1940

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS

ARMAND GRENIER, K.C.
S. EDWARD BOLTON, K.C.

PUBLISHED PURSUANT TO THE STATUTE BY

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1941

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir LYMAN POORE DUFF, G.C.M.G., C.J.C.
The " THIBAUDEAU RINFRET J.
" " LAWRENCE ARTHUR CANNON J.
" " OSWALD SMITH CROCKET J.
" " HENRY HAGUE DAVIS J.
" " PATRICK KERWIN J.
" " ALBERT BLELLOCK HUDSON J.
" " ROBERT TASCHEREAU J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Right Hon. ERNEST LAPOINTE, K.C.

18485—1½

MEMORANDUM

On the ninth day of February, 1940, Robert Taschereau, one of His Majesty's Counsel, was appointed a Puisne Judge of the Supreme Court of Canada.

ERRATA

in Volume 1939

Page 60, f.n. (2) should be [1915] A.C. 330, at 339.

Page 137, at f.n. (4), 465 should be 165.

Page 137, f.n. (1) should be (1898) 33 L.J. N.C. 615.

Page 147, f.n. (1) should be (1938) Q.R. 65 K.B. 104.

Page 173, f.n. (1) should be (1857) 1 Swaky 211, at 213.

Page 214, part of f.n. (2) should be (1883) 3 Ont. R. 570.

Page 386, part of f.n. (1) should be [1939] Ex. C.R. 277.

Page 447, f.n. (3) should be [1898] A.C. 571, at 575; and the name of the case cited should be *Eastman Photographic Materials Co.* v. *Comptroller General of Patents.*

Page 519, f.n. (9) should be [1926] S.C.R. 515.

Page 562, at the 16th line, *Fenton* v. *Thorley* is reported at [1903] A.C. 443; and "(1)" should be cancelled.

Page 564, f.n. (6) should be [1905] 2 K.B. 232.

Page 566, at last line, f.n. (1) should be (2); and the f.n. entered: [1940] A.C. 479; [1940] 2 All E.R. 85.

Page 577, f.n. (2) should be [1905] A.C. 230.

Page 647, marginal note should be Duff C.J.

NOTICE

This volume contains the French version of the Consolidation of the Rules of the Supreme Court of Canada, 1939.

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.

Board of Education for the City of Windsor v. *Ford Motor Company of Canada, Limited et al.* [1939] S.C.R. 412. Leave to appeal granted, 7th May, 1940.

Brownlee v. *Macmillan.* [1937] S.C.R. 318. Appeal dismissed with costs, 4th June, 1940.

Fuso Electric Works et al. v. *Canadian General Electric Company Ltd.* [1940] S.C.R. 371. Leave to appeal dismissed with costs, 9th July, 1940.

Massie and Renwick Limited v. *Underwriters' Survey Bureau.* [1940] S.C.R. 218. Leave to appeal dismissed with costs, 15th March, 1940.

Pepsi Cola Company of Canada Ltd. v. *Coca Cola Company of Canada Ltd.* [1940] S.C.R. 17. Leave to appeal and cross-appeal granted, 21st December, 1940.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

S—*Concluded*

T

U

V

W

Y

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

B

B—*Concluded*

C

D

E

F

G

H

I

J

K

L

M

Mc

R—*Concluded*

T

U

V

W

X

Y

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

RICHMOND WINERIES WESTERN LTD. AND EAKINS PRODUCTS LTD. (PLAINTIFFS) ..... APPELLANTS;

AND

W. R. SIMPSON AND JOHN A. McKINNEY, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF RICHMOND WINERIES, AND THE SAID RICHMOND WINERIES (DEFENDANTS) ..... RESPONDENTS.

1939

* Feb. 21, 22, 23.
* Nov. 30.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Sale of goods—Damages—Action for damages for vendors' breach of alleged contract for sale of wine—Evidence and findings as to contract—Statute of Frauds, ss. 4, 17—Measure of damages—Sale of Goods Act, R.S.B.C., 1936, c. 250, s. 56 (2) (3)—Damages based on estimated loss of profits.

The plaintiff's action was for damages for breach by defendants of an alleged contract (which contract was disputed by defendants) to sell to plaintiff 50,000 gallons of wine. The trial judge found that there was a verbal contract made (to the effect claimed) based upon, but varying in some respects, certain written documents; that s. 17 of the *Statute of Frauds* did not apply, as pursuant to the contract there were accepted and actually received three carloads of wine as part of the 50,000 gallons; that s. 4 of the *Statute of Frauds* was not a bar to the action, as, though the parties expected that all deliveries would not be made within one year, yet, as the purchaser (plaintiff) might, if it saw fit, accelerate deliveries, there was a contract which was not incapable of being performed within a year. As to damages, he held that s. 56 (3) of the *Sale of Goods Act*, R.S.B.C., 1936, c. 250, had no application, as there was no available market where plaintiff could have procured wine to fill the contract; that s. 56 (2) contained the rule to be applied, namely, that the measure of damages was the estimated loss directly and

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

naturally resulting, in the ordinary course of events, from the sellers' breach of contract; that plaintiff was entitled to recover the profits which it might have been expected to make on the sale of the wine which defendants did not deliver; on which basis, and accepting as a guide a certain estimate as to profits given in evidence, but also considering elements involved and making allowances, he fixed damages. The Court of Appeal for British Columbia reversed his judgment, holding that the documents and other evidence did not establish or support a contract such as that claimed. Plaintiff appealed.

Held: On the documents and other evidence (and in view of the trial judge's findings on issues of fact involving questions of credibility) there was a contract established for sale of 50,000 gallons of wine as claimed. S. 17 of the *Statute of Frauds* had no application, there having been acceptance and actual receipt by plaintiff of goods under the contract. S. 4 of the *Statute of Frauds* was not a bar to the action, for the reasons (*supra*) given by the trial judge. His judgment on the question of damages (*supra*) for breach was not impeachable on the ground that he erred in the principle he applied or in the manner of his application of it to the particular facts. (As to the canon applicable by an appellate court as to assessment of damages made at trial, *McHugh* v. *Union Bank of Canada,* [1913] A.C. 299, at 309, cited).

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia which reversed the judgment of McDonald J. in favour of the plaintiffs. The action was for damages for breach of an alleged contract to sell wine to plaintiffs.

The defendants were a partnership who operated a loganberry winery in British Columbia. The plaintiff Richmond Wineries Western Ltd. was a company incorporated in Saskatchewan on May 29, 1936. The plaintiff Eakins Products Ltd. was a company incorporated in British Columbia on June 17, 1931, and was controlled by H. G. Eakins.

Eakins proposed to incorporate a company in Saskatchewan (later incorporated as Richmond Wineries Western Ltd. aforesaid) to sell loganberry wine to the Liquor Control Board of Saskatchewan.

On April 22, 1936, the following agreement was made:

Vanc'r. Apr. 22/36.

Richmond Wineries
Steveston, B.C.
Gentlemen

We herewith confirm our arrangement with you whereby we are to purchase up to 50,000 gallons of your Loganberry wine, naked, Sales tax, gallonage Tax extra with cooperage at our cost: Wine to be a minimum

of two years, strength 28 degrees proof, at 55c. per Imperial gallon, payment to be made within thirty days of each shipment. Firm orders or shipping instructions are to be in your hands by July 1st, 1936. Sale to be f.o.b. your winery in Richmond District.

Yours truly,

Eakins Products Ltd.

H. G. Eakins.

Accepted
Richmond Wineries
Per W. R. Simpson.

Subsequently the plaintiff Richmond Wineries Western Ltd. was incorporated on May 29, 1936. Subsequently the following letter was written (and acceptance stated thereon):

Ste. 5, 410 Seymour St.,
Vancouver, B.C.
June 19th, 1936.

The Richmond Wineries,
Steveston, B.C.
Dear Sirs:—

Re:—Richmond Wineries Western Limited.

We beg to advise you that we have arranged to assign the contract dated the 22nd of April 1936 between ourselves and yourselves with respect to the purchase of 50,000 gallons of your loganberry wine to the Richmond Wineries Western Limited of Prince Albert, Saskatchewan. Will you please acknowledge receipt of this letter.

Yours truly,

Eakins Products Limited
Per: "H. G. Eakins."

Notice of Assignment Accepted:
Richmond Wineries
Per "W. R. Simpson"

On June 29, 1936, Eakins Products Ltd. assigned the agreement of April 22, 1936, to Richmond Wineries Western Ltd. No notice of this assignment was given to defendants, but the assignment was in accordance with the original intention and understanding of all parties and Simpson testified that after said letter of June 19, 1936, he dealt with Richmond Wineries Western Ltd. on the assumption that the agreement had been assigned to that company.

It was alleged that a certain telegram of June 30, 1936 (a copy of which was tendered at the trial but excluded) and confirming letter of July 2, 1936, were sent by Richmond Wineries Western Ltd. to the defendant Simpson. Simpson denied receiving these. There was admitted in evidence a certain telegram of June 30, 1936, from Richmond Wineries Western Ltd. to S. H. Gilmour, solicitor

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

for said company, which Gilmour stated was read by him to Simpson over the telephone on June 30, 1936, as follows:

> Register Company Victoria Stop have wired Simpson shipping instructions one car July 12th Balance contract three thousand gallons monthly till further notice stop assure yourself this notification received as vital part of contract.

About July 10, 1936, Simpson went to Prince Albert, and there were conferences there. According to Eakins, it was verbally agreed that defendants were to supply blended wine instead of the quality originally specified and that the terms of payment be altered. It was also alleged that a further agreement was made as follows: It was expected that the 50,000 gallons referred to in the April agreement (aforesaid) would supply the anticipated requirements of Richmond Wineries Western Ltd. for two years and Simpson agreed to supply it with 25,000 gallons a year for a three-year period to commence in 1938; in order to assist Simpson to finance his berry purchases to meet this added demand, Richmond Wineries Western Ltd. advanced him $5,000 against future deliveries of the wine under the additional three-year contract. Plaintiffs abandoned at the trial the enforcement of any claim arising out of this alleged additional contract.

Defendants shipped a carload of wine on July 17, 1936. In August, 1936, another carload was ordered and sent; this was paid for at the rate of 60 cents a gallon, following a letter from defendants of August 20, 1936, claiming an additional 5 cents a gallon because of the extra cost of the blended wine. In October, 1936, a further carload was ordered and delivered. On November 18, 1936, defendants sold their loganberry wine business to Growers' Wine Company Ltd. (made a Third Party in this action). A further order for shipment of wine not being complied with, the present action was brought for damages for breach of contract.

The facts of the case are more fully stated in the judgment of the Chief Justice of this Court, now reported.

The trial judge took the view that the document of April 22, 1936, constituted an offer by defendants to sell a quantity of wine not to exceed 50,000 gallons; that offer was open for acceptance until July 1, 1936; the communication through Gilmour of June 30, 1936, purporting to accept that offer, not being in the terms of the offer in

that it contained the words "till further notice," did not serve to constitute a completed contract. But he found that there was a contract concluded at Prince Albert during Simpson's visit there, by which contract the plaintiff Richmond Wineries Western Ltd. was to buy and defendants were to sell 50,000 gallons of blended wine at 60 cents a gallon, and save as to this the contract was to buy and sell in accordance with the contents of said document of April 22, 1936, and the said telegram of June 30, 1936, read by Gilmour to Simpson. He held that, as pursuant to that contract Richmond Wineries Western Ltd. accepted and actually received three carloads of wine as a part of the 50,000 gallons, s. 17 of the *Statute of Frauds* did not apply; also that s. 4 of the *Statute of Frauds* was not a bar to the action on the facts with regard to the contract as he had found them; although the parties did expect that all deliveries would not be made within one year, nevertheless, in view of the fact that Richmond Wineries Western Ltd. might, if it saw fit, accelerate deliveries, there was a contract which was not incapable of being performed within a year (citing *Quance* v. *Brown* (1)). As to damages (the difficulties in estimating which he emphasized) he held that s. 56 (3) of the *Sale of Goods Act,* R.S.B.C., 1936, c. 250, had no application, as there was no available market where plaintiff could have procured wine to fill the contract; that the rule to be applied was contained in s. 56 (2) of that Act; that the measure of damages was the estimated loss directly and naturally resulting, in the ordinary course of events, from the sellers' breach of contract; that plaintiffs were entitled to recover the profits which the court considered they might have been expected to make on the sale of the 41,360 gallons which defendants failed to deliver. On the evidence, including evidence as to estimate of profits, and considering elements involved and allowing for possible losses in business, he estimated the net profit at 65 cents per gallon and fixed the damages on this basis at $26,884. (The defendants' claim against the third party for indemnity was left to be proceeded with).

