 9 (1) (*j*) could only be determined by investigating the facts concerning its organization and its operations; and there was evidence on which the Board could properly arrive at its conclusion that respondent was occupying or using the land for the purpose of a business within the meaning of s. 9 (1) (*j*), in view of s. 9 (12) which excludes the application of the *ejusdem generis* rule.—A corporation's liability to business assessment in connection with its lands on which it carries on its affairs does not depend on whether or not a profit is being made.—In the result, the judgment of the Court of Appeal, [1932] O.R. 637, was varied, by increasing the valuation for assessment purposes by a sum for the value of the buildings for wreckage purposes, and by declaring respondent liable for business assessment (based on the valuation of the property as fixed by this Court). THE CORPORATION OF THE CITY OF TORONTO *v.* ONTARIO JOCKEY CLUB.. **223**

3 —— *Municipal law — Exemptions — Lands used in connection with and for purposes of a college—Assessment together of exempt and non-exempt land—Taxing statute—Construction of—The Edmonton Charter*, 1913, *c.* 23, *s.* 320 (5).—In 1924 the appellant corporation, the "Synod", purchased for the purposes of a college certain blocks of land in the city of Edmonton, containing a little over eight acres, and erected college buildings on a portion thereof, and these have since been used by the Synod for the purposes of the college. In 1930 the Synod acquired six other lots, now in question, which were not contiguous to the lands on which the college buildings were situated, and erected thereon four residences, or dwelling houses, for the use of the professors of the college. No rent was charged or collected from the professors occupying these residences by the Synod, but the professors were entitled to occupy these residences only while engaged as professors of the college in the service of the Synod, and a condition of their engagement was that residence accommodation would be furnished them rent free. The professors had some duties to perform in the college at night, such, for instance, as

ASSESSMENT AND TAXATION— *Continued*

superintendence and assistance to the students in their studies, and inspection of dormitories, and meetings of the faculty of the college. The six lots in question had an area of .572 acres and with 3.428 acres comprising the sites of the college and buildings, formed just 4 acres. Section 320 of the Edmonton Charter provides that "All lands in the city shall be liable to assessments and taxation for both municipal and school purposes, subject to the following exceptions: * * (5) The land not exceeding four acres of and attached to or otherwise *bona fide* used in connection with and for the purposes of any * * * college, * * * so long as such land is actually used and occupied by such institutions, but not if otherwise occupied."—*Held*, Cannon and Crocket JJ. dissenting, that the appellant was not exempted from taxation as to the lots upon which the residence of its professors were situated.—*Per* Duff C.J. and Lamont and Hughes JJ.—Assuming in the appellant's favour that the professor's residences were "*bona fide* used in connection with and for the purpose of" the college, it has not been established from the facts as disclosed in the special stated case, (and the onus was on the appellant to bring itself strictly within the provision of the statute granting immunity) that these residences were "actually used and occupied by" the appellant institution, and "not otherwise occupied".—*Per* Duff C.J. and Lamont and Hughes JJ.—Section 320 does not give to an institution to which an exemption is granted the right to select the various pieces of property up to four acres to which the exemption would apply; under the Act, in the absence of any statutory provision indicating that the selection of the exemptions under the section may be made by the donee thereof and for giving notice of the same to the assessor, it is the assessor's duty to select the exemptions.—The other portion of the appellant's land, i.e., the site of the college buildings and the land immediately surrounding them, was assessed as a block described as 8.107 acres with the added words "4.107 taxable, 4 acres exempt".—*Per* Duff C.J. and Lamont and Hughes JJ.—Such an assessment is invalid as it is impossible to ascertain from that description which particular piece of land is assessed and which is exempt.—*Per* Cannon J. dissenting.—According to the facts disclosed in the special stated case, the land and the professors' residences erected thereon were exempted from taxation under section 320 of the Edmonton charter. These facts and the plans fyled in the case established that the residence of the principal of the institution was a building used and occupied by him in connection and for the

BANKS AND BANKING—*Continued*

company is insufficient to bring the appeal within the jurisdiction of this court.—The other action concerns three cheques amounting to $7,380.14 and interest drawn by the mis-en-cause, the city of Chicoutimi, payable, in payment of insurance premiums, to the company appellant, with whom the city mis-en-cause had fire and workmen's compensation insurance. Those cheques were delivered by the city mis-en-cause to one Vézina, who, at the material times, was acting as agent for the appellant company, and was also mayor of the city of Chicoutimi. All these cheques were delivered to the latter by the city before the premiums, for which they were severally intended to be given in payment, were due. This was done on the instructions of the mayor, (Vézina), himself. They were all, either cashed by him at the respondent bank's branch in Chicoutimi, or discounted by him when post-dated, and the proceeds were all deposited by him in his own account at the respondent bank. The agent Vézina having failed to remit the amount of these cheques to the appellant company, the latter, by its second action, claimed the amounts from the respondent bank.—*Held* that the appellant company, under the circumstances disclosed by the evidence, was not entitled, on the form of action as taken by it, to recover from the respondent bank the amount of the above mentioned cheques. The appellant company might have a claim for damages against the respondent bank, on the ground that, through the latter's negligence, it deprived the appellant of the advantage resulting from the possession of the cheques, but, at this stage of the case, the appellant company is not entitled to obtain from this Court the right to amend its action and convert it into a claim for damages; *per* Rinfret J. especially when the appellant still possesses its right against the city of Chicoutimi for the recovery of the premiums.—*Per* Rinfret J.—The question whether these cheques were properly paid by the respondent bank is a matter between the bank and the city of Chicoutimi. It was not the appellant company's funds that the respondent bank appropriated towards the payment so made: the cheques were the city's cheques and the moneys out of which they were paid were the city's moneys; and the matter resolves itself into one of accounting between the bank and the city.—*Per* Cannon J.—Under the circumstances disclosed by the evidence, the authority vested in Vézina to collect premiums due to the appellant company and grant discharges, included the right to endorse cheques for the purpose of making the collection of his commission and of the moneys to be remitted to the appellant

BANKS AND BANKING—*Concluded*

sixty days after the issue of the policies or when the amount due for workmen's compensation premiums would be finally adjusted.—Appeal from the Court of King's Bench (Q.R. 55 K.B. 538) aff. NORWICH UNION FIRE INSURANCE CO. *v.* LA BANQUE CANADIENNE NATIONALE **596**

CHURCHES

See WILL 7

CIVIL CODE—*Art.* 610 (*Of the qualities requisite to inherit*)..... **512**
See WILL 3.

2——*Arts.* 755, 758, 762, 776, 777 (*Gifts inter vivos*)..... **249**
See PROMISSORY NOTE.

3——*Art.* 868 (*Legacies*)..... **512**
See WILL 3.

4——*Arts.* 893, 900, 901, 904 (*Revocation and lapse of wills and legacies*)..... **512**
See WILL 3.

5——*Arts.* 925, 926 (*Substitutions*)... **512**
See WILL 3.

6——*Art.* 982 (*Obligations*)..... **249**
See PROMISSORY NOTE.

7——*Arts.* 984, 989 (*Contracts*)..... **249**
See PROMISSORY NOTE.

8——*Arts.* 1053, 1054 (*Offences and quasi-offences*)..... **189**
See NEGLIGENCE 2.

9——*Art.* 1065 (*Effect of obligations*). **528**
See SALE 3.

10——*Art.* 1140 (*Payment*)..... **249**
See PROMISSORY NOTE.

11——*Art.* 1233 (7) (*Testimony*)..... **550**
See EVIDENCE 1.

12——*Art.* 1243 (*Admissions*)..... **550**
See EVIDENCE 1.