The Court of Appeal held that the agreement of April 22, 1936, as varied in Prince Albert, was in essence an

(1) (1926) 58 Ont. L.R. 578.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

option agreement, and until an order or orders were given the buyer remained free from obligation (and there being no mutuality of obligation, there was no contract); that the telephonic order given by Gilmour to Simpson on June 30, 1936, could not be construed as an order for the entire 50,000 gallons or as constituting a binding contract for delivery of more than one carload of wine; that the orders in August and October were likewise separate orders creating separate contracts which were duly executed by delivery; that whether these orders be regarded as given and accepted under an extension of the agreement of April 22, 1936, or it be considered that the option expired on June 30 for failure of the buyer to comply with its terms, and each subsequent order be looked upon as an offer by Richmond Wineries Western Ltd. incorporating, by reference, the terms of the expired option and accepted by Simpson on that basis, was of no moment because the result was the same; these transactions were completed and closed and the orders for limited and specified quantities of wine could not be regarded as firm orders for the entire 50,000 gallons; that the failure to deliver wine pursuant to the order of February 1, 1937 (the order given by Richmond Wineries Western Ltd. after the sale by defendants to Growers' Wine Co. Ltd.) did not amount to a breach of contract; in the first place, there was not a binding contract for the delivery of the wine until the order was accepted and in this instance it was not accepted; on the other hand, if the option agreement, as extended by the forbearance of Simpson to insist upon its exact terms, be considered as binding defendants to deliver upon orders to be given from time to time until 50,000 gallons had been delivered, there was nothing in the agreement of April, 1936, compelling defendants to remain in business, and on the facts of this case the court could not imply any such stipulation in the said agreement; defendants were, therefore, on February 1, 1937, precluded by the sale of their business from making any further deliveries; that there was nothing in the evidence to support the finding that a contract was concluded at the said conferences at Prince Albert as found by the trial judge.

The plaintiffs appealed to the Supreme Court of Canada.

J. W. deB. Farris K.C. for the appellants.

Martin Griffin K.C. and *C. H. Locke K.C.* for the respondents.

The judgment of the Chief Justice and Davis, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—This appeal turns (in respect of one of the two grounds upon which I base my decision) upon one or two fundamental questions of fact in respect of which the evidence is partly documentary, partly oral. The learned trial judge has found these issues of fact (involving as they do questions of credibility) in favour of the appellants. The Court of Appeal appears to have thought that there was no evidence to support these findings. I am not in agreement with the view of the Court of Appeal. It is necessary, therefore, to review the facts and refer to the evidence in some detail.

In the spring of 1936, the respondents W. R. Simpson and John A. McKinney, under the trade name of the Richmond Wineries, were the owners of a loganberry winery in British Columbia and had on hand a large quantity of matured loganberry wine. H. G. Eakins owned and controlled a personal company, the Eakins Products Limited. Eakins was, until July, 1936, a considerable shareholder in the Growers' Wine Company and had endeavoured to induce that company to enter the business of manufacturing loganberry wine in Saskatchewan but without success. He then decided to form a company for that purpose, but first of all, since it takes considerable time to mature loganberry wine, it was necessary to secure a supply of matured wine in order to provide a stock in trade while engaged for the first year or two in establishing his business; and for this reason he arranged to purchase wine from Simpson. The following memorandum was signed:

Vancouver, Apr. 22/36

Richmond Wineries
Steveston, B.C.
Gentlemen

We herewith confirm our arrangement with you whereby we are to purchase up to 50,000 gallons of your Loganberry wine, naked, Sales tax, gallonage Tax extra with cooperage at our cost: Wine to be a minimum of two years, strength 28 degrees proof, at 55c per Imperial

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

gallon, payment to be made within thirty days of each shipment. Firm orders or shipping instructions are to be in your hands by July 1st, 1936. Sale to be f.o.b. your winery in Richmond District.

Yours truly,

Eakins Products Ltd.

H. G. Eakins.

Accepted

Richmond Wineries

Per W. R. Simpson

Simpson was well aware of Eakins' plan and that his intention was to transfer the agreement of the 22nd of April to the new Company. In May, Simpson wrote to Eakins saying he had no objection to the use of the name Richmond Wineries of Saskatchewan for the new company and offered to act as a director if desired. The Richmond Wineries Western, Ltd., was incorporated on the 29th of May in Saskatchewan and, on the same day, licensed to carry on business for the year ending the 31st of December, 1936. It was registered as an extra-provincial company in British Columbia on the 14th of July, 1936. On the 19th of June the Eakins Products Limited wrote to the Richmond Wineries the following letter:

Ste. 5, 410 Seymour St.,
Vancouver, B.C.

June 19th, 1936.

The Richmond Wineries,
Steveston, B.C.

Dear Sirs:

Re: Richmond Wineries Western Limited

We beg to advise you that we have arranged to assign the contract dated the 22nd of April 1936 between ourselves and yourselves with respect to the purchase of 50,000 gallons of your loganberry wine to the Richmond Wineries Western Limited of Prince Albert, Saskatchewan. Will you please acknowledge receipt of this letter.

Yours truly,

Eakins Products Limited
Per: "H. G. Eakins."

Notice of Assignment Accepted:
Richmond Wineries
Per "W. R. Simpson."

On the 29th of June, 1936, a formal assignment of the contract of the 22nd of April, 1936, to the Richmond Wineries Western, Ltd., of Prince Albert, was executed by the Eakins Products Limited, in consideration of an agreement on the part of the Company to issue to Eakins 6,000 fully paid up shares of the new company. On the 30th

of June, the solicitor for the company, S. H. Gilmour of Vancouver, received from the Richmond Wineries Western, Ltd., at Prince Albert, the following telegram:

Register Company Victoria Stop Have wired Simpson shipping instructions one car July 12th Balance contract three thousand gallons monthly till further notice Stop Assure yourself this notification received as vital part of contract.

And on the same day Mr. Gilmour, acting on behalf of the Company, communicated the contents of the telegram to Simpson, reading the document to him. On the 2nd of July, 1936, Richmond Wineries Western, Ltd., sent to the Richmond Wineries at Steveston a letter confirming a telegram to Simpson of the 30th of June in the following words:

July 2, 1936.

Richmond Wineries
Steveston, B.C.

Attention of Mr. W. R. Simpson

Dear Mr. Simpson:

We are confirming herewith our telegram to you of June 30th:

> "Ship one carload wine per contract on or about July 12th consigned to Liquor Commission Prince Albert notify Richmond Wineries Western Limited stop We prefer the blended type stop Ship balance contract at rate of three thousand gallons monthly till further notice stop Are you coming out. Answer."

I had been expected to hear from you that you were on your way here as I particularly wanted you to meet the crowd down here and so much more can be done on the spot. Please let me know if you can possibly come out before Logan season starts.

We are enclosing herewith waiver for you to sign and return as a Director. You were issued one share to qualify as a Director at the preliminary meeting which will be forwarded to you by the next mail or as soon as signed by the President, Mr. Sanderson. Furthermore, we believe, Mr. Eakins has transferred to you One Thousand Dollars paid up stock which will also go through concurrently.

All formalities in connection with the launching of the new company were implemented this week and legal registration is now being effected in Victoria, the stocks are allotted and the funds transferred and we are ready for business. Hence our telegram to you.

We do hope to do a rousing business in time and are naturally concerned as to the first shipment. In as much as the public here apparently prefer the blended to the straight Logan, I think we had better start off with this character of wine and leave that end of it to you.

Please wire or write anything any time.

Yours truly,

Richmond Wineries Western Ltd.

The learned trial judge thought (and herein the Court of Appeal agreed with him) that the document of the

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

22nd of April was an offer which was to be accepted not later than the 1st of July and held that the communication made by Gilmour on the 30th of June was not an acceptance of this offer, not conforming, as he thought, to the terms of the offer.

Hereafter, I shall refer to the appellants as the Wineries Western and Eakins respectively, and to the respondents as the respondents.

It is unnecessary to consider whether the document of the 22nd of April, signed by both parties, could properly be considered as merely an offer by the respondent to Eakins. In form it is an agreement by which Eakins and the respondents agree that the former shall buy and the latter shall sell the respondents' loganberry wine "naked" up to 50,000 gallons on the terms stated; but the quantity is to be determined by firm order or shipping instructions given by Eakins by the 1st of July. A firm order or shipping instructions given pursuant to this term of the agreement will give rise to a binding contract to buy and sell the quantity thereby named. I shall deal later with the position of the Wineries Western.

The next point is the effect of the communication made by Mr. Gilmour to Simpson. Simpson denies that he received this communication. He begins by taking refuge in a mere *non mi ricordo* but adds that the matter was so important that he would have remembered the communication if he had received it; but he implicitly denies the receipt of it, when he declares that he visited Prince Albert because, not having received any order or shipping instructions, he wanted to ascertain the position there. The trial judge and the Court of Appeal have both found that he did receive this communication and I have no doubt that he received also the letter of the 2nd of July which, admittedly, was sent.

What is the meaning of the communication? Mr. Gilmour says that he read the telegram to Simpson. The purport of the telegram seems to me to be clear enough. "Contract" in the phrase "balance of contract" can, I think, mean nothing but the quantity mentioned in the contract, 50,000 gallons; and the telegram, I think, is a notice that the balance of the 50,000 gallons is to be delivered at the rate of 3,000 gallons a month until this rate of delivery is altered by further notice. Strictly,

" until further notice " relates to the rate of delivery and, I think, that is the natural reading of this telegram which professes to be a firm order or shipping instructions within the meaning of the document of the 22nd of April. That seems to me to be the natural construction and I can perceive no adequate ground for reading it in such a manner as to make it senseless and inoperative for the purposes for which it was intended.

I am satisfied that the learned trial judge was right in inferring from all the facts that in effect the parties did by their conduct and their expressions declare to one another at Prince Albert that this was the footing upon which they were dealing; and that pursuant to this understanding the shipments of July, August and October were received and paid for.

There is a feature of the dealings that was not much discussed on the argument which I regard as of great importance. Mr. Gilmour says that when he communicated the contents of the telegram from Prince Albert to Simpson, Simpson asked, " Does he say anything about the money?" That this is true I have no doubt. The evidence of Simpson's partner McKinney is very clear on the point. Before Simpson's departure for Prince Albert, they, McKinney says, discussed the contract of April 22nd and they discussed the question of securing payment for shipments to be made under the contract; and McKinney's evidence shews that, as he understood it, this matter of security was the principal object of Simpson's visit to Prince Albert. Simpson pretends that it was only after his visit there that the idea of security occurred to him. And he swears that he had no discussion on the subject with his partner. I can see no reason for not accepting the evidence of Mr. Gilmour and McKinney on that point in preference to the evidence of Simpson. Mr. McKinney's testimony is illuminating and I quote it:

218. Q. You don't think so. Did you have any discussion with Mr. Simpson before he went to Prince Albert with reference to an order which had been placed for wine? A. Just on that 50,000 gallons.

219. Q. Just on the 50,000 gallons. A. Yes.

220. Q. Now what discussion did you have about that? A. Well, we figured we had to increase our output for that year if we were going to carry on a business of that capacity.

221. Q. Did you know that an order has been placed for wine? A. Yes.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

222. Q. Before Mr. Simpson went to Prince Albert? A. Yes.

223. Q. And how many gallons was that that had been placed at that time? A. That was the 50,000.

224. Q. All the 50,000? A. Just the 50,000.

* * *

230. Q. And that was the reason Mr. Simpson went to Prince Albert, wasn't it, to see how you could get paid? A. Yes.

* * *

232. Q. Yes, and you had discussed that with Mr. Simpson? A. Yes. We wanted to get security on our wine.

* * *

237. Q. And I show you the invoice dated July 17th, 1936, of 55 barrels of loganberry wine, 2,869 gallons. That was what was— A. That was the first.

238. Q. And then this matter had been discussed between you and Mr. Simpson before he went up there on the question of delivering that first order, is that right? A. Delivering the first order and getting security on that wine, that is what we figured on.

* * *

252. Q. Yes, that is, the contract was to be assigned to this company which was incorporated and called the Richmond Wineries Western Limited. You knew that. Isn't that so? A. Yes.

Simpson, of course, says that the $5,000 received in July from the Wineries Western was merely a loan to enable him to finance his pack for that year. But even his evidence, when read as a whole, shews that his real purpose in getting the advance was to get security for payment of shipments to be made under the existing contract.

The arrangement as to the alteration of the terms of payment, that each instalment might be paid for at any time before the shipment of the next, which, Simpson implies, was correlative with and dependent upon Eakins' agreement to make the advance, strengthens the significance of this last-mentioned agreement and Simpson's conduct in relation to it.

Eakins, no doubt, believed that Simpson was contracting to supply an additional 75,000 gallons of wine after the 50,000 gallons they had contracted for had been exhausted. Simpson denies not only that there was any such arrangement, but even that the subject was discussed; I have no doubt he did so orally contract. The arrangement, I have no doubt, was as Eakins says that " after the exhaustion of our existing contract " the respondents were to supply to Wineries Western wine at the rate of 25,000 gallons annually and that the $5,000 which was to be paid to Simpson, and was paid to Simpson, was to be an annual deposit

to assist Simpson in financing the manufacture of wine to be matured for the purpose of carrying out that engagement. The whole arrangement was on the footing that there was an existing contract for the supply of 50,000 gallons of wine under the document of the 22nd of April which had become a binding contract by the communications of June 30th. I have no doubt either that Eakins is stating a fact in saying that Simpson mentioned a possible sale of his business to the Growers Company, and he having expressed apprehension of the effect of such a sale upon this "existing" contract between the Wineries Western and the respondents, Simpson assured him that that contract would not be prejudiced. In passing, it is worth while noticing that the contract of sale to the Growers Company by the respondents is made subject to a claim on the part of Eakins under certain letters annexed to the contract and while in this series of letters the document of the 22nd of April is disclosed, there is no reference to the Gilmour telegram or the Gilmour communication or to the letter of the 2nd of July.

Simpson, of course, fully realized the importance of Gilmour's communication. He says himself it was so big a thing that he was hardly likely not to remember it. Although he hesitates to admit it he meant by that, of course, that in the absence of such a communication there would be no binding contract. He must have known at the same time the importance attached to Gilmour's communication by Eakins. The telegram to Gilmour which Gilmour read to Simpson would make this clear.

Simpson must have known when he went to Prince Albert on July 10th that Eakins considered he had a binding contract, and, as I have said, he proceeded immediately to transact business with him on that footing. Eakins' first question to Simpson when he stepped from the train at Prince Albert was, "Have you shipped the car?" This, of course, could only refer to the shipment of 3,000 gallons on July 12th specified in Gilmour's telegram, and the telegram and letter to Simpson, and Simpson's answer was, "No, not yet." He added, producing a sample of blended wine:

> I am going to ship you four-year-old wine as incorporated in this sample rather than the two-year-old wine specified in our contract. This is the class of wine that I propose to send you under our contract.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

Then the shipments and the correspondence relating to them show that the shipments were made pursuant to the communications of June 30th. Simpson, in order to explain his first shipment, says it was ordered at Prince Albert. Eakins says no such order was given there; and I have no doubt that the only order for that shipment was the order contained in the previous communication.

It is significant that the shipment was made the day after Simpson acknowledged receipt of the cheque for $5,000 which he had stipulated for at Prince Albert as a term of the contract with the object of protecting him respecting payments to be made under the contract; although, as appears, he did not disclose this purpose to Eakins.

Reading the correspondence, one sees very plainly that the parties are not dealing with individual, independent orders. Simpson's own letter of the 20th of August referring not to past, but to future, shipments explicitly acknowledges the existence of the contract—"I will ship as per contract." At all events, I find it impossible to escape the conclusion that Simpson was fully aware that in the transactions at Prince Albert and in the subsequent shipments Eakins was dealing with him on the footing of a concluded contract in the terms of the communication of June 30th; and that Simpson himself was actually dealing with Eakins on that footing, or was deliberately leading Eakins to believe that he, Simpson, was dealing with him on that footing.

But it is not necessary to attempt to fathom the mind of Simpson; he is bound by the interpretation reasonably ascribed to his words and conduct by Eakins and acted upon by him. As regards the assignment to the Wineries Western, it may be questionable whether the assignment of June 29th before there was a concluded contract could (even assuming a sufficient notice) take effect as a legal assignment of the contract as ultimately concluded. That is of no importance because it is plain from the oral evidence as well as from the letters that the parties dealt with one another and that the wine was shipped on the footing of a contract of sale in which the Wineries Western were the purchasers. Eakins, the proprietor of the Eakins company, was not only aware of, but was a party to all

the transactions and wrote the letters addressed to Simpson. The invoices were all addressed to the Wineries Western. In this aspect of the controversy, the letter of the 19th of June, and Simpson's examination of the minutes, and his reading of the formal assignment in the minutes, are relevant circumstances as well as the admission by all parties that from the beginning it was understood that as soon as Wineries Western was incorporated they were to be substituted for Eakins as purchasers. It must, of course, not be overlooked that the communications of the 30th of June were all addressed to Simpson by the Wineries Western. Simpson says that after the 19th of June he dealt with Wineries Western on the assumption that they had an assignment of the contract.

Since the Eakins company, as well as the Wineries Western, are plaintiffs, non-compliance with the statutory formalities in respect of the assignment of legal choses in action under British Columbia legislation cannot affect the appellants' right to recover.

On the view of the facts above explained, it is not, of course, of cardinal importance whether the communications of the 30th of June were in strict conformity with the term that there were to be firm orders or shipping instructions by the 1st of July. Assuming there was an absence of strict conformity, an acceptance of the terms of those communications by conduct is clearly established. I agree with the trial judge that the proper inference from all the facts is that by words and conduct a contract was concluded between the parties of purchase and sale on the footing of the document of the 22nd of April and the communications of the 30th of June,—blended wine being substituted for "naked" wine, the terms of payment being altered, as already explained, and the price increased (by the letters of August 20th and September 2nd) to sixty cents.

I also agree with the learned trial judge that the seventeenth section of the *Statute of Frauds* has no application. There was acceptance and actual receipt by Wineries Western of goods under the contract. I also agree with him and for his reasons that the fourth section of the Statute is not an answer.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

The question of damages remains. We have had an able and useful argument upon it. The learned judge had a difficult task but he recognized the difficulty and there is no ground for thinking that he did not apply his mind to the various considerations substantially involved; and I do not think his judgment is impeachable on the ground that he erred in the principle he applied; namely, that the appellants are entitled to reparation for the loss of the profits they might reasonably expect if the contract was performed. The application of the principle to the particular facts was by no means easy; but he came to the conclusion that the estimate of Mr. Young might be regarded as a safe basis and he accepted and acted upon it as a guide, although he did not slavishly follow it. The sale by the respondents to the rivals of the appellants at a high profit is a circumstance not to be overlooked.

Lord Moulton's judgment in *McHugh* v. *Union Bank of Canada* (1) supplies, I think, the canon by which we ought to govern ourselves in this case:

> The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck J's assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal.

The appeal should be allowed and the judgment of the trial judge restored with costs throughout.

CROCKET J.—My Lord the Chief Justice in his reasons, I think, clearly shews that there was ample evidence to support the learned trial judge's finding that there was a contract concluded between the parties at Prince Albert for the purchase and sale of 50,000 gallons of blended Loganberry wine at the increased price of 60 cents a gallon, to be shipped as per the terms of the telegram of June 30th, 1936, and the letter of April 22nd, 1936, this evidence consisting, not only of written communications and verbal conversations between the parties, but of their acts and conduct with reference to the matter in controversy.

(1) [1913] A.C. 299, at 309.

I agree with the view of the learned trial judge also that the contract as concluded between the parties was one which was not incapable of being performed within a year and that s. 4 of the *Statute of Frauds* accordingly does not bar an action upon it, and also that the acceptance and actual receipt by the plaintiff of three carloads of wine, as part of the 50,000 gallons contracted for, takes the case out of s. 17 of the same statute.

As to damages, I can see no reasons which would justify this court in interfering with the assessment the trial judge has made.

For these reasons I agree that the appeal should be allowed and the judgment of the learned trial judge restored with costs throughout.

Appeal allowed with costs.

Solicitor for the appellants: *S. H. Gilmour.*

Solicitor for the respondents: *R. W. Ellis.*

PEPSI-COLA COMPANY OF CANADA, LIMITED (DEFENDANT) ..... APPELLANT;

AND

THE COCA-COLA COMPANY OF CANADA, LIMITED (PLAINTIFF)... RESPONDENT.

1939
*Mar. 27, 28, 29, 30, 31.
*April 3.
*Dec. 9.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade mark—Alleged infringement of trade mark "Coca-Cola" by use of trade mark "Pepsi-Cola"—Counterclaim against registrations of "Coca-Cola"—Delay and acquiescence—Burden with regard to confusion—Tests by comparison—Joining of descriptive words into compound word.

Plaintiff, The Coca-Cola Company of Canada, Ltd., and defendant, Pepsi-Cola Company of Canada Ltd., were each incorporated under the Dominion *Companies Act*, plaintiff in 1923, defendant in 1934. Plaintiff claimed to be the owner of the trade mark "Coca-Cola," to be applied to the sale of non-alcoholic beverages and syrup for the preparation thereof, which was registered in Canada, in distinctive script form, in 1905, registration being renewed in 1930, and was

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

further registered in Canada, not in distinctive script but in ordinary typewritten form, in 1932. (In argument in this Court it was sought to support this latter registration by s. 28 (1) (*b*) of *The Unfair Competition Act, 1932,* a position not taken on the pleadings). Defendant claimed to be the owner of the trade mark "Pepsi-Cola," to be applied to the sale of a non-alcoholic beverage, which was registered in Canada, in distinctive script form, in 1906, and renewed in 1931. Plaintiff in 1936 brought action against defendant, claiming infringement of its trade mark by the use of defendant's trade mark. Defendant attacked the validity of plaintiff's trade mark and by counterclaim sought cancellation of the registrations thereof.

Held: Plaintiff's action for infringement should be dismissed (judgment of Maclean J., [1938] Ex. C.R. 263, reversed). Defendant's attack against plaintiff's trade mark fails, except that this Court makes no order on defendant's counterclaim in respect of plaintiff's registration in 1932; subject to that, the counterclaim is dismissed.

Per The Chief Justice and Rinfret, Davis and Hudson JJ.: Though "coca" and "cola" is each a descriptive word, it does not follow that a trader cannot join them into a compound which, written in a peculiar script, constitutes a proper trade mark. (*In re Crosfield,* [1910] 1 Ch. 130, at 145-6, and other cases, cited). If there ever was any legitimate ground for impeaching the 1905 registration of "coca-cola," there has been such long delay and acquiescence that any doubt must now be resolved in its favour. It would be a matter of grave commercial injustice to cancel the registration which has stood since 1905 and become widely used by plaintiff. As to defendant's contention that one of plaintiff's courses of dealing—selling its syrup to some 80 different bottling concerns throughout Canada who add carbonated water according to standard instructions and then bottle the beverage and sell it as coca-cola to retail dealers—constitutes a public use of the word "coca-cola" as the name of a particular beverage and an abandonment of the word as a trade mark for the product of a particular manufacturer:—There may be some force in that contention, but the evidence at the trial was not developed sufficiently on this branch of the case to show explicitly how these bottling concerns or the retail dealers who purchased from them actually sold the beverage, and if said course of dealing were to be relied upon as an abandonment by plaintiff of its trade mark, the facts should have been plainly established.

Plaintiff had not established a claim for infringement from defendant's use of the trade mark "Pepsi-Cola." In the general attitude taken by plaintiff, its objection really went to the registration by any other person of the word "cola" in any combination, for a soft drink; and if such objection were allowed, then plaintiff would virtually become the possessor of an exclusive proprietary right in relation to the word "cola"; and to this it was not entitled. (In this connection it was held that 30 certificates of registration of trade names or trade marks in which the word "cola" or "kola" in some form was used were admissible as some evidence of the general adoption of the word in names for different beverages or tonics.) It cannot be said by tests of sight and sound that "Pepsi-Cola" bears so close a resemblance to "Coca-Cola" as to be likely to cause confusion in the trade or among the purchasing public. Each

case depends upon its own facts. In the present case further circumstances that might be taken into account were: that "Pepsi-Cola" as a registered trade mark in Canada had stood unimpeached since 1906, and the evidence disclosed that pepsin and cola flavour actually formed part of the ingredients of the beverage manufactured and sold by defendant as pepsi-cola; that no application in objection to defendant's corporate name was made by plaintiff following upon defendant's incorporation; that there was no evidence that anyone had been misled, and where a defendant's trade is of some standing the absence of any instance of actual confusion may be considered as some evidence that interference is unnecessary. Under all the circumstances of the case, commercial injustice would follow the injunction sought by plaintiff against defendant's use of the mark "Pepsi-Cola."

While the rules of comparison for testing an alleged infringement of a registered mark resemble those rules by which the question of similarity on an application for registration is tested, it is necessary to establish a closer likeness in order to make out an actual infringement than would justify the refusal of an application to register; the burden on a plaintiff in an infringement action is to show reasonable probability of confusion, while an applicant for registration must establish, if challenged, the absence of all reasonable prospect of confusion.