13——*Art.* 1488 (*Things which may be sold*)..... **121**
See SALE 1.

14——*Art.* 1508 (*Warranty against eviction*)..... **445**
See MUNICIPAL CORPORATION 3.

15——*Art.* 1670 (*Lease and hire of work*) **528**
See SALE 3.

16——*Art.* 2103 (*e*) (*Privilege upon immovables*)..... **121**
See SALE 1.

16——*Art.* 2268 (*Prescription*)...**121, 249**
See SALE 1.
PROMISSORY NOTE

CONSTITUTIONAL LAW — *Marriage —Action for declaration that marriage ceremony null and void—Want of parent's consent—Marriage Act, R.S.O.* 1927, *c.* 181, *ss.* 17, 34—*Validity of legislation—Jurisdiction of Supreme Court of Ontario—The Divorce Act (Ontario)*, 1930 (*Dom.*)—*B.N.A. Act, ss.* 91 (26), 92 (12) (14).] Plaintiff, aged 20, and defendant, aged 17, went through a form of marriage in Ontario on December 2, 1930. To obtain the marriage licence, defendant swore (falsely, as known to both parties) that she was 18 years of age. No parent's consent, as required by s. 17 of the *Marriage Act*, R.S.O. 1927, c. 181, was obtained. Carnal intercourse had previously taken place between the parties. The marriage was not consummated nor did the parties since the ceremony cohabit or live together as man and wife. Plaintiff sued for a declaration that the marriage ceremony was null and void.—*Held*: The action should be dismissed, as the Supreme Court of Ontario had no jurisdiction to grant the decree sued for.—S. 17 (requiring in certain cases parental consent as a condition precedent to a valid marriage) and s. 34 (providing that a form of marriage gone through without the required consent should be void; and giving the Supreme Court of Ontario power to entertain an action and declare the marriage void, but limited with regard to circumstances or conditions, such limitation excluding jurisdiction in the present case) of the *Marriage Act* (as it stood in 1930 and when the judgment at trial was pronounced) were *intra vires* of the Ontario legislature (Crocket J. dissenting as to the jurisdictional enactment in s. 34).—The construction and effect of ss. 17 and 34 discussed.—In the exercise of its jurisdiction in relation to "the solemnization of marriage in the province" (*B.N.A. Act, s.* 92 (12)), a provincial legislature may require parental consent to the marriage of a minor as a condition precedent to a valid marriage.—The Dominion statute, *The Divorce Act (Ontario)*, 1930 (*c.* 14) (the construction and effect of it discussed) did not affect the Ontario legislation in question, nor do the facts in the present case afford any ground for annulment of marriage under the Dominion statute.—The obtaining of the marriage licence by defendant's false affidavit as to age did not afford plaintiff a ground for annulment of the marriage (*Plummer* v. *Plummer*, [1917] P. 163, cited by Lamont J.).—*Per* Duff C.J.: The province's authority as to "solemnization of marriage" is plenary (*Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437, at 442) and extends (*inter alia*) to attaching the consequence of invalidity absolutely or conditionally. It is not necessary to decide whether the requirements of s. 34, controlling its courts in exercising the jurisdiction thereby conferred, had the effect of qualifying any rule of substantive law as to the invalidity of marriages which might be established by ss. 17 (1) and 34. The province has power to prescribe rules governing its courts in exercising the jurisdiction conferred upon them by s. 34 (for giving effect by remedial process to rules of substantive law relating to "solemnization of marriage") because that power (1) *prima facie* affects matters falling within "solemnization of marriage" or "administration of justice" (in *B.N.A. Act*, s. 92 (12) (14)), and (2) could not be brought under any jurisdiction appertaining to the Dominion Parliament under any of the enumerated heads of s. 91 of the *B.N.A. Act*; as regards process designed to give effect to substantive rules of law competently enacted by a province in execution of its exclusive authority under s. 92 (12) (solemnization of marriage), the Dominion could not intervene in any way with a view to sanctioning or controlling any jurisdiction or procedure established for that purpose by a province (and therefore the power must be vested in the province —*Att. Gen. for Ontario* v. *Att. Gen. for Canada*, [1912] A.C. 571, at 581).—*Per* Rinfret, Smith and Cannon JJ.: The provincial legislature had power to provide that the stipulated consent must be had under certain circumstances but should not be necessary under certain other circumstances. But irrespective of the question of the validity of the marriage under (and on construction of) ss. 17 and 34 (2), the plaintiff could not succeed in his action; the Ontario court had no inherent jurisdiction to entertain it—its jurisdiction rested entirely upon the provisions of the Act, and s. 34 (2) excluded jurisdiction under the circumstances of this case.—*Per* Lamont J.: The provincial legislature had full power, under s. 92 (14) (administrative of justice in the province) of the *B.N.A. Act*, to enact s. 34; to give jurisdiction to the

court in some cases and conditions and withhold it in others; and without s. 34 the court had no jurisdiction to declare null and void the going through of a form of marriage.—*Per* Crocket J.: The limitations in s. 34 upon the court's jurisdiction to declare a marriage void for want of consent, in effect prescribed conditions to the jurisdiction depending on matters which did not pertain in any way to "solemnization of marriage," but went beyond that subject and invaded the exclusive legislative authority of the Dominion Parliament in relation to all other matters pertaining to the larger subject of "marriage and divorce" (*B.N.A Act*, s. 91 (26)), and therefore the jurisdictional enactment in s. 34 (which, however, was severable from the substantive enactment therein) was *ultra vires*. But, apart from s. 34 (purporting to give jurisdiction only under conditions which did not exist in the present case) there was no enactment authorizing the court to pronounce the decree asked for; (the jurisdiction conferred by the Dominion Act, 1930, c. 14, did not cover any jurisdiction to grant a decree of annulment for any cause which the provincial legislature has validly declared as a cause of annulment in exercise of its exclusive legislative authority upon the subject of Solemnization of Marriage); nor (with some doubt —reference to *Board* v. *Board* [1919] A.C. 956; also to the reasons in *Vamvakidis* v. *Kirkoff*, 64 Ont. L.R. 585) has the Supreme Court of Ontario inherent jurisdiction to do so.—Judgment of the Court of Appeal, Ont., [1932] O.R. 601, affirmed in the result. KERR *v.* KERR **72**

2——*Waters and Watercourses—Real Property—Title to island claimed by Dominion and by Province—"Public Harbour"—"River Improvement"—B.N.A. Act*, 1867, *s.* 108, *and third schedule.*] *Held* that Goderich Harbour, located at the mouth of the river Maitland, in Ontario, was (applying the test stated in *Atty. Gen. for Canada* v. *Ritchie Contracting & Supply Co.*, [1919] A.C. 999, at 1004, and upon the evidence), at the time of Confederation, a "public harbour" within the meaning of the 3rd schedule to the *B.N.A. Act*. (Duff C.J. refrained from deciding whether, in view of a certain lease, the harbour was, at Confederation, part of the "public works" or "public property" of the province, within s. 108 of the Act; consideration of this question being unnecessary in view of the ground of decision of the appeal).—But *held* that, on the evidence, it was not established that Ship Island (the land in question), was, at the time of Confederation, a part of the harbour, or a "river improvement" within said schedule; and therefore it could not be said that the island became the property of Canada under s. 108 of the Act.—Certain questions discussed, as to what forms part of a "public harbour" (and as to circumstances to be considered), and as to what would come under the designation of "river improvement," and authorities referred to. (*Per* Duff C.J.: The several descriptions in the schedule are not to be narrowly construed or applied—citing *Atty. Gen. of Ontario* v. *Mercer*, 8 App. Cas. 767, at 778. Where there is a "river improvement" in the form of a definite physical structure consisting of a principal part and auxiliary or subsidiary works, the whole would pass and with it a title, at least, to so much of the site and of the subsoil as might be regarded as reasonably necessary to give the Dominion free scope for the complete discharge of the responsibilities it was expected to assume touching such works).—And *held* further, that a certain patent of lease made in 1862, under which the Crown in right of the Dominion of Canada claimed title by reason of a conveyance to it in 1927 of the lessee's rights, did not, on the description in the lease, include Ship Island.—The judgment of the Exchequer Court of Canada (Maclean J.—[1933] Ex. C.R. 44), that the title to the island was vested in the Crown in right of the Province of Ontario, subject to its lease (made in 1929) to respondent Forrest, affirmed. THE KING *v.* ATTORNEY-GENERAL OF ONTARIO AND FORREST..... **133**