Cases cited with regard to principles applicable to the use of trade marks included: *In re Crosfield,* etc., [1910] 1 Ch. 130, at 145-6; the *Reddaway* case, [1927] A.C. 406, at 413; *Hall* v. *Barrows,* 33 L.J. (N.S.) Ch. 204, at 207-8; the *Payton* case, 17 R.P.C. 628, at 634; the *Pianotist* case, 23 R.P.C. 774, at 777; the *"Peps" and "Pan-Pep"* case, 40 R.P.C. 219, at 223, 224.

Per Kerwin J.: A comparison of the words "Coca-Cola" and "Pepsi-Cola," their appearance in script, and their sound as pronounced and as likely to be pronounced by dealers and users of the wares of the parties, do not indicate that they are "similar" within the definition in s. 2 (*k*) of *The Unfair Competition Act, 1932,* (c. 38). The question in each case is one of fact (*Johnston* v. *Orr Ewing,* 7 App. Cas. 219, 220, cited), and in this case that question must be answered adversely to plaintiff's claim. Defendant's counterclaim against the 1905 registration of "Coca-Cola" should be dismissed, but solely on the ground that there is no evidence that would warrant the court declaring that it was not registrable or ordering that the registration be cancelled. In view of s. 28 (1) (*b*) of said Act (without determining its precise meaning) and of the course that the trial took, neither party should be precluded in a properly framed action from litigating the question whether under s. 28 (1) or otherwise plaintiff could apply for and secure registration of the compound word "Coca-Cola," although the same compound word in script form had already been registered by it as a trade mark; the judgment at trial dismissing the counterclaim's attack against the 1932 registration, should be set aside, and it should be declared that this Court makes no order with respect to it.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

(1), holding that the plaintiff's trade mark "Coca-Cola" had been infringed by the use by the defendant of the trade mark "Pepsi-Cola" and granting to plaintiff injunctions and other relief, and dismissing defendant's counterclaim for an order that the trade mark "Coca-Cola" was not registrable and for cancellation of registrations thereof.

The material facts and circumstances of the case are sufficiently stated in the reasons for judgment given in this Court, now reported.

By the judgment of this Court, the defendant's appeal was allowed (with regard to plaintiff's claim) and the action dismissed; as to defendant's counterclaim, the plaintiff (respondent) was entitled to succeed except that this Court did not see fit to make any order in respect of the registration of 1932 (discussed in the reasons for judgment); subject to that, the counterclaim was dismissed; appellant (defendant) to have its costs of the appeal and the action, and respondent (plaintiff) its costs of the counterclaim.

W. D. Herridge K.C., J. J. Creelman K.C., and *J. C. Osborne* for the appellant.

R. S. Smart K.C. and *A. W. Langmuir K.C.* for the respondent.

(*J. L. Ralston K.C.,* by special leave, spoke on behalf of certain clients, not parties to the action, with regard to certain observations in the reasons for judgment at trial).

The judgment of the Chief Justice and Rinfret, Davis and Hudson JJ. was delivered by

DAVIS J.—Both parties to this trade mark litigation, which was commenced in the Exchequer Court of Canada, manufacture and sell in Canada in competition with each other a low priced (five cents) non-alcoholic beverage. The plaintiff (respondent) uses as a trade mark the compound word "Coca-Cola" and the defendant (appellant) uses as a trade mark the word "Pepsi-Cola." Both parties are limited companies incorporated under the Dominion *Companies Act;* the plaintiff on September 29th, 1923, with the corporate name "The Coca-Cola Company

(1) [1938] Ex. C.R. 263; [1938] 4 D.L.R. 145.

of Canada Limited," and the defendant on May 29th, 1934, with the corporate name " Pepsi-Cola Company of Canada Limited." Neither party has disclosed the formula from which its product is made. The plaintiff commenced this action against the defendant on May 30th, 1936, alleging that it was the duly recorded owner of the registered trade mark " Coca-Cola " for non-alcoholic, soft drink beverages and syrup for the preparation thereof and that the said trade mark had been registered in the Canadian Patent Office on November 11th, 1905, and renewed on April 15th, 1930. A further registration on September 29th, 1932, to which special reference will have to be made later, was also set up. The plaintiff then alleged that the defendant was adopting and using the designation " Pepsi-Cola " with its beverage, which it alleged " was and always has been so arbitrarily similar in colour and appearance to plaintiff's ' Coca-Cola ' as to be virtually indistinguishable therefrom by the purchasing public," and that the corporate name of the defendant was " confusingly similar to " the corporate name and trade mark of the plaintiff, and that it was obviously done with the object that the defendant in competition with the plaintiff would benefit by the good will which had been built up by the plaintiff and its predecessors in title; and that the designation " Pepsi-Cola " whenever applied to that beverage was " in script form closely and confusingly similar to the distinctive script form in which the trade mark ' Coca-Cola ' had been used by the plaintiff and its predecessors in title." The plaintiff alleged that all acts aforesaid of the defendant had been knowingly done in contravention of the provisions and prohibitions of *The Unfair Competition Act* (22-23 Geo. V, (1932) ch. 38) " and by way of infringement of the plaintiff's trade mark ' Coca-Cola '." The plaintiff claimed the usual relief in an infringement action.

The defendant in its defence admitted that the plaintiff was " registered as the proprietor of the registered trade mark ' Coca-Cola '," but denied that the registrations were in force or effect. The defendant alleged that the registration of November 11th, 1905, had been abandoned, or, in the alternative, that the registration of September 29th, 1932, is not distinguishable from the first registration, or if distinguishable, at no time has there been user or

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

intended user of the last registered trade mark. The defendant alleged that it was the owner (by assignment) of a trade mark "Pepsi-Cola," to be applied to the sale of a non-alcoholic beverage, which was registered in Canada on November 30th, 1906, and that the same is in full force and effect, and that its predecessors in title had carried on in the United States for many years prior to the incorporation of the defendant an extensive business, and in Canada for a short period of years, a limited business in the manufacture and sale of soft drink beverages and syrups used in the preparation thereof under the trade mark "Pepsi-Cola" used in the distinctive form set out in the certificate of registration thereof, and that the defendant had upon its incorporation commenced and had since continued the manufacture and sale of its soft beverages, and the syrups used in the preparation thereof, and distributed the same under the said trade mark "Pepsi-Cola." After setting up the usual defence pleadings in an infringement action, the defendant specifically attacked the validity of the registration in 1905 of "Coca-Cola" upon the ground that the words "were descriptive and not properly registrable as a valid trade mark" and by way of counterclaim the defendant sought cancellation of the registrations of the said mark relied upon by the plaintiff.

It is plain then that this is not a passing off action but an infringement action upon a registered trade mark, the validity of which is directly put in issue.

When the action came on for trial, counsel for the plaintiff merely filed the certificates of the registration of "Coca-Cola" of November 11th, 1905, and of September 29th, 1932; read into the record a few questions and answers from the examination for discovery of the Manager of the defendant company; and filed as exhibits a sample bottle of Pepsi-Cola and photographs showing the markings on cases in which the defendant shipped its beverage in bottles. No evidence was tendered in support of paragraphs 3, 4, 5 or 6 of the statement of claim (all of which had been denied by the statement of defence) which had alleged long years of manufacture and sale, the expenditure of large sums in advertising, the extent of the plaintiff's business in Canada, and the acquisition by the plaintiff of all of the business and good will in and through-

out Canada in connection with which the trade mark "Coca-Cola" had been used by the plaintiff's predecessors in title including the trade mark "Coca-Cola."

Counsel for the defendant moved for a non-suit, upon the ground that there was no proof that the plaintiff had acquired the good will or was the assignee of the original proprietor of the trade mark "Coca-Cola." The motion was reserved by the learned trial judge and the defence then called only one witness, Guth, the General Manager of the American Pepsi-Cola Company, which, he said, owns all the capital stock of the defendant company; filed the examination for discovery of the Secretary-Treasurer of the plaintiff, the certificate of registration of Pepsi-Cola of November 30th, 1906, and an assignment, a certificate of the registration of the design of the bottle in which Coca-Cola is marketed, and, subject to objection, 30 certificates of registration of trade marks which contain the word "cola" or "kola" or some similar word. The plaintiff gave no evidence in reply.

Each party attacked the title of the other to its trade mark and if the evidence were to be closely examined it may be that neither party has strictly established its own right to the trade mark it claims. The evidence on both sides is at least not satisfactory. In the case of "Coca-Cola" the application in 1905 was filed by a United States company, the Coca-Cola Company of Georgia. A notation attached to the certified copy of the registration states that the mark was assigned in 1922 by the Georgia company to a Delaware company. A further notation appears on the registration that "a document purporting to be an assignment" of the trade mark between the Delaware company and the plaintiff had been registered. But there was no proof of the assignments. Counsel for the plaintiff relied upon the pleadings and sec. 18 of *The Unfair Competition Act, 1932,* but the admission in the statement of defence is only "that the plaintiff is registered as the proprietor of" the trade mark "Coca-Cola", "as set out in paragraph 2 of the Statement of Claim." The defendant is in an even less favourable position on the question of title. The word "Pepsi-Cola" had been registered on November 30th, 1906, by a North Carolina company and it does not appear by whom its renewal on November 30th, 1931, was obtained. The defendant did

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

not become incorporated until May 29th, 1934, and it is admitted that it did not succeed to the business of any other company in Canada, though it produced to the Trade Mark Office and caused to be recorded what purported to be an assignment, dated May 11th, 1936, made by a United States company which was described as a Delaware corporation and "successor" to the North Carolina company. There is no proof of any assignment or succession between the North Carolina company and the Delaware company. It may be on a strict view of the evidence that neither party has proved a legal right to the trade mark it claims. But we prefer to deal with the appeal from a broader point of view having regard to the substantial and important questions raised and the exhaustive and helpful arguments submitted to us by counsel for both parties. For that purpose we shall assume the title of each party is established until it becomes necessary, if it does, to determine that question.

It may be convenient at this point to refer to the plaintiff's registration of "Coca-Cola" of September 29th, 1932. This new registration (application for which was filed August 11th, 1932) was a specific trade mark

> to be applied to the sale of beverages and syrups to be used in the manufacture of such beverages, and which consists of the compound word: "Coca-Cola," in any and every form or kind or representation; as per the annexed pattern and application.

The application made by the plaintiff stated that "we verily believe" the specific trade mark

> is ours on account of our having acquired the same from the Coca-Cola Company, a corporation of the State of Delaware, United States of America, which last mentioned company in its turn acquired the same from the Coca-Cola Company, a corporation of the State of Georgia, United States of America,

and

> We hereby declare that the said specific trade mark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof.

The application continued:

> The said specific trade mark consists of the compound word "Coca-Cola" in any and every form or kind of representation. A drawing of the said specific trade mark is hereunto annexed.

In the earlier registration of the same words in 1905, the words were written in a very distinctive script and it is in that form that the mark has actually been used by the

plaintiff. We find it a little difficult to understand the purpose or effect of this registration, though obviously it was with a view to obtaining some advantage under *The Unfair Competition Act* which was passed by the Dominion Parliament on May 13th, 1932, and came into force on September 1st, 1932, which statute, by sec. 61, repealed the provisions of the *Trade Mark and Design Act,* R.S.C., 1927, ch. 201, in so far as trade marks are concerned. The application was not based upon the words having acquired any secondary meaning and no such claim is made in this action in respect of the registration.

It was almost unbelievable that the 1932 registration consists merely of the words Coca-Cola in ordinary typewritten form, as shown on the certified copy filed. We have examined the original document, in the Registrar's Office and, as we might have expected, the certified copy before the Court is exactly the same as the original document—a foolscap sheet of plain paper with nothing on it but the compound word Coca-Cola typewritten in the centre of the page. The application refers to this as "a drawing" and the certificate of registration refers to it as the "annexed pattern." Registration was granted for the use of the compound word "in any and every form or kind or representation." The words are the same hyphenated words that appear in the original registration of 1905 in the well known characteristic script. During the opening of the case the learned trial judge said to Mr. Smart, counsel for the plaintiff:

> The whole question is, you say, as to whether the words Pepsi-Cola infringe Coca-Cola?
>
> Mr. Smart: Yes, in the way it is written. The "Coca-Cola" is, as your Lordship may have seen, always displayed in characteristic form. The first letter has a scroll extending below the first word, and the second word has a scroll extending above.

When Mr. Smart was filing proof of the 1932 registration, he said:

> * * * it consists of a compound word "Coca-Cola" again, but it is not shown in the characteristic form. This is a word-mark in itself.
>
> His Lordship: Why was it renewed,—does the statute require it?
>
> Mr. Smart: It is the second registration. That was just before *The Unfair Competition Act* was passed, dividing trade marks into word marks and design marks. And, as the original registration showed not only the word but a special form, it was presumably thought that some additional protection would be obtained by registering it without showing the particular form. As a matter of fact, that drops out of sight now, in view

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

of *The Unfair Competition Act,* which provided that marks registered before that Act, under the *Trade Mark and Design Act,* should be treated, if they were in distinctive form, as a word mark for the word and a design mark for the design. So that by reason of *The Unfair Competition Act,* the first registration is the equivalent of two registrations, one on the word "Coca-Cola," and one on the special and distinctive and characteristic form of that word.

The only evidence touching this registration is that of the Secretary-Treasurer of the plaintiff on his examination for discovery:

Q. Do you make any distinction in point of use between these two registered trade marks?

A. No, sir.

Q. Do you know whether or not there is any distinction made in the use of these two trade marks?

A. Not to my knowledge, no.

Q. You use them indifferently for the same purpose?

A. Yes.

Q. Do you use the trade mark Coca-Cola in any form but the script form?

A. Yes.

Q. In what other form do you use it?

A. It is typed out and may be in block letters.

Q. How do you use it in relation to the product in a form other than the script form?

A. We generally use it in script form in our advertising.

Q. But sometimes you use it in block letter form?

A. Not in our advertising. In our advertising it is used in script form.

Q. Then how is it used in block letter form?

A. In the typing of a letter, for instance.

Q. Is that all?

A. It may appear in block letters in, for instance, a newspaper. Anyone writing the word Coca-Cola in a newspaper article might do that.

Q. But apart from the user of it in block letters where it is not convenient to use it in script, you do not use it in any other way?

A. That is not exactly correct.

Q. Will you state just how you do use it?

A. In a pamphlet, for instance, where you are using a certain form of type, particularly where the lettering is small, it is difficult to make the Coca-Cola trade mark small in distinctive script.

All that the trial judge says about this registration is:

In 1932, the plaintiff also registered the mark "Coca-Cola," for the same use, "in any and every form or kind or representation," but that registration may here be disregarded.

But the registration was specifically pleaded in the statement of claim and its validity specifically denied in the statement of defence and the counterclaim asked for its cancellation. The plaintiff in its supplemental factum takes the position that the registration may be super-

fluous under the old Act but seeks to support it under sec. 28 (1) (*b*) of the new Act, a position which was not taken on the pleadings. In the circumstances we do not think it advisable to make any order on the counterclaim in respect of the 1932 registration. But that registration does show that the plaintiff was plainly asserting a claim to the use of the words themselves in any shape or form.

The defendant's main attack was against the 1905 registration of Coca-Cola upon the ground that the two words were common English words of merely descriptive character and were not distinctive. It was said that "cola" (kola) is a word with a very common meaning, being a genus of trees native to western tropical Africa which had been introduced into the West Indies and Brazil, whose seed, called cola-nut or cola-seed, about the size of a chestnut, brownish and bitter, is largely used for chewing as a condiment and digestive and the extract used as a tonic drink, and that the available literature, much of which we were referred to, shows that the word "cola" was well known and in the widest use to describe beverages containing cola extract long before the registration in 1905 of the mark "Coca-Cola"; further, that coca is a common word describing a South American shrub from the leaves of which cocaine, among other substances, is obtained and that the use by the natives of its leaves for their supposed stimulating properties had long been known. It was contended that long before 1887 extracts from coca leaves and from cola nuts had found a place in the pharmacopœia. We were referred to the case of *Nashville Syrup Co.* v. *Coca Cola Co.* (1), where it is stated at p. 528 that

> In 1887 Pemberton, an Atlanta (Georgia) druggist, registered in the Patent Office a label for what he called "Coca Cola Syrup and Extract."

The Coca Cola Company, in the *Nashville* case (1), was organized as a corporation in 1892 and acquired Pemberton's formula and label, according to the report of that case.

In *United States* v. *Coca Cola Company of Atlanta* (2), the Food and Drugs authorities of the United States filed a libel against the Coca Cola Company (Georgia) charging that its beverage was adulterated and misbranded.

(1) (1914) 215 Federal Reporter 527.

(2) (1916) 241 U.S. 265.

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

The Coca Cola Company denied the charge of misbranding and averred that its product contained "certain elements or substances derived from coca leaves and cola nuts." Mr. Justice Hughes (the present Chief Justice of the United States) in his opinion at p. 289 said:

> In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product contains both.

And at p. 288:

> Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists, for if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation.

It is not without its own significance that there is no evidence in the case now before us that an extract or ingredient from either cola nuts or coca leaves forms any part of the formula from which the plaintiff's beverage is made. We doubt if the public who buy and consume the beverage ever think in terms of either coca leaves or cola nuts. We should think it not unreasonable to presume that the ordinary consumer thinks of "coca" as a mere corruption of the word "cocoa" or "cacao" and might not unreasonably expect that the beverage contained something of the product we all know as cocoa. Mr. Herridge made a powerful attack upon the registration of the words "coca" and "cola" as the basis of an exclusive trade mark for a beverage. No doubt each of the words is a descriptive word but we are not prepared to say that a trader cannot join the words into a compound which, written in a peculiar script, constitutes a proper trade mark.

In *In re Joseph Crosfield & Sons Ltd. and other cases* (1) (an application case), Lord Justice Fletcher Moulton said, at pp. 145 and 146:

> Much of the argument before us on the part of the opponents and the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to

(1) [1910] 1 Ch. 130.

words, and that if you can shew that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive and vice versa. * * * There is therefore no natural or necessary incompatibility between distinctiveness and descriptiveness in the case of words used as trade marks. The notion that there is such an incompatibility is confined to lawyers, and is, in my opinion, due to the influence of the earlier Trade Marks Acts.

These observations were referred to with approval by Lord Maugham (then Maugham, L.J.) in *Bale and Church Ld.* v. *Sutton Parsons & Sutton and Astrah Products* (1) and by Lord Wright in the "Sheen" case, *In re J. & P. Coats, Ld.* (2).

Viscount Dunedin in the *Reddaway* case (3) said:

* * * it seems to me that to settle whether a trade mark is distinctive or not * * * is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case.

The compound word "Coca-Cola" was registered in Canada as early as 1905 and has been used by the plaintiff as its trade name and trade mark in connection with the sale of its beverage (whatever its ingredients may be), and the defendant's claim to have the registration of 1905 declared invalid and cancelled was not made until 1936. If there ever was any legitimate ground for impeaching the 1905 registration of Coca-Cola, there has been such long delay and acquiescence that any doubt must now be resolved in its favour. It would be a matter of grave commercial injustice to cancel the registration that has stood since 1905 and which admittedly has become widely used by the plaintiff.

The evidence is that the plaintiff manufactures the syrup and from it the beverage is made by adding carbonated water in some proportions not disclosed. In some cases the plaintiff itself adds the carbonated water and bottles and sells direct to the retailers; it has some 20 bottling plants of its own. In other cases the plaintiff sells the syrup to jobbers who in turn sell it to soda fountain owners who in turn add the carbonated water to it, before selling to the consumer. But it is also shown that the plaintiff sells the syrup to some 80 different bottling concerns throughout Canada who add carbonated

(1) (1934) 51 R.P.C. 129, at 144. (2) (1936) 53 R.P.C. 355, at 378.
(3) *George Banham & Co. Ltd. et al.* v. *F. Reddaway & Co. Ltd. et al.*, [1927] A.C. 406, at 413.

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

water according to standard instructions and then bottle and sell the beverage to retail dealers. The evidence of Duncan, secretary-treasurer of the plaintiff, was this:

Q. Do these independent bottling plants bottle Coca-Cola alone or do they bottle other beverages as well?
A. Practically all of them bottle other products as well.
Q. What would be the nature of those products?
A. A general line of sodas.

There can be no doubt upon the evidence that the plaintiff's beverage is merchandized in Canada to a large extent through these independent bottling concerns. What is said against the plaintiff is that this method of doing business—selling its product in syrup to some 80 different concerns throughout Canada who in turn add a certain quantity of carbonated water to it in accordance with standard instructions and then sell the bottled drink to the public as Coca-Cola—constitutes a public use of the word Coca-Cola as the name of a particular beverage and an abandonment of the word as a trade mark for the product of a particular manufacturer. There may be some force in that contention but the evidence at the trial was not developed sufficiently on this branch of the case to show explicitly how these bottling concerns, or the retail dealers who purchased from them, actually sold the beverage. It would seem to be a fair inference from the evidence that it was sold under the name Coca-Cola but if the plaintiff's course of dealing with the syrup and the sales to the public of the beverage made from the syrup were to be relied upon as an abandonment by the plaintiff of its trade mark, the facts should have been plainly established.

The defendant's counterclaim for cancellation of the registration of Coca-Cola must fail.

We now come to the attack against Pepsi-Cola. The question is whether or not the names are so similar and confusing as likely to mislead the consuming public. It is not a passing off action; and there is no evidence that anyone has been misled. Where a defendant's trade is of some standing, the absence of any instance of actual confusion may be considered as some evidence that interference is unnecessary. What is said is that the designation "Pepsi-Cola" is "confusingly similar to" the trade mark "Coca-Cola" and that its use by the defendant constitutes an infringement of the plaintiff's trade mark.

Lord Westbury said in *Hall* v. *Barrows* (1):

* * * the property in a trade mark consists in the exclusive right to the use of that mark as applied to some particular manufacture. Nor is it correct to say that the right to relief is founded on the fraud of the defendant, as appears from the case of *Millington* v. *Fox* (2), already referred to. Imposition on the public is indeed necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury done to the plaintiff if the mark used by the defendant be not such as may be mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff. But the true ground of the Court's jurisdiction is property.

Each case depends upon its own facts. We were referred to a great many authorities and while they contain statements of much value on general principles, they all deal with the particular facts of the particular cases. The actual decisions in cases of words of such similarity as "Kleenoff" and "Kleenup" (3), "Coalite" and "Ucolite" (4), "Ustikon" and "Justickon" (5), "Harvino" and "Vyno" or "Vino" (6), do not assist us in this particular case. While the *Payton* case in the House of Lords (7) was an action to restrain passing off, the words of Lord Macnaghten (at p. 634) may well be recalled:

Now, when a person comes forward to restrain a colourable imitation of this sort in a case like this, and when he cannot prove that the defendants have tried to steal his trade, he has to make out beyond all question that the goods are so got up as to be calculated to deceive. The principle is perfectly clear—no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application, and when it is a case of colourable imitation I think it is very desirable to bear in mind what Lord Cranworth said on one occasion—that no general rule can be laid down as to what is a colourable imitation or not. You must deal with each case as it arises and have regard to the circumstances of the particular case.

Lord Parker, then Parker, J., said in another application case, the *Pianotist* case (8):

(1) (1863) 33 L.J. (N.S.) Ch. 204, at 207-208.
(2) (1838) 3 Myl. & Cr. 338.
(3) *Bale and Church Ld.*, v. *Sutton Parsons & Sutton and Astrah Products*, (1934) 51 R.P.C. 129.
(4) *In re an application by Magdalena Securities, Ld.*, (1931) 48 R.P.C. 477.
(5) *Davis* v. *Sussex Rubber Co. Ld.* (1927) 44 R.P.C. 412.
(6) *In re applications by Wheatley Akeroyd & Co. Ld.*, (1920) 37 R.P.C. 137.
(7) *Payton & Co., Ld.* v. *Snelling, Lampard & Co., Ld.*, (1900) 17 R.P.C. 628.
(8) *In re an Application by the Pianotist Co. Ld.*, (1906) 23 R.P.C. 774, at 777.

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case.

The authorities are plain, we think, that the rules of comparison for testing an alleged infringement of a registered mark resemble those rules by which the question of similarity on an application for registration is tested but that it is necessary to establish a closer likeness in order to make out an actual infringement than would justify the refusal of an application to register. The burden on a plaintiff in an infringement action is to show reasonable probability of confusion, while an applicant for registration must establish, if challenged, the absence of all reasonable prospect of confusion.

What is protected by law is the whole mark as registered but a part of a mark may be so taken and used as to amount to a substantial taking of the whole. The only similarity between the two compound words here in question lies in the inclusion of the word "cola" in both marks. The plaintiff does not, and of course could not, claim any proprietary right in the word "cola" standing alone. None the less it is plain that the objection of the plaintiff really goes to the registration by any other person of the word "cola" in any combination, for a soft drink. If such objection is allowed, then the plaintiff virtually becomes the possessor of an exclusive proprietary right in relation to the word "cola." The general attitude of the plaintiff finds expression in the evidence of Duncan, the secretary-treasurer of the plaintiff, whose connection with the parent company goes back to 1920, when he said in answer to a question on this examination for discovery: "But cola to me means coca-cola." The defendant's factum set out a list of actions pending in the Exchequer Court at the present time brought by the plaintiff against other parties for using the word "cola" in connection with their beverages.