3——*Solemnization of Marriage Act, Alta.*, 1925, *c.* 39, *s.* 20, *as amended in* 1931, *c.* 16—*Requirement of parental consent in certain cases as condition precedent to valid marriage—Constitutional validity—"Solemnization of Marriage in the Province* (*N.B.A. Act, s.* 92 (12)).] Sec. 20 of *The Solemnization of Marriage Act*, Alberta, 1925, c. 39, (requiring parental consent to marriage under a certain age), as amended in 1931, c. 16, (making the consent a condition precedent to a valid marriage except in certain circumstances) is *intra vires*. (*Kerr* v. *Kerr*, [1934] Can. S.C.R. 72).—"Solemnization of Marriage" is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The said statute, in its essence, deals with those steps or preliminaries in the province. The requirement, in the statute, of parental consent is one similar in quality to the other requirements therein concerning the banns or the marriage licences. It is one of the forms to be complied with for the marriage ceremony, and it does not relate to capacity. It is a requirement which a provincial legislature may competently prescribe in the exercise of its jurisdiction in relation to "the solemnization of marriage in the province" (*N.B.A. Act*, s. 92 (12)) and to which it

which were both appellants, having cleared from Levis, opposite Quebec, for Gaspé, stopped somewhere below Rimouski to take over from a schooner a cargo of liquor and then turned back to try and land these smuggled goods at some point on the shores of the St. Lawrence, and then, to avoid capture by the Government patrol, the vessel was deliberately stranded and abandoned by its crew on the shores of Beaumont, within the limits of the harbour of Quebec, several hundred miles inland.—There is no conflict between the judgment appealed from and the decision in *Rex v. Langille* (57 Can. Cr. Cas. 151).—Judgment of the Court of King's Bench (Q.R. 56 K.B. 88) aff. CHESNEL *v.* THE KING. DAIGLE *v.* THE KING..... **519**

3——*Wounding with intent to commit murder—Sufficiency of charge to jury—Criminal intent—Self defence—Defence of alibi—Inconsistency with other defences—Legal consequences from story of complainant being different from that of witnesses.*] On the trial for wounding with intent to commit murder, the complainant stated that at about a quarter to 6 o'clock on the evening of November 6, 1932, after turning south on Jackson avenue from Hastings street, in Vancouver, he turned and saw accused following him. He then walked faster but as accused was catching up to him he ran diagonally across the road in a southeasterly direction. When he reached the curb on the east side of the road the accused caught up to him and fired a shot at him with a revolver. Accused then took $90 from his pocket and after firing two more shots at him ran across a vacant lot in a northeasterly direction, and on emerging on Hastings street he was recognized by two witnesses with a revolver in his hand. Two other Crown witnesses, Irwin and Brodner, were standing on the southwest corner of Hastings street and Jackson avenue, when they saw two Chinamen run from the northwest corner of Pender street and Jackson avenue (Pender street being one street south and parallel with Hastings street) across Jackson avenue in a northeasterly direction, followed by a third Chinaman who was calling to them in Chinese and gesticulating with his arms, and when the two men reached the curb on the east side of Jackson avenue the rearmost of the two men turned and fired a shot at the man following, who fell. He then "paused," stooped down and fired two more shots at him and he and his companion then ran northeasterly across the vacant lot. The accused attempted to prove an *alibi* by several Chinese witnesses who swore he was in Victoria from the 2nd until the 12th of November, 1932. The accused was convicted. On appeal the conviction of

McDonald J. was affirmed by an equal division of the Court. Counsel for the accused contended before this Court that the trial judge should have instructed the jury that the accused was entitled to have them consider any alternative defence the supporting facts of which appear in the record, and that, as the record shewed that the complainant was chasing the accused, waving his arms and shouting in Oriental, such conduct was sufficient, if the jury believed the evidence, to bring into play the sections of the Criminal Code relating to provocation and self defence. He contended that the failure of the trial judge to adequately instruct the jury on the issue of self defence, was a misdirection which entitled the accused to a new trial. Counsel for the accused also contended that the trial judge failed to properly instruct the jury on the question of intent, and erred in his charge in not explicitly and fully instructing the jury as to the legal consequences flowing from the two contradictory stories, in respect to the conduct of the parties prior to the shooting, as related by the complainant on one side, and Irwin and Bodner on the other.—*Held* that, under the circumstances of this case, there was no duty on the trial judge to instruct the jury on the issues of provocation or self defence. If it were material to the accused to prove that the words shouted in Oriental by the complainant amounted to provocation the onus was upon him to prove what the words were. In any event provocation, which would reduce murder to manslaughter, is not a defence to the charge as laid. Shooting in self defence would constitute a valid defence provided the accused brings himself within sections 53 and 54 of the Code. It is justifiable to repel an unprovoked attack if the force used by the accused is not meant to cause death or grievous bodily harm and is not more than is necessary for the purpose of self defence. It is justified, even if it does cause death or grievous bodily harm, if it is done under reasonable apprehension of death or grievous bodily harm to himself, and if he believes, on reasonable grounds, that it is necessary for his own preservation. There is no evidence in the record from which a jury could reasonably infer that the accused when he shot the complainant did so under a reasonable apprehension of death or bodily harm to himself, or that he reasonably believed that he could not otherwise save himself from bodily injury. Such evidence is not in the record. The rule, therefore, that an accused person at trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record. Even then the rule is not without

EVIDENCE—*Continued*

appellant also testified that, having been unable to find a buyer for those shares, at the price agreed upon of $250,000, he had been obliged to keep them and had effectively paid to the estate that amount. The evidence also shows that the appellant had in his custody or under his control certificates endorsed in blank by Mr. Quinlan, on the 21st of May, 1927, when the appellant visited the latter, for the greater part if not for all of these shares, and that he, before the death of Mr. Quinlan, had the shares transferred on the registers of the companies respectively in his own name as owner. On that same day, Mr. Quinlan dictated to his son a memo. specifying all the certificates of shares he owned in those companies with the following note: "Dep. in A. W. Robertson's box," with the date of the. endorsements, to wit: 21st of May, 1927. The respondents are two of the children of the late Hugh Quinlan; and the material conclusions of their action are that the Capital Trust Corporation, Limited, and the appellant, be dismissed as trustees and executors of the estate (*destitués de leurs fonctions*) for misfeasance in office and be ordered to render account of their administration of the estate; that the sale and transfer of the shares mentioned in the said letter of the 20th of June, 1927, be annulled and that the appellant be ordered to return them to the estate of the late Hugh Quinlan or to pay to it their value, which the respondents estimate at $1,350,000. At the hearing of the trial, the appellant proved, by his own testimony and by that of the witnesss there present that he had communicated the letter of June the 20th, 1927, to the late Hugh Quinlan, at the latter's house, by reading it aloud; but when he proceeded to prove that the late Hugh Quinlan had acquiesced to the contents of the letter and accepted the agreement therein contained, the trial judge refused to allow this evidence and held that the acquiescence and consent of the late Hugh Quinlan could not be proved by parol evidence. The trial judge dismissed the two first claims of the respondent as to the dismissal of the executors and as to the order to render account; he annulled the transfer of the shares by the late Hugh Quinlan to the appellant and he condemned the appellant to retrocede to the estate these various shares, with the profits made and the dividends paid since the death of the late Hugh Quinlan, or to pay their value as determined by him to be $408,728, but, in either case, the respondents were obliged to reimburse the appellant the sum of $270,000 paid by him, $20,000 being an amount mentioned in another transaction. And this judgment, with certain modifications, was affirmed by the appellate court.—*Held*