Suit No. 17042 vs. E. Denis, to restrain the use of the mark "Denis cola."

Suit No. 17057 vs. Eskimo Bottling Works, to restrain the use of the marks "Eskimo cola" and "Texacola."

Suit No. 17048 vs. Frisco Soda Water Co. Ltd., to restrain the use of the mark "Sunshine cola."

Suit No. 17036 vs. Girouard Ltd., to restrain the use of the mark "Hero-Cola."

Suit No. 17056 vs. Canadian Aerated Waters, Ltd., to restrain the use of the mark "Soda-Kola."

No objection was taken to this statement. The thirty Canadian registrations of trade names or trade marks in which the word "cola" in some form was used were in our opinion admissible as some evidence of the general adoption of the word in names for different beverages or tonics:

Date of Registration	Trade Mark	Product	Page number in Record
June 11, 1896	Bromo-Kola	Medicine	78
April 7, 1898	Clarke's Kola Compound for Asthma	Medicine	80
Mar. 11, 1901	Laxakola	Tonic Beverage	82
Nov. 22, 1902	Kola Tonic Wine	Tonic Beverage	85
Nov. 11, 1905	Coca-Cola	Beverage	87
June 28, 1906	Noxie-Kola	Tonic Beverage	91
Oct. 3, 1906	Tona-Cola	Tonic Beverage	92
Nov. 30, 1906	Pepsi-Cola	Beverage	95
April 9, 1907	La-Kola	Beverage	98
April 25, 1907	Cola-Claret	Beverage	100
Feb. 17, 1910	Kola-Cardinette	Medicine	102
July 23, 1912	Cocktail Kola	Tonic Beverage	104
Oct. 18, 1915	Mint-Kola	Beverage	107
Oct. 29, 1915	Kel-Ola	Beverage	108
April 20, 1918	Kelo	Tonic Beverage	111
Nov. 21, 1919	Kuna Kola	Beverage	113
July 11, 1921	Kola Astier	Medicine	115
Sept. 1, 1922	Rose Cola	Beverage	117
Nov. 2, 1922	Orange Kola	Beverage	119
Nov. 17, 1922	O'Keefe's Cola	Beverage	121
Aug. 31, 1925	Smith's O'Kola	Beverage	123
Feb. 19, 1926	Fruta-Kola	Beverage	124
Mar. 9, 1926	Kola-Fiz	Beverage	127
June 17, 1927	Ketra-Kola	Beverage	128
Oct. 15, 1927	Royal Cola	Beverage	130
June 25, 1928	Kali Kola	Beverage	132
July 3, 1930	Celery-Kola	Beverage	137
Aug. 27, 1930	Mexicola	Beverage	139
Oct. 27, 1930	Klair-Kola	Beverage	140
Nov. 20, 1930	Oxola	Beverage	142
July 7, 1934	Kolade	Medicine	146
Oct. 15, 1936	Vita-Kola	Beverage	148

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

It will be observed that Coca-Cola is the fifth and Pepsi-Cola the eighth in the given list of registrations.

The United States case of *The Coca-Cola Company* v. *The Koke Company of America et al.* (1) was relied upon by the respondent. In that case the Supreme Court of the United States granted an injunction but both courts below had agreed that, subject to one question in respect of which a writ of *certiorari* was granted by the Supreme Court, the plaintiff had on the facts a right to equitable relief. It had been found that the defendant's mixture was made and sold " as and for the plaintiff's goods." Mr. Justice Holmes, who wrote the judgment in the Supreme Court, referred to the defendant's conduct there as " a palpable fraud." Nothing of that sort is proved or seriously suggested in the case before us. The question which the Supreme Court of the United States considered was whether the plaintiff had there been guilty itself of such representations to the public of its own beverage as would disentitle it to equitable relief.

The plaintiff obviously seeks to eliminate the word " Pepsi-Cola " from the trade, in whatever form it is written. This is plain from its demand that even the use of the corporate name of the defendant be restrained. The real basis of the plaintiff's claim is not against the style of script lettering in which the Pepsi-Cola mark as registered or used by the defendant is written; the basis of the claim is the use of the compound word in any form, obviously because it contains the word " cola." The registration of September, 1932, as we have seen, is not in script but in ordinary type and its use is claimed " in any and every form or kind of representation." In the " Peps " and " Pan-Pep " case (2), Eve J. pointed out that

> One must be careful in determining the issue that the claim put forward by the owners of the mark shall not develop into a claim calculated greatly to restrict the use in the particular business of an affix or a prefix extremely common in the trade.

Here the plaintiff is really attempting to secure a monopoly in the word " cola."

Both companies were incorporated under the Dominion *Companies Act*. Under sec. 7 a proposed corporate name

(1) (1920) 254 U.S. 143.

(2) *In re a Trade Mark of the United Chemists' Associations Ltd.*, (1923) 40 R.P.C. 219, at 223.

shall not be a name liable to be confounded with the name of any other company, and sec. 23 provides for a change of corporate name if it is made to appear to the satisfaction of the Secretary of State that the name of a company is so similar to the name of an existing company "as to be liable to be confounded therewith." *The Companies Act,* R.S.C., 1927, chap. 27, secs. 7 (*a*) and 23, as amended by 20-21 Geo. V (1930), chap. 9, secs. 4 and 10. No such application appears to have been made by the plaintiff following upon the incorporation of the defendant. It is one of the circumstances that may be taken into account.

We cannot say by tests of sight and sound that the compound word "Pepsi-Cola" bears so close a resemblance to "Coca-Cola" as to be likely to cause confusion in the trade or among the purchasing public. The difference between the two compound words is apparent. If the sound test is applied, the difference is sharply accentuated; if the sight test is applied, the first word "Pepsi," written in any form, at once distinguishes the compound words. The general impression on the mind of the ordinary person, we think, made by sight and sound of the two marks would be one of contrast, rather than of similarity. Moreover, it must be borne in mind that "Pepsi-Cola" as a registered trade mark in Canada has stood unimpeached since 1906 and that the evidence in the case discloses that pepsin and cola flavour actually form part of the ingredients of the beverage manufactured and sold by the defendant as Pepsi-Cola. To refer again to certain language of Eve J. in the "Peps" case (1):

* * * I feel satisfied that, if confusion had in fact arisen, or, if in fact there had been reason to believe that confusion was likely to arise in the near future, it would not have been impossible to produce evidence of some retailer of the circumstances in which confusion had either been created or was apprehended.

While this is not decisive of the matter, it is of considerable weight.

Considering all the circumstances of the case, the same commercial injustice which we spoke of in connection with the defendant's attempt to cancel the registration of "Coca-Cola" would follow, though perhaps to a lesser extent, the

(1) (1923) 40 R.P.C. 219, at 224.

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Davis J.

injunction sought by the plaintiff against the use of the mark "Pepsi-Cola" by the defendant. We are satisfied the plaintiff has not established its claim for infringement.

The learned trial judge, the President of the Exchequer Court, found infringement and gave judgment in favour of the plaintiff, restraining the defendant not only from selling or distributing its beverage in association with the compound word "Pepsi-Cola" but also from using the word "Pepsi-Cola" in or as part of its corporate name, ordering the delivery up of all labels, advertising matter, price lists and other material in the possession or under the control of the defendant which bear the compound word "Pepsi-Cola," and awarding such damages as may be ascertained on a reference. The counterclaim was dismissed. It is plain from the reasons for judgment of the learned Judge that he concluded that there was a system of deception and fraud practised by the defendant against the plaintiff and that his view of the whole case was much influenced by certain findings of fraud and deception that had been made in a judgment in an American case (Delaware) introduced into the evidence of the present case and referred to by the learned Judge in his reasons for judgment. Neither of the parties to this action was a party in the foreign action and it is sufficient to say, with the greatest respect, that the findings of fact in that case have nothing whatever to do with this case and were clearly inadmissible.

At the opening of the appeal we heard Mr. Ralston, by special leave, who said he represented several other "Cola" companies who feared their rights might be prejudicially affected by certain rather extended observations in the trial judgment to which he called our attention, relating to the number of other registrations and the use of trade names containing the word "cola" in some form. It is only necessary for us to say that our judgment is solely concerned with the rights of the parties to this litigation and nothing in this case can alter or prejudicially affect the rights of other parties.

We would allow the appeal with costs. Both the action and the counterclaim should be dismissed with costs, except that there shall be no order under the counterclaim in respect of the 1932 registration.

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Kerwin J.

KERWIN J.—The defendant, Pepsi-Cola Company of Canada, Limited, appeals from a judgment of the Exchequer Court whereby, at the instance of the plaintiff-respondent (The Coca-Cola Company of Canada, Limited), the appellant, its servants, agents and workmen were perpetually restrained

from selling or distributing any beverage not of the plaintiff's manufacture in association with the compound word "Pepsi-Cola" or any other word or words so similar to the plaintiff's trade mark "Coca-Cola" as to be calculated to cause confusion between the defendant's beverage and that the plaintiff.

The judgment perpetually restrained the appellant

from using the compound word "Pepsi-Cola" in or as part of its corporate name, or any word or words therein so similar to the plaintiff's trade mark "Coca-Cola" as to be calculated to cause confusion between the plaintiff and the defendant;

and also perpetually restrained the appellant, its servants, agents and workmen

from distributing any beverage not of the plaintiff's manufacture in association with any word or words in script form of a kind calculated to cause confusion between the defendant's beverage and that of the plaintiff.

The judgment contained an order for the delivery up by the appellant to the respondent of all labels, advertising matter, etc.; directed a reference to determine the damages suffered by the respondent by reason of the infringement complained of in the statement of claim or alternatively as the plaintiff might elect to take an account of profits; and dismissed the appellant's counterclaim for an order that the trade mark "Coca-Cola" was not registrable and for the cancellation of the registrations of the respondent.

At the trial the respondent filed a certificate of registration of trade mark dated November 11th, 1905, a certificate of another trade mark registered September 29th, 1932, a sample bottle of Pepsi-Cola, two photographs showing markings on cases of Pepsi-Cola, and a sample bottle of Coca-Cola. In addition to filing these exhibits, the respondent read certain questions and answers from the examination for discovery of Donald S. Hawkes, General Manager of the appellant company, which merely showed that the deponent and some of his predecessors in the position occupied by him had been at various times connected with the respondent company and with some other company which may be referred to as the Coca-Cola Com-

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Kerwin J.

pany. There is also a statement that the appellant company did not take over the Canadian business of any other company, to the deponent's knowledge, but in the view I take of the matter, the effect of that answer need not be considered. The respondent then rested its case and after a motion for non-suit had been refused, certain evidence was led and certain exhibits filed on behalf of the appellant. It appears that the appellant registered the name "Pepsi-Cola," in the form shown in its application, as a trade mark to be applied to the sale of beverages and particularly to a non-alcoholic beverage on November 30th, 1906.

Whatever may have been proved in other actions brought by the respondent or its parent company against other individuals or companies cannot, of course, be considered, and it is unnecessary, in my opinion, to define the precise effect of section 18 of *The Unfair Competition Act, 1932,* chapter 38. The respondent undoubtedly appears to be the owner of the trade mark and the word mark "Coca-Cola," and by section 3 of the Act the appellant is prohibited from knowingly adopting for use in Canada in connection with beverages and syrup for the manufacture of such beverages the respondent's trade mark or any distinguishing guise which is similar to it. By section 2 (*k*):—

> "Similar," in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

In the present case the only admissible relevant evidence consists of the two names, the forms in which they respectively appear and the fact that they are used in the same areas in Canada in connection with similar wares, i.e., "soft" drinks. Facsimiles of the respective trade marks are reproduced in the judgment of the President of the Exchequer Court (1). A comparison of the two hyphenated words, their appearance in script, and their sound as pronounced and as likely to be pronounced by dealers

(1) [1938] Ex. C.R. 263; [1938] 4 D.L.R. 145.

and users of the wares of the parties do not indicate that they so resemble each other or so clearly suggest the idea conveyed by each other that they fall within the definition of section 2 (*k*).

Numerous judgments were cited at bar to show that in other cases certain words or expressions were calculated to cause the goods of one party to be taken by purchasers for the goods of the other party but the question in each case is one of fact. "How (asks Lord Watson in *Johnston* v. *Orr Ewing* (1)) can observations of judges upon other and quite different facts bear upon the present case, in which the only question is what is the result of the evidence?" Lord Blackburn in the same case states (2): "The question to be determined is a question of fact." In the present case that question must, in my opinion be answered adversely to the respondent.

As to the counterclaim, I find myself unable to agree with all the reasons given by the learned President. I would affirm its dismissal in so far as respondent's trade mark registered as No. 43/10433 is concerned, but solely on the ground that there is no evidence that would warrant the Court declaring that it was not registrable or ordering that the registration be cancelled. I would set aside the judgment *a quo*, in so far as it dismisses that part of the counterclaim which asks for a declaration that respondent's trade mark registered as No. 257/55268 was not registrable and for an order cancelling the registration.

The parties having been permitted to file supplementary factums, it appears from that submitted on behalf of the respondent that the position now taken by it with respect to the second trade mark differs from that advanced by it at the trial. Our attention has been drawn to section 28 (1) (*b*) of *The Unfair Competition Act, 1932*:—

> 28. (1) Notwithstanding anything hereinbefore contained:—* * *
>
> (*b*) similar marks shall be registrable for similar wares if the applicant is the owner of all such marks, which shall be known as associated marks, * * *

I am not prepared, at the moment, to determine the precise meaning of that provision but in view of it and

(1) (1882) 7 App. Cas. 219, at 219-220.
(2) at 220.

68285.

1939

PEPSI-COLA CO. OF CANADA, LTD. v. COCA-COLA CO. OF CANADA, LTD.

Kerwin J.

of the course that the trial took, I am not disposed to preclude either party in a properly framed action litigating the question whether under section 28 (1) or otherwise respondent could apply for and secure registration of the compound word "Coca-Cola" although the same compound word in script form had already been registered by it as a trade mark. The judgment on the counterclaim should, therefore, declare that with respect to the respondent's second trade mark, the Court does not see fit to make any order.

The appellant should have its costs of the appeal and of the action, and the respondent its costs of the counterclaim.

Appeal allowed in part.

Solicitors for the appellant: *Creelman, Edmison & Beullac.*

Solicitors for the respondent: *Osler, Hoskin & Harcourt*

1939

* Feb. 6, 7, 8.
* Nov. 30.

DOUGLAS RICHMOND STREET AND NORMAN BROWNLEE (PLAINTIFFS) } APPELLANTS;

AND

OTTAWA VALLEY POWER COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Water-course—Dams—Lease from Government—Order in Council—Flooding of lands—Damages—Jurisdiction to entertain claims—Whether Superior Court or Quebec Public Service Commission—Work connecting two provinces—Watercourse Act, R.S.Q., 1925, c. 46, s. 12.

The Montreal Engineering Company, later replaced by the Chats Falls Power Company whose name was subsequently changed to that of the respondent company, was authorized by Order in Council to erect, operate and maintain a dam in the river Ottawa, at Chats rapids, such Order purporting to be given pursuant to sections 4 *et seq.* of the Quebec *Watercourse Act*. The appellants, alleging that they were riparian proprietors of certain properties situated west of Chats Falls and although admitting that the water level of the river was not in consequence of these works raised above the ordinary high water mark, claimed that they were nevertheless entitled to recover damages in virtue of section 12 of the *Watercourse Act* on several grounds mentioned in their statement of claim. Section 12

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

enacts that "(1) The owner or lessee of any such work shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood gates or otherwise. (2) Such damages shall be assessed and fixed by the Quebec Public Service Commission." The respondent contested the appellants' right to claim damages and further alleged that the Superior Court had no jurisdiction to entertain the claim under paragraph (2) of section 12. The trial judge dismissed the appellants' action, finding upon the evidence that no damages had been sustained. The appellate court affirmed that decision on many grounds, holding *inter alia* that the Superior Court had no jurisdiction because such damages should have been assessed by the Quebec Public Service Commission under section 12 of the Act. The appellants also advanced before this Court a new contention that the dam of the respondent company, being part of a single work connecting the province of Quebec with the province of Ontario, was, therefore, part of a work which the former province was without legislative competence to authorize.

Held that the finding of the trial judge that no damages had been sustained by the appellants should not be disturbed, such finding being amply supported by the evidence.

Held, also, reversing the judgment of the appellate court on that point, that under articles 7295 and 7296 of R.S.Q. (1909) the Superior Court possessed jurisdiction to entertain an action for damages such as the present and to give judgment for such damages as might be assessed. Section 12 of the present *Watercourse Act* is not new legislation; similar legislation having been passed in 1856 (19-20 Vict., ch. 104), subsequently appearing as chapter 51 of the Consolidated Statutes of Lower Canada (1861) and again as articles 5535 and 5536 R.S.Q. (1888). Since the first enactment in 1861, there has been a series of decisions in the province of Quebec in which it was held that the right to damages given by the statute was one which could be enforced by action in any competent court; and the legislature of Quebec by re-enacting in 1888 and again in 1909 the legislation first passed in 1856 and later embodied in chapter 51 of the Consolidated Statutes of Lower Canada (1861) must be taken to have given statutory sanction to the course of decision culminating in the judgment of this Court in *Breakey* v. *Carter* (Cassels Digest, 2nd ed. 463). By force of articles 7295 and 7296 of R.S.Q. (1909) the Superior Court would have been, so long as that legislation remained unchanged, competent to entertain such an action as the present. It must be taken that, by these articles, the legislature declared an action for damages under article 7296 (1) to be competent in the Superior Court. Terms more explicit than those contained in paragraph 2 of section 12 would be required to deprive the courts of Quebec of the jurisdiction they possessed under the then existing statute. Subsection 2 of section 7296 R.S.Q. (1909) was providing for the ascertainment of damages by experts; and by enacting section 12 of the *Watercourse Act* to replace ss. 2 of s. 7296 R.S.Q., the legislature must be deemed not to have taken away the jurisdiction of competent courts. The more natural interpretation of the action of the legislature in enacting section 12 would be that recourse to experts for assessing damages was being replaced by the Public Service Commission and that competent courts had not been deprived of jurisdiction.

1939

STREET
v.
OTTAWA VALLEY POWER CO.

Held, further, that the appellants' ground of appeal based on the contention that the dam was part of a simple work connecting the province of Quebec with the province of Ontario was not open to the appellants in this court. Upon the facts, the dam was a work wholly situated within the province of Quebec, constructed there under the authority of a provincial statute and the property in relation to which the appellants allege they had suffered prejudice was also situated in that province. *Prima facie,* therefore, the reciprocal rights and liabilities of the parties must be governed by the law of that province. It was not alleged in the pleadings that this dam affected the flow of the river south of the interprovincial boundary, and the issues of fact which might have to be considered for the purpose of examining this contention of the appellants are not among the issues to which an order was directed, or which were considered by the courts below, or presented to those courts by the pleadings or otherwise.

Judgment of the Court of King's Bench (Q.R. 65 K.B. 504) aff.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Trahan J. and dismissing the appellants' action for damages.

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

W. B. Scott K.C. and *P. F. Foran* for the appellants.

Aimé Geoffrion K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The appellants' claims are in two separate groups. The first of these is based upon the ground that for various reasons the works of the respondents are illegal; those in the second group are founded on the right to damages given by section 12 of the Quebec *Watercourse Act.*

It is convenient to deal first with these latter. Section 12 is in these words:

12. (1) The owner or lessee of any such work shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the floodgates or otherwise.

(2) Such damages shall be assessed and fixed by the Quebec Public Service Commission.

The works in question were constructed under authority of an order of the Lieutenant-Governor in Council of the 20th of June, 1930, purporting to be given pursuant to sec-

(1) (1938) Q.R. 65 K.B. 504.

tions 4 *et seq.* of *The Watercourse Act.* Admittedly, the water level of the river was not, in consequence of these works, raised above the ordinary high water mark; but it is urged that the appellants as riparian proprietors are entitled to recover damages in virtue of section 12 on several grounds.

The damages under that section are claimed in virtue of the allegations in paragraphs 13 to 18 inclusive in the declaration, and these paragraphs are textually as follows:

13. That since the erection and construction of the said dams as aforesaid the said defendant has caused the waters of the said river Ottawa to be raised thereby to a level corresponding to and exceeding the level of the said river in the spring time at high water mark notwithstanding the protests of the plaintiffs against such action and have since maintained said waters at said unnatural level throughout all periods of the year.

14. That the action and conduct of the defendant has caused loss, damage and injury to the plaintiffs by the continuous presence of a large body of water adjoining their properties, because of the perpetual seepage, percolation and changes in the bank of the said river opposite the properties of plaintiffs by which the bank of the river has been weakened and destroyed and the flowing of the said river on to the property of the plaintiffs has ensued, especially after wind storms, and from the action of the ice on the shore and the breaking up of the ice in the spring time of the year; and the drainage of the said lots and the dwellings thereon for sanitary and other purposes has been rendered impossible, and the shade and ornamental and useful trees growing thereon have been undermined and destroyed and their replacement rendered impossible.

15. That the defendant has neglected to strengthen the shores of the said river so altered by them so as to prevent such percolation and changes weakening in the said shores.

16. That the said property of the plaintiffs was naturally well adapted to the laying out of a summer resort.

17. Plaintiffs' property as a summer resort has been further damaged because the raising of the waters of the said river has interfered with boating, bathing, and landing facilities connected therewith, and has taken away all rights of accession and alluvion.

18. That the sales and the disposal of the lots of the plaintiffs have been lessened and the market therefor has been destroyed because of the degradations and changes which have been caused on the said lots of the plaintiffs by the above-mentioned acts and proceedings of the defendant in connection with the waters of the Ottawa river, and the said market in any event can never be reopened so long as the present state of affairs caused by the action of the defendant is allowed to continue.

By the plea these allegations are denied. The trial lasted several days and evidence was given on both sides on the issue thus raised and the learned trial judge held

1939

STREET
v.
OTTAWA VALLEY POWER CO.

Duff C.J.

that the evidence did not justify a finding that the plaintiffs were entitled to such damages. He found:

> Considérant que les faits révélés par la preuve ne donnent pas ouverture aux conclusions de la demande et que, d'ailleurs, ils ne sont pas suffisamment précis et concluants pour permettre au tribunal d'asseoir une condamnation à des dommages-intérêts;
>
> Considérant que la défenderesse a établi en fait et en droit le bien fondé de son plaidoyer.

Having regard to the character of the allegations which are denied by the plea and which the learned trial judge thus found to be negatived by the evidence, it is plain that the learned judge was in an exceptionally advantageous position to pass upon the issues with which he was dealing; and, having fully considered that evidence, I am quite satisfied that we should not be justified in interfering with his findings.

There is one topic upon which it is desirable, perhaps, to make an observation, and that concerns the claim based upon the alleged reduction in the width of the beach.

It is quite clear that the right of *accès* and *sortie* to the river as a navigable river is in no way interfered with. It should also be noticed that in the province of Quebec the beds of navigable rivers, as well as the banks, are the property of the Crown (article 400 C.C.); and the appellants, whose property is bounded on the southerly side by the Ottawa river, have no title to any of the soil below high water mark. The learned trial judge has found, and this is not now disputed, that the respondents' works have not the effect of elevating the waters of the river above ordinary high water mark and that the property of the appellants has, therefore, not been inundated; and it seems indisputable that the respondents, who *ex hypothesi* in virtue of the Order in Council, have authority from the Crown for raising the waters of the river, are not in consequence alone of this inundation of Crown property answerable at the suit of the appellants. They could have no claim as against anybody acting for the Crown for prejudice suffered by reason of the deepening of the channel or by reason of the penning back of the waters of the river on Crown property; and, if there were any prejudice arising from the sole fact that as a result of the work constructed by the respondents under contract with the Crown, the beach became covered with water at sea-

sons when it would otherwise be bare, that prejudice could, in my opinion, not be the basis of a claim for damages under section 12.

I rest my judgment, however, in this respect upon the finding of the learned trial judge that no such damages were sustained and that this finding is amply supported by the evidence.

As to illegality, the grounds of complaint, including the claim in respect of the lodging of the plans and other documents in the Registry Office have, I respectfully think, been satisfactorily dealt with in the Court of King's Bench and I say nothing further about any of them with the exception of one which was raised in this court for the first time.

The appellants sought to advance a contention not mentioned in the courts below that the dam of the respondents is part of a single work connecting the province of Quebec with the province of Ontario and is, therefore, part of a work which the former province is without legislative competence to authorize.