EVIDENCE—*Concluded*

(reversing the judgment appealed from) that, upon the evidence and upon consideration of many other facts stated in the judgment, the transfer of the shares to the appellant bearing the signature of the late Hugh Quinlan, their possession by the appellant, the memo. dictated by Mr. Quinlan to his son and the understanding between the partners in case of death of one of them, were all facts constituting a commencement of proof by writing, and, consequently, parol evidence should have been admitted by the trial judge to prove that the late Hugh Quinland had acquiesced to the contents of the letter of the 20th of June, 1927. All these facts do not establish the assent of the late Hugh Quinlan to accept the sum of $250,000 for his shares; but they are facts which render probable the fact which the appellant wanted to prove. It is not necessary that facts or writings establish one of the elements of the fact to be proved; it is sufficient that they may constitute a starting point of a reasoning by the trial judge. The probability of an alleged fact is the criterion of the commencement of proof in writing. ROBERTSON *v.* QUINLAN..... **550**

2——*Negligence—Motor vehicles—New trial*..... **128**
See NEGLIGENCE 1.

3——*Application to adduce new evidence before Supreme Court of Canada*..... **214**
See APPEAL 1.

4——*Contract—Course of dealing*.... **388**
See CONTRACT 1.

5——*Onus of proof*.....**431, 717, 725**
See SALE 2.
MOTOR VEHICLES 1.
WILL 8.

EXEMPTION
See ASSESSMENT AND TAXATION 3
MUNICIPAL CORPORATION 3

EXPROPRIATION..... **414**
See MUNICIPAL CORPORATION 2.

FARM MACHINERY..... **431**
See SALE 2.

FRAUD..... **725**
See WILL 8.

GUARANTEE—*Action against guarantor of account—Alleged extension of time by creditor to debtor—Alleged misdirection in charge to jury—Alleged insufficiency in direction, and in submission of questions, to jury—Failure to object at trial, as precluding objecting on appeal.*] Appellants sued respondent as guarantor of an account of R. At trial, after answers by the jury to certain questions submitted, judgment was given dismissing the action

be accounted and reckoned as and from the first day of January (1931) of that certain lease" * * * and specifically the right "of renewing the said lease for a further period of five years on giving to the lessor notice in writing prior to the first day of November, nineteen hundred and thirty-one." On March 12, 1931, Ostro wrote to the appellant company, giving it notice that he intended "to exercise the option mentioned in the lease and to remain in possession * * * of the premises * * * for a further period of five years from the 1st of May, 1932." On April 13, 1931, Ostro, by notarial deed, which he caused to be signified upon the respondents, declared and notified them that he exercised the right of renewal. On April 18, 1931, the appellant company evidently unaware that Ostro had already done it wrote to him acknowledging receipt of his letter of the 12th of March, 1931, and advising him of the necessity of giving himself notice to the respondents as to the exercise of the right of renewal. On the 30th of October, 1931, the appellant company, being aware of some financial embarrassment of Ostro, had a notarial document served on the respondents to the effect that the appellant "disavowed the action of Ostro in renewing the lease for a further period of five years." The respondents on November 6, 1931, advised the appellant that they held it responsible for the fulfilment of its obligations under the lease for the renewal period of five years. On August 5, 1932, the Selby estate brought action, both by principal and incidental demands, against the Delco company, claiming rental for the premises for the months of May, June, July and August, 1932, altogether a sum of $5,333.32, which was contested by the Delco company, but the Superior Court and the Court of King's Bench unanimously maintained the action.—*Held*, affirming the judgment of the Court of King's Bench (Q.R. 56 K.B. 263), that, under the circumstances of this case contained in the headnote and more fully stated in the judgment now reported, the respondents' action should be maintained. Among the rights, derived from the contract which the Delco company was expressly authorized to transfer, was comprised the right of renewal. To the right of renewal was attached the condition that it shall be "subject otherwise to all the other terms and conditions of the present lease." And among the other terms and conditions to which the right of renewal was so made subject, there was the condition that, if the right of transfer is exercised by the Delco company, it shall be "subject, however, to (the company) continuing at all times responsible

for the due fulfilment of all its obligations under the present lease" (or contract); one of the obligations being, of course, the payment of the rent. From the moment that the Delco company assigned to Ostro its right of renewal, the assignment necessarily carried with it, on the part of the company, the liability for the rent during the last period of five years, if the renewal was duly effected by Ostro. Now, the notice of renewal given by Ostro to the respondents, which did not require to be accepted by them, was sufficient to bind them and to effect a renewal of the lease *ipso facto*.—Under the terms of the original contract, in order to renew the lease, the Delco company had to give the Selby estate a notice in writing not later than the 1st of November, 1931. The right of renewal was expressly transferred to Ostro. The transfer carried with it the right by Ostro to request the Delco company itself to give the notice in writing if that were required to insure the renewal. Ostro, in due time, notified the Delco company of his intention to exercise the option. The legal result was that, by force of the terms of the transfer, the Delco company was bound to carry out its obligation to have the lease extended and to give the notice itself if it were necessary.—The question whether the transfer of the lease and the rights thereunder is the transfer of "droit de créance" requiring service upon the Selby estate before Ostro could acquire possession available against the estate, is a question solely for the Selby estate itself. It might have been raised by that estate, but it was not open to the Delco company, who was bound to make good the transfer to Ostro (Arts. 1570 C.C. & seq.) DELCO APPLIANCE CORPORATION *v.* SELBY..... **684**

2——*Landlord and Tenant Act, R. S. Sask. 1930, c. 199, ss. 42 to 48.*

See BANKRUPTCY 1.

LEASE

See LANDLORD AND TENANT.

MARRIAGE ACT OF ALBERTA. 635

See CONSTITUTIONAL LAW 3.

MARRIAGE ACT OF ONTARIO— *Sections 17, 34—Validity*..... **72**

See CONSTITUTIONAL LAW 1.

MECHANICS' LIENS — *Mortgages — Priority as between lien and mortgage— Priority as between lien and mortgagee's expenditure in completing building—Lien chargeable as general lien against several buildings—Mechanics' Lien Act, R.S.O., 1927, c. 173, ss. 5, 32 (2), 7 (3), 13 (1).*— Respondent, who had a contract "to do the brickwork and supply the bricks for five" adjoining detached duplex houses at

(45) as to justify the conclusion that the authority to assent to such an agreement must proceed from a by-law enacted under that clause; to hold that a simple "expropriating by-law," where there is no express or implied authority by by-law to settle the compensation, creates such authority by force of the statute, would postulate an intention out of harmony with that manifested by the enactments of s. 351; and (2) the power to settle compensation by agreement is one of those powers contemplated by s. 258 (1); the power to create a binding contractual obligation fixing the amount of compensation to be paid in circumstances such as in the present case, is clearly *ejusdem generis* with the power to acquire by purchase; a power which (ss. 396 (45), 5, 258 (1), of the Act; *Mackay* v. *City of Toronto, supra*) can only be executed by by-law.—Judgment of the Court of Appeal for Ontario, [1933] O.R. 442, reversed. THE CORPORATION OF THE CITY OF TORONTO *v.* PRINCE..... 414

3——*Taxes — Exemption — By-law imposing taxes passed within period of exemption—Collection roll adopted after its expiry—Cities and Towns Act, R.S.Q.* 1925, *c.* 102, *ss.* 484, 518, 520, 521, 534, 538, 540, 542, 546, 548, 572, 589—*Art.* 1508 *C.C.*] The city respondent claimed from the respondent company municipal taxes due for the year 1927, payment of which was disputed on ground of exemption. On the 2nd of March, 1903, a resolution was adopted by a municipality later on annexed to the city respondent declaring the lands of the appellant company and all their existing and future buildings and machinery exempt from ordinary annual municipal and business taxes "during the twenty-five years which commenced to run on the first of September last, 1902," accordingly until the first of September, 1927. On the 11th August, 1927, the city respondent adopted a by-law which is captioned "By-law imposing a tax on the immoveable property of the City for the year 1927". After reciting the amount required for the purposes of the municipality for the "current year", the total valuation of all taxable immoveable property of the city subject to the general property tax, the amount of exemptions, and the balance required after taking into account the revenues derived from other sources, the by-law imposed a general property tax of 1 36-100 of 1% on all the taxable immoveables of the city of Lachine (une taxe est par le présent imposée et sera prélevée * * *) according to their real value as set forth on the valuation roll in force," "in order to provide for the general administration expenses of the city for the current year, and for the amortization of its funded debt". The by-law likewise provided that as soon as possible after the coming into force thereof the secretary-treasurer of the city shall prepare the collection roll of the general and special taxes imposed by the city and shall give public notice of its preparation and deposit as required by law. This by-law was published on the 12th day of August, 1927, and came into force on the 27th of the same month, at a time when the twenty-five year period of exemption, from September 1, 1902, had not yet expired. The collection roll under the said by-law however was not prepared and published until the 10th day of September, 1927, and the taxes became exigible on the 30th of September, 1927, after the expiry of the period of exemption. The city respondent urged that it was the collection roll which created the tax, while the appellant company alleged that it was the by-law imposing it.—*Held*, reversing the judgment of the Court of King's Bench (Q.R. 54 K.B. 414), that the appellant company was entitled to claim exemption from taxes so imposed. A municipal tax is formally created at the date the by-law imposing it is adopted and not at the time of the entry into force of the collection roll. The by-law of the 11th of August, 1927, imposing taxes for that year did not affect the property of the appellant company, as it had been adopted before the expiry of the exemption. Consequently the collection roll could not validly impose taxes which were unauthorized by the by-law; and the act of the secretary-treasurer in including in the collection roll the property of the appellant company as subject to taxation was therefore illegal and *ultra vires*. CANADIAN ALLIS-CHALMERS LTD. *v.* CITY OF LACHINE..... 445

4——*Notice of action—Negligence — Accident—Claim for damages—Notice given after the delay prescribed by statute—Exception clause providing valid excuse—Irresistible force (force majeure) or analogous reasons—Knowledge of the accident by officers or employees of the municipality—Section* 535 *of the Charter of the City Of Quebec,* 19 *Geo. V, c.* 95.] The respondent's action for bodily injuries, sustained by him on the 28th of August 1931, while giving a hand to the appellant city's employees, on their invitation, was maintained by the trial judge, which judgment was affirmed by the appellate court. Counsel for the appellant before this Court, in view of these unanimous judgments on question of facts, admitted the appellant city's liability; and the controversy was limited to the validity of the notice of action which the respondent

MUNICIPAL CORPORATIONS— *Continued*

was bound to give to the city prior to the institution of his action. The need of such notice is prescribed by article 535 of the Charter of the City of Quebec, the important part of it being as follows: "Notwithstanding any law to the contrary, no right of action shall exist against the city for damages resulting from bodily injury, caused by an accident * * * unless, within thirty days from the date of such accident or damages * * * a written notice has been received by the city, containing the particulars of the damages sustained. * * * The default of such notice, however, shall not deprive the victims of an accident of their right of action, if they prove that they were prevented from giving such notice by irresistible force (force majeure), or for any other similar (analogous) reasons deemed valid by the judge of the Court." The appellant city received a written notice of action, contained in a letter from the respondent's solicitors, dated 9th of January, 1932, four months and ten days after the date of the accident; but the respondent alleged that he had been prevented from giving the notice by irresistible force or by circumstances over which he had no control amounting to irresistible force, or an analogous cause. The principal facts, more fully stated in the judgment, are as follows: Immediately after the accident, the respondent was conveyed to a hospital, where he remained until the 6th of September, 1931; he was unconscious, delirious and apparently suffering from mental trouble, so that he was removed to a clinic hospital for mental diseases where he remained, until the 30th of September; he left the hospital notwithstanding the adverse opinion of the attending physicians; but he returned to the hospital on two different occasions, from the 15th to the 20th of November and from the 14th to the 21st of December; during the intervals, he was under the care of physicians; one doctor testified that, before the beginning of the year 1932, the respondent was not able to attend properly to his business; the respondent himself declared that he had not a complete knowledge of what he was doing during these periods.—*Held*, affirming the judgment of the Court of King's Bench (Q.R. 55 K.B. 255), that, under the circumstances of this case, the respondent had not been able to give notice of action to the appellant sooner than he did and that his case was falling within the exception clause provided by art. 535 of the appellant's charter. The condition of the respondent's mental powers constituted, if not a case of irresistible force (force majeure) in the strict sense of the word, at least precisely

MUNICIPAL COPPORATIONS— *Concluded*

one of the analogous causes (raisons analogues) which the legislature intended to foresee and which entitled the trial judge to hold that it was a valid excuse for not having given notice of action within the delay provided by Art. 535.—*Held* also that the knowledge, by some officers or employees of a municipal corporation, of the circumstances of an accident or of a claim made by the injured party, does not exempt the latter from giving notice of action in the manner and within the delays prescribed by the civil code or by statute (*Jobin* v. *City of Thetford Mines*, [1925] S.C.R. 686 cited); though such knowledge may have some weight in deciding whether the details or particulars contained in a notice given within the delays are sufficient. LA CITÉ DE QUÉBEC *v.* BARIBEAU..... **622**

5——*Taxes—Exemption*..... **280**

See ASSESSMENT AND TAXATION 3.

NEGLIGENCE — *Motor vehicles — Evidence—Misdirection in charge to jury—Objection not taken at trial, to the charge—Miscarriage of justice—New trial.*] M., while driving appellant's motor car on a city street at night (3.30 a.m.) in a heavy rainstorm and very poor visibility, ran into a steel post which was four inches inside the curb off the travelled highway. The impact rendered M. unconscious and injured W., an occupant, and damaged the car. M. testified that he was driving that night at 15 to 18 miles per hour. W. sued appellant and M. for damages. The trial judge, in charging the jury, said: "There is no suggestion, apparently, that he was going too fast, that is, that he was exceeding any speed limit; and there is no evidence as to just how fast he was going when he went down Bathurst St. So that I think, on the whole, you may take it safely for granted that there is no evidence that he was going too fast, either in exceeding the definite speed limit, or under the circumstances." The jury found that the accident was not caused by negligence of M., and the action was dismissed. The Court of Appeal ordered a new trial. Appellant appealed. —*Held*: The above facts in evidence constituted evidence that should have been considered by the jury as to whether or not M. was driving too fast under the circumstances (*Tart* v. *Chitty*, 102 L.J. K.B. 568; *Baker* v. *Longhurst*, 102 L.J. K.B. 573), and should have been directed to their attention; and the above quoted part of the charge amounted to a withdrawal of those facts from their consideration, and was a misdirection, involving a mistrial and a miscarriage of justice in the sense that the plaintiff's case was not properly submitted to the jury;

PATENT — *Validity — Infringement — Subject matter—Combination—Anticipation—Claims of Specification (sufficiency of)—Patent Act, R.S.C.*, 1927, *c.* 150, *s.* 14]. The judgment of Maclean J., President of the Exchequer Court of Canada, [1933] Ex. C.R. 13, holding that the plaintiffs' patent for a certain "improvement in acoustic devices" (of the type commonly known as loud speakers) was valid and had been infringed by defendant, was affirmed; the court holding against the defendant's contentions that there was lack of subject matter, that there was anticipation, no infringement, and (a ground not urged in the Exchequer Court) that the two claims of the specification which plaintiffs relied on were insufficient and failed to meet the requirements of s. 14 (*c*) of the *Patent Act* (R.S.C. 1927, c. 150) because they did not distinguish between what was already old and what the applicant for patent "regarded as new" in the invention claimed.—To decide an objection grounded upon anticipation, one must look at the description in the specification, so as to ascertain what the invention really is. The claims may add light to it, but they are not meant for that purpose, and their object is mainly to define the extent of the monopoly to which protection is granted. The description in the present patent clearly showed that the invention consisted in a certain combination, not a mere aggregation or a juxtaposition of known contrivances, but a group of co-acting parts achieving a combined result, which satisfies the definition of a combination for the purposes of the patent law. In such case, it matters not whether some or all of the elements were old and already known in the art as separate entities; the only point (on the question of anticipation) is whether the actual combination was new.—The claims relied on by plaintiffs (and attacked as aforesaid) must be read with reference to the entire specification; and it was sufficient if it appeared from the claims so read what the applicant regarded as his invention; and, so read, the claims left no doubt of the exact nature of the invention claimed as new; and there existed no difficulty in ascertaining and defining what were the exact parts of the new combination and what the monopoly covered. Where the combination itself is the only thing regarded and described as the invention, the fact that the claiming clause does not distinguish old from new is not a ground for objection (*British United Shoe Machinery Co. Ltd.* v. *A. Fussell & Sons, Ltd.*, 25 R.P.C. 631, and other cases cited; *Patent Act*, s. 14, considered). It is only if the applicant desires to claim invention for a subordinate element *per se* that it is necessary for him to claim the element separately. BALDWIN INTERNATIONAL RADIO CO. OF CANADA *v.* WESTERN ELECTRIC CO..... **94**

2——*Validity—Sufficiency of advance upon prior art and of inventive ingenuity—Infringement.*] The judgment of Maclean J., President of the Exchequer Court of Canada, [1933] Ex. C.R. 141, holding that plaintiff's patent (relating to improvements in coffin handles) was valid and had been infringed by defendant, was affirmed.—It was *held* that the construction invented, whereby a certain method of locking was made possible, was novel and ingenious; that the advance upon the prior art, and the inventive ingenuity in the discovery, were sufficient to make it good subject matter of a patent.—As to infringement, it was *held* (distinguishing *P. & M. Company* v. *Canada Machinery Corporation Ltd.*, [1926] Can. S.C.R. 105, and *Gillette Safety Razor Co. of Canada Ltd.* v. *Pal Blade Corporation Ltd.*, [1933] Can. S.C.R. 142) that, even assuming that the pivoting means used by defendant were not precisely and exactly covered by the claims of the patent, the article placed on the market by defendant embodied the principle itself of the invention in question; defendant had taken that which constituted the patentable article in the inventor's disclosure; at best, defendant had borrowed the essence of the patented structure with a small variation in its unimportant features or its non-essential elements. ELECTROLIER MANUFACTURING CO. LTD. *v.* DOMINION MANUFACTURERS LTD..... **436**

3 —— *Infringement — Specification — What it should disclose—Construction of—Within province of court, and not of jury or experts—Also question of law—Matters on which experts may give evidence—Devices for amplifying electric signal waves—Audions.*] In an action for infringement of a patent, not only is the construction of the specification exclusively within the province of the Court, and not within that of the jury or expert witnesses, but it is also for the Court a question of law.

TRUST AND TRUSTEES—*Liability for interest on uninvested balances in trustee's hands—Passing accounts—Res judicata—Surrogate Courts Act, R.S.O.*, 1927, *c.* 94, *s.* 65.(1) (3).] The judgment of the Court of Appeal for Ontario, [1932] O.R. 641, holding that the defendant was liable to pay interest on certain uninvested balances of trust funds held by him for the late Lady H., and directing a reference to take an account of the sum properly chargeable for interest, was affirmed. It was held that the plaintiff's claim for interest had not become *res judicata* by the judgment of the Judicial Committee of the Privy Council in *Campbell* v. *Hogg*, [1930] 3 D.L.R. 673 (on an appeal in former proceedings which began by petition filed by the present defendant in the proper Surrogate Court in Ontario for the passing of his accounts), as that judgment (as interpreted in the present judgment) did not dispose of the matter of interest now in question except to hold that in the proceedings then before the court there was no jurisdiction to charge interest on uninvested balances in the hands of such a trustee as was the defendant. (In this connection, s. 65 (1), (3), of the *Surrogate Courts Act*, R.S.O., 1927, c. 94, considered). HOGG *v.* THE TORONTO GENERAL TRUSTS CORPORATION..... 1

WILL — *Construction — Vesting.*] By clause 5 of her will the testatrix directed that a fund invested in a certain way for her by W. should continue to be so invested by W. during the lifetime of the testatrix' son and the income therefrom be paid to the son during his lifetime, and, in the event of W.'s death during the son's lifetime, the fund be invested by the testatrix' executors and the income therefrom paid to the son during his lifetime; and "on the death of my said son", that the fund "is to be divided as follows": one half to her grand-daughter, E. (daughter of the son), and the remainder "to be divided equally between" three named daughters of the testatrix. By clause 6 the residue of the estate was given equally amongst E. and the said three daughters. Clause 7 read: "In the event of [E.] or any of my said daughters predeceasing me or predeceasing my said son, leaving issue, I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived." All said beneficiaries survived the testatrix.—*Held*: The legacies directed under clause 5 to be paid to E. and said three daughters upon the death of the son, did not become vested upon the testatrix' death. The fair and literal meaning of the words used in clause 5 in giving the capital of the fund is that the testatrix gives when she divides—that the operation of the gift is postponed until the period of distribution; and this meaning found support in the form and nature of the prior directions in clause 5, in contrasting the wording of the gift in question with that of other gifts in the will where immediate vesting was indicated, and in the wording of clause 7 ("would have been entitled had she survived" indicating that the "mother"—i.e., any one of E. and said three daughters—should take no title to the interest conferred in clause 5 unless she survived both the testatrix and her son).—The fundamental principle to guide in interpreting wills is that effect must be given to the testator's intention ascertainable from the expressed language of the will. So far as possible the will itself must speak. If, after careful consideration of the language used, in the particular passage in question and consistently with the context of the document, the intention remains doubtful, then resort may be had to certain rules which have been generally adopted, upon the strength of which courts are enabled to draw a certain conclusion as "more nearly corresponding" with the testator's intention. (*Busch* v. *Eastern Trust Co.*, [1928] Can. S.C.R. 479, explained. That case should not be "cited as deciding more than was actually determined"; there was no intention of laying down a rule of general application, far less of "effecting a radical change in the law and creating some new principle governing the question of vesting."). IN RE BROWN **324**

WILL—*Continued*

2—— *Construction — Vesting — Time of payment.*] A testator's will, after some specific bequests, gave the residue of his estate to his executors in trust for purposes defined in the will. Then, after certain directions and gifts of annuities, the will provided, par. 14, that "on the death of my said wife or when my youngest son shall or would have attained the age of 25 years whichever event shall first happen" the trustees should divide the net residue into two equal parts, and one part (subject to a charge) "shall be equally divided between my said two sons" (with provisions for gifts over in events which did not happen); then, par. 15, that the "other half" of the said residuary estate (subject to charges) "upon the death of my said wife * * * shall subject as hereinafter be distributed in equal shares amongst" certain named beneficiaries, including B., with provisions that should any of them "predecease my said wife or die before the period of distribution with reference to this half of my residuary estate leaving a child or children surviving, such child or children living at the date of such distribution * * * shall take the share which the parent * * * would have received if living at the time of such distribution" and that the share of any of said named beneficiaries "who shall die before the period of distribution aforesaid without leaving any child or children who shall be living at the date of distribution shall belong to my said two sons in equal shares"; and that, in the event (which did not happen) of the wife dying before the youngest son "shall or would have attained the age of 25 years", then the period of distribution with regard to this half of the residuary estate should be delayed until the latter event.—The testator died in 1909, leaving his widow and two sons. The widow is still living. The younger son attained the age of 25 years in 1912, and conformably to (and subject to) par. 14 of the will, the trustee then divided the net residue of the estate into two equal parts and divided one part between the two sons. The older son died in 1915 and the younger son in

1930. In 1922, B., one of the said named beneficiaries in par. 15 of the will, died without issue. The present question was concerned with her share.—*Held*: Upon the words in par. 15 (a construction supported by comparison of language in other parts of the will) both sons took, on the testator's death, a vested interest, in equal shares in the "other half" (of the residuary estate) disposed of in par. 15 (subject to charges there mentioned), subject to partial defeasance in favour of any of the said named beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution; and therefore the sons' estates took the benefit of the aliquot part of the residuary estate which B. would have received under par. 15 had she lived until the time therein fixed for distribution; but that aliquot part was not payable until the testator's wife's death. *Busch* v. *Eastern Trust Co.*, [1928] Can. S.C.R. 479, distinguished. IN RE HAMMOND..... **403**

3——*Whole estate left by mother to children as universal legatees—Clause providing for the case of decease of legatee without children—Whether fiduciary or vulgar substitution created.—Arts.* 610, 868, 893, 900, 901, 904, 925, 926, *C.C.*] The mother of both appellant and respondent died on the 7th of December, 1912, leaving a will made in notarial form on the 13th of September, 1905, by which she left all her property, subject to certain conditions, to her six children therein named, as universal legatees, namely: Emma Bourgeau, Louisa Bourgeau, Rose de Lima Bourgeau, Léa Bourgeau, Joseph Bourgeau and Wilfrid Bourgeau. Emma (who was a sick person and could not have children) died unmarried, in 1930. Louisa died without children, in 1925, leaving all her property to her two sisters, Rose de Lima and Léa, with substitution as to the share of Léa in favour of Rose de Lima. Joseph also died in 1925, but his estate is not involved in the present case. Léa died unmarried in 1930, leaving all her property to Rose de Lima. The only children of the testatrix living at the time of the institution of this action were the appellant and the respondent. The latter claimed that, under the will, she was entitled to the whole of the interests of both Louisa and Léa in the estate of her mother, including what both had received from Emma's share. The appellant, on the other hand, claimed that the will created a compendious substitution, i.e., both vulgar and fiduciary (Arts. 925-926 C.C.) in favour of the surviving children of the testatrix when one of these children died after the testatrix, without leaving any children, and that accordingly he was entitled to share equally with the respondent in the shares of Louisa and Léa. The

material clauses of the will are quoted in the judgment; but the clause, which is to be interpreted and upon which the appellant mainly relied, was in the following words: "dans le cas de décès sans enfants, la part du décédé accroitra à mes autres légataires universels survivants" (in case of decease without children the share of the deceased will be added to the shares of my other universal legatees surviving). The respondent's claim was maintained by the trial judge, whose judgment was unanimously affirmed by the appellate court.—*Held*: That the respondent, was alone entitled to the whole of the interests of her sisters Louisa and Léa in the estate of her mother, including what both had received from Emma's share, thus affirming the decisions of the trial and the appellate courts, and that the above quoted clause did not create a fiduciary substitution as claimed by the appellant. BOURGEAU *v.* BOURGEAU..... **512**

4——*Trust—Accounts—Testator's widow appointed executrix and given "the right to use such part of the income and principal of my estate as may reasonably be necessary for her support and maintenance"—Action by residuary legatee for accounting as to widow's use of estate—Extent of widow's right to encroach upon corpus—Reference to Master to take an account—Widow's dealing with the property—Method of fixing income of estate and of fixing allowance for support and maintenance—Authority of Master—Whether right on appeal to object to method adopted by Master in view of conduct at hearing—Right of appeal to Supreme Court of Canada from dismissal by Court of Appeal from judgment dismissing appeal from Master's report.*] By his will W. appointed his widow to be executrix and left her "the right to use such part of the income and principal of my estate as may reasonably be necessary for her support and maintenance." W. died in 1919 and his widow died in 1931. W.'s residuary legatee sued the widow's executrix for an accounting of W.'s estate. The trial judge held that it was for the court to determine what was reasonably necessary for the widow's support and maintenance and her right to encroach upon the corpus of the estatew as limited in amount to what the court deemed reasonably necessary; and he made a reference to the Master to take an account and to ascertain what amount of W.'s estate remained or ought to be in the hands of the widow's executrix. Accounts were filed before the Master but vouchers were lacking; also the Master was of opinion that the widow had brought herself within the law as to liability and onus for mixing trust property with one's own (*Lupton* v. *White*, 15 Ves. 432); and he did not go through the accounts, though he

referred to them on occasions during the hearing. He held that a certain passing of accounts by the widow on February 16, 1922, was binding upon the parties, found the amount in her hands when she came to Toronto in September, 1922, and, in view of the investments at the latter date, fixed 6% as a fair rate at which to fix her income from the property, and, on evidence, fixed amounts per year (with certain items added) to be allowed her for reasonable support and maintenance, and made his report on that basis. The widow's executrix appealed from his report to a Judge, and then to the Court of Appeal for Ontario, the appeals being dismissed, and she then appealed to this Court.—*Held* that, while it is not for the Master, as a rule, without further direction, to apply the principle as to liability and onus for mixing trust property with one's own (*Lupton* v. *White*, *supra*, at 436), appellant must, on the record of the hearing, be taken, to the extent stated *infra*, to have agreed on the method of procedure adopted by the Master, and, to such extent, could not now object thereto (*In re Pratt*, 12 Q.B.D. 334, at 341); but this agreement applied only to the period after the widow came to Toronto in September, 1922, and only to the method in calculating a reasonable allowance for support and maintenance; the receipts, therefore, should be taken from the accounts (not by fixing a percentage as aforesaid); and the widow should have received credit for all sums shown by the accounts to have been expended for her reasonable support and maintenance from February 16, 1922, aforesaid, until she arrived in Toronto in September 1922; from that time appellant was bound by the method adopted by the Master of ascertaining reasonable annual amounts for support and maintenance regardless of the accounts.—*Held*, further, that it was proper for the widow to purchase and maintain a property in Toronto as a home, and it was not necessary for her to live alone in it or to live in an apartment; but this real property (purchased in the widow's name), and certain furniture, were purchased with funds of W.'s estate and were assets of that estate passing to W.'s residuary legatee.—*Held*, further, that there was jurisdiction to entertain this appeal. *Hendrickson* v. *Kallio*, [1932] O.R. 675; *Supreme Court Act* (R.S.C. 1927, c. 36; s. 2 (*b*) defining "final judgment"); and Ontario Cons. Rule 506, referred to.—In the result, the appeal was allowed and the matter referred back to the Master to take the accounts in accordance with the judgment of this Court. BAKER *v.* DUMARESQ. **665**

5——*Construction—Description of devised property—Falsa demonstratio.*] A testator's real estate consisted of a farm at Cape John upon which he and his family resided and a wood lot about 50 miles therefrom. He had a wife and four children. By his will he gave his wife the third part of his real estate and personal property for her life; then, by clause 2 (the construction of which was in question, he gave to his younger son, W., "all my real estate consisting of the farm on which I now reside, situated at Cape John and also all my personal property subject to his mother's claim and also to" arrangements for building a house and for carrying on the work of the farm for the maintenance of the family until W. reached 21 years of age, but "in the event of his dying before he comes to that age, then all my real estate and personal property shall go to my oldest son L., he at the same time assuming all the responsibilities and liabilities involved in these arrangements." By the subsequent clauses the testator gave to his son L. and to his daughter M. each a sum to be paid by W. "after he comes into possession of the property" and to the testator's daughter N. a sum to be paid by W. after N. reached the age of 21.—*Held*: The words in clause 2 giving to W. "all my real estate consisting of the farm on which I now reside, situated at Cape John" should, in view of their context and the other provisions of the will, be construed as a gift of all the testator's real estate, including the wood lot as well as the farm; the words "consisting of the farm," etc., being rejected as a mere *falsa demonstratio*.—*Slingsby* v. *Grainger*, 7 H.L. Cas. 273, discussed and distinguished.—Judgment of the Supreme Court of Nova Scotia *en banc*, 7 M.P.R. 255, affirmed. J. LEWIS SONS LTD. *v.* DAWSON..... **676**

6——*Administration and distribution of estate—Postponement of conversion into money of testator's shares of stock in company—Shares apparently unsaleable and no dividends received—Ultimate realization on shares on liquidation of company—Rights as between tenants for life and remaindermen as to moneys realized—Manner of distribution among shareholders of moneys received by company for its assets—Directions of will.*] K. died in 1912. In his will, after certain bequests, he devised and bequeathed the remainder of his property to his trustee to carry out the trusts of the will, which included conversion into money "in such manner and at such times as he may deem proper," direction to invest and power to change investments, direction for payments to K.'s widow out of income for maintenance, direction for division, after the widow's death (which occurred in 1916), of the balance of the net income of the estate among his children, and, by par. 14, direction that

if it were comprehended in the contract of service itself.—The Act should not be narrowly construed against workmen, but should be given a large and liberal construction in their interest (*Gibbs* v. *Great Western Ry. Co.*, 12 Q.B.D. 208, at 211, cited).—In the present case, the vital question was, not whether the descending into the mine shaft was a duty which the appellants' husbands' contracts of service as coal miners imposed upon them, but whether, in going to and participating in the work of rescue which the mine manager had undertaken at the shaft, they were doing something which they were, expressly or impliedly, authorized to do. This question demanded consideration of the entire evidence regarding the employing company's responsibility for the condition of the idle shaft and the presence in it of noxious gas as well as its responsibility for the protection of that shaft as a source of danger, the giving of the alarm, the mine manager's participation in the work of rescue, his bringing employees to the scene of peril, and especially his directions as to summoning other employees from the neighbouring shafts. The question as to the appellants' husbands going to and participating in the rescue in consequence of orders or directions expressly given by the mine manager was entirely one of fact, upon which the Board had not made, and this Court was (under said Act) precluded from making, a finding. As the Board had misconstrued provisions of the Act and (in consequence) had ignored evidence that should have been considered, the case should be sent back to it for reconsideration in the light of this Court's holdings as to the true construction of s. 7 of the Act. BETTS AND GALLANT *v.* THE WORKMEN'S COMPENSATION BOARD..... **107**

2——*R.S.O.* 1927, *c.* 179, *ss.* 119-121—*Janitor cleaning outside part of windows in office building—Reaching from one window to clean another—Decayed condition of window-sill—Fall and injury—Whether injury "caused" by "defect" in condition of sill, within s.* 119 (1)—*Manner of use of sill—Jury's findings—Evidence—Excessive damages awarded by jury and new trial as to amount.*] L., as part of his work as janitor and caretaker of respondent's office building, was cleaning two upper windows, which were separated by a pillar 12 inches wide. He had finished one window on the outside, sitting on the sill and facing towards the inside of the building. He then proceeded to clean the other window on the outside by reaching over from the sill of the finished window, and, in doing so, changing from his former posture, when the outside sill of the finished window, from which he was

reaching, gave way and he fell and was injured. Respondent was sued for damages, and the claim was treated, in the questions put to the jury, as one under ss. 119-121 in Part II of the *Workmen's Compensation Act*, R.S.O. 1927, c. 179. The jury found that the accident was caused by defect in the window sill, being owing to its "decayed condition"; that at the time of the accident L. was acting within the scope of his employment; and that he was not guilty of contributory negligence; and judgment was entered for the damages found. The Court of Appeal for Ontario ([1933] O.R. 595) set aside the judgment and dismissed the action, on the ground that the case was not brought within the statute, L. being the author of his own injury by exposing himself to an unnecessary risk (*Lancashire & Yorkshire Ry. Co.* v. *Highley*, [1917] A.C. 352). On appeal to this Court: *Held*: The judgment of the Court of Appeal should be set aside; and the jury's findings sustained (as being not unwarranted on the evidence) in all respects except as to the amount of damages awarded, which were excessive, and as to which there should be a new trial. On the facts in evidence and the jury's findings, the injury was "caused" by a "defect" in the sill's condition, within s. 119 (1) of the Act.—*Per* Duff C.J.: The exposition of "defect" (within such a statute) in *Walsh* v. *Whiteley*, 21 Q.B.D. 371, at 378, and *Nimmo* v. *Connell*, [1924] A.C. 595, at 606, is (subject to exclusion, under the Ontario Act, of negligence as an essential element of the cause of action) reasonably applicable to the present case. "It is the use to which a thing is intended to be put and is being put which must be considered when the question whether or not there is a defect in its condition has to be determined" (*Nimmo* v. *Connell*, *supra*, at 606). When the employer permits a particular use, that shews conclusively that such is the intended use of the thing to which "defect" is imputed within the meaning of this principle (*Jones* v. *Burford*, 1 T.L.R. 137). The jury's findings established that the sill was being used in a reasonable way for a purpose for which its use was permitted, when, owing to its condition, it gave way and so caused the fall. These facts brought the case within s. 119 (1) of the Act.—*Per* Lamont J.: As respondent permitted, and therefore intended, that the sill be used as a base of operations for window washing, it was, within the meaning of the Act, "intended for or used in the business of his employer". If it was, in its condition, unfitted for such use, or if its condition made it dangerous when reasonably so used, that condition constituted a "defect" within the Act; and the jury had, by