This is a contention which is clearly not open to the appellants in this court. As the facts appear from the record before us, the respondents' dam is a work wholly situated within the province of Quebec, constructed there under the authority of a provincial statute, and the property in relation to which the appellants allege they have suffered prejudice is also situated in that province. *Prima facie,* therefore, the reciprocal rights and liabilities of the parties must be governed by the law of that province. It is not alleged in the pleadings that this dam affects the flow of the river south of the interprovincial boundary, and the issues of fact which might have to be considered for the purpose of examining this contention of the appellants are not among the issues to which evidence was directed, or which were considered by the courts below, or presented to those courts by the pleadings or otherwise.

Another question of law of great importance was raised and argued which, in the views above expressed, it is strictly unnecessary to pass upon. I think, however, it is inadvisable to put it aside without comment.

Section 12 of the *Watercourse Act* has already been quoted. The Court of King's Bench has held, acceding to the contention of the respondents, that this enactment

1939
STREET
v.
OTTAWA VALLEY POWER CO.
Duff C.J.

must be interpreted according to the generally recognized rule that, where a right of compensation is given by statute, in respect of something the statute authorizes, and by the same enactment extrajudicial machinery is provided for ascertaining the amount, the matter of compensation is not cognizable by the courts, until, at all events, the amount has been determined in accordance with the statutory method; and accordingly that the Superior Court had no jurisdiction to entertain the claim for damages arising under section 12.

Section 12 is not new legislation. In 1856, the legislature of the old province of Canada passed a statute, restricted in its operation to Lower Canada which, in its title, is described as *An Act to authorize the improving of Watercourses.* Thereby (sections 3 and 4) riparian proprietors were authorized to improve any watercourse bordering upon or passing through their property for industial purposes, subject to the payment of such damages as might result from these improvements to other persons in the ordinary manner.

This statute, which was chapter 104 of 19-20 Vict. appeared as chapter 51 of the Consolidated Statutes of Lower Canada of 1861, and again as articles 5535 and 5536, R.S.Q. (1888).

Since the first enactment of this legislation in 1861 there had been a series of decisions in the province of Quebec in which it was held that the right to damages given by the statute was one which could be enforced by action in any competent court. This appears to have been first held in 1869 in the case of *Nesbitt* v. *Bolduc* (1); Loranger Commentaires du Code Civil, vol. I, p. 140, no. 25. This decision was followed in *Jean* v. *Gauthier* (2); and in *Breakey* v. *Carter* (3).

In 1885 the Supreme Court of Canada held (in *Breakey* v. *Carter*) (4) that the mode of assessing damages prescribed by chapter 51 of the Consolidated Statutes of Lower Canada did not exclude the right to proceed by ordinary action; and after this decision the legislation was re-enacted by R.S.Q. (1888), articles 5535 and 5536. Later, the construction of these articles of R.S.Q. (1888) came

(1) (1869) 15 R.L. 513, note.
(2) (1877) 3 Q.L.R. 360.
(3) (1881) 7 Q.L.R. 286.
(4) Cassels Digest, 2nd ed. 463.

before this Court in *Gale* v. *Bureau* (1); and it was there held that, in view of the previous course of jurisprudence in the province of Quebec and the decision of this Court in *Breakey* v. *Carter* (2) (and the subsequent re-enactment of the legislation in identical terms) the statute must be construed and applied conformably to those decisions; and, consequently, that the Superior Court of the province of Quebec had jurisdiction to entertain an action for damages and to assess the damages under article 5536, R.S.Q. (1888). During the progress of the litigation in *Gale* v. *Bureau* (1) through the Courts the legislation was again re-enacted in identical terms by articles 7295 and 7296 of R.S.Q. (1909).

There appears to be no room for doubt that, under these articles of the Revised Statutes of 1909, the Superior Court possessed jurisdiction to entertain an action for damages such as the present and to give judgment for such damages as might be assessed. The legislature of Quebec, by re-enacting in 1888 and again in 1909 the legislation first passed in 1856, and later embodied in the provisions of chapter 51, C.S.L.C. (1861), must be taken to have given statutory sanction to the course of decision culminating in *Breakey* v. *Carter* (2), decided by this Court in 1885. The rule in such a case is stated by Lord Halsbury in *Webb* v. *Outrim* (3) in a passage quoted from the judgment of Griffith C.J. in these words:

> When a particular form of legislature enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which has been so put upon them.

This rule was affirmed afresh and applied in *Barras* v. *Aberdeen* (4). In that case, three of the Law Peers, Lord Buckmaster, Lord Warrington of Clyffe and Lord Russell of Killowen, adopted and applied the rule as laid down by Lord Halsbury and also as laid down by James L.J. in *Ex parte Campbell* (5). Lord Blanesburgh and Lord Macmillan would appear to have thought that the language of James L.J. required some qualification, but neither of them would, as their judgments shew, have had

(1) (1910) 44 S.C.R. 305.
(2) Cassels Digest, 2nd ed. 463.
(3) [1907] A.C. 81, at 89.
(4) [1933] A.C. 402.
(5) 1870) L.R. 5 Ch. App. 703.

1939

STREET
v.
OTTAWA
VALLEY
POWER CO.

Duff C.J.

any doubt about the application of the rule in a case like the present; where a course of decision in the province of Quebec, beginning in the year 1869, culminated in a decision of this Court in 1885 and the statute, which was the subject of these decisions, was thereafter re-enacted without modification in its terms. It is evident, I think, that Lord Blanesburgh, who thought the rule not applicable in *Barnes* v. *Aberdeen* (1), would have had no hesitation in applying it in the circumstances now under consideration. That, I think, sufficiently appears from his observations at page 433.

We start from the premise then that, by force of articles 7295 and 7296 of R.S.Q. (1909), the Superior Court would have been, so long as that legislation remained unchanged, competent to entertain such an action as the present. It must be taken that, by these articles, the Legislature declared an action for damages under article 7296 (1) to be competent in the Superior Court.

The question raised by the contention of the respondents is this: by the change embodied in subsection 12, as it now appears in the Revised Statutes, has the Legislature taken away this jurisdiction?

For subsection 2 of article 7296 R.S.Q. (1909) providing for the ascertainment of damages by experts, the following is substituted:

> Such damages shall be assessed and fixed by the Quebec Public Service Commission.

I am very much disposed to think that something more explicit than this is required to deprive the courts of Quebec of the jurisdiction they possessed under the existing statute. The legislature is conclusively presumed to have known the effect of the re-enactment of the statute after the earlier decisions,—to have known, that is to say, that by the statute, as it stood before it was amended, the Superior Court had jurisdiction, but that the proceeding by way of assessment by experts was also available. There is at least much to be said for the view that the more natural interpretation of the action of the Legislature in amending subsection 2 is that recourse to experts is being replaced by the Public Service Commission, and that the courts have not been deprived of jurisdiction.

(1) [1933] A.C. 402.

1939

STREET v. OTTAWA VALLEY POWER CO.

Duff C.J.

Reference ought to be made to *The King* v. *Southern Canada Power Co.* (1) and to the judgment therein delivered by Lord Maugham. Damages were recovered under section 12 of the *Watercourse Act* in that case by the Crown in an action brought in the Exchequer Court of Canada. It does not appear to have been suggested throughout the litigation that the jurisdiction of the Quebec Public Service Commission in respect of damages was exclusive although an objection was taken by the defendant to the jurisdiction of the Exchequer Court, the contention being that the action ought to have been brought in the Superior Court.

This appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Foran & Foran.*

Solicitors for the respondent: *Geoffrion & Prud'homme.*

IN THE MATTER OF A REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9 OF THE FOURTH SESSION, EIGHTEENTH PARLIAMENT OF CANADA ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

1939

* June 19, 20, 21.

1940

* Jan. 19.

Constitutional law—Appeals to His Majesty in Council and to the Judicial Committee from Canadian courts—Whether Parliament of Canada has jurisdiction to pass an Act amending the Supreme Court Act so as to abrogate jurisdiction of Privy Council to hear such appeals.

A Bill, entitled "An Act to amend the *Supreme Court Act*" was referred to this Court by Order of the Governor General in Council for its opinion as to whether that Bill, or any of its provisions, was *intra vires* of the Parliament of Canada. Such Bill purported to enact that "the Supreme Court of Canada shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada"; and, for the purpose of giving effect to that enactment, it was in substance provided that the jurisdiction of His Majesty in Council and of the Judicial Committee to hear appeals from Canadian courts was abrogated.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] 3 D.L.R. 737; [1937] 3 A.E.R. 923.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Held, by the Court, that the Parliament of Canada was competent to enact such Bill in its entirety.

Crocket J. was of the opinion that the Bill should be declared wholly *ultra vires* of the Parliament of Canada.

Davis J. was of the opinion that the Bill referred if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceeding commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following question: Is said Bill 9, entitled "An Act to amend the *Supreme Court Act,*" or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

Whereas there has been laid before His Excellency the Governor General in Council a report from the Right Honourable the Minister of Justice, dated April 18th, 1939, representing that, at the fourth session of the Eighteenth Parliament of Canada, Bill 9, entitled "An Act to amend the Supreme Court Act," was introduced and received first reading in the House of Commons on January the 23rd, 1939; and

That, on April the 14th, the debate on the motion for second reading of this Bill, an authentic copy of which is hereto annexed, was adjourned in order that steps might be taken to obtain a judicial determination of the question of the legislative competence of the Parliament of Canada to enact the provisions of the said Bill in whole or in part;

Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and pursuant to the provisions of section 55 of the Supreme Court Act, is pleased to refer and doth hereby refer the following question to the Supreme Court of Canada for hearing and consideration:—

Is said Bill 9, entitled "An Act to amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada?

E. J. Lemaire,
Clerk of the Privy Council.

The text of the Act referred to this Court is the following:

An Act to amend the Supreme Court Act of Canada

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Section fifty-four of the *Supreme Court Act,* chapter thirty-five of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor:—

"54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.

(2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

(3) *The Judicial Committee Act, 1833,* chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and *The Judicial Committee Act, 1844,* chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada."

2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the *Canada Gazette*.

Aimé Geoffrion K.C., C. P. Plaxton K.C. and *W. R. Jackett* for the Attorney-General of Canada.

Gordon D. Conant K.C. (Attorney-General), *W. B. Common K.C.* and *E. R. Magone K.C.* for Ontario.

Eric Pepler for the Attorney-General for British Columbia.

P. H. Chrysler for the Attorney-General for Manitoba.

J. B. Dickson for the Attorney-General for New Brunswick.

J. H. MacQuarrie K.C. (Attorney-General) and *T. D. MacDonald* for Nova Scotia.

S. F. M. Wotherspoon for the Attorney-General for Prince Edward Island.

THE CHIEF JUSTICE—For convenience of discussion, it is advisable to consider separately the prerogative appeal and the appeal by right of grant, or more shortly, the appeal as of right.

And first, of the prerogative appeal. The jurisdiction of His Majesty in Council in respect of the appeal which "lies" from the decisions of "various courts of judicature" in "the East Indies, the Colonies and plantations and other dominions abroad" was affirmed and regulated by the Parliament in the Privy Council Acts of 1833 and 1844. By the former of these Acts, the Judicial Committee of His Majesty's Privy Council was established, a statutory body, to whom (it was enacted)

> all appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom may be brought before His Majesty in Council

from the order of any Court or Judge should thereafter be referred by His Majesty. It was enacted further that the Judicial Committee should hear such appeals and make a report or recommendation to His Majesty in Council for his decision thereon.

"It is clear," says the judgment of the Judicial Committee in *British Coal Corporation* v. *The King* (1),

(1) [1935] A.C. 500, at 510.

that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of Law, to which by the statute of 1833 all appeals within their purview are referred.

The Bill referred to us purports to enact that the Supreme Court of Canada shall have, hold and exercise exclusive, ultimate, appellate jurisdiction, civil and criminal, in and for Canada; and, for the purpose of giving effect to this enactment, it is in substance provided that the jurisdiction of His Majesty in Council and of the Judicial Committee to hear appeals from Canadian Courts is abrogated.

The consideration of the questions raised involves an examination of the authority of the Parliament of Canada under section 101 of the *British North America Act* as well as its authority under its general powers to make laws for the peace, order and good government of Canada.

The authority last mentioned, to make laws for the peace, order and good government of Canada is, by the express provisions of the Confederation Act of 1867, affected by only two limitations; first, it does not extend to matters assigned exclusively to the legislature of the provinces, a limitation which still persists notwithstanding the enactments of the Statute of Westminster; and, second, by section 129, it did not authorize the repeal, abolition or alteration of any law in force in the federated provinces or of any legal commission, power or authority existing therein, enacted by or existing under any Act of the Imperial Parliament, a limitation now, since the enactment of the Statute of Westminster, no longer in force.

Section 101 is expressed in absolute terms and by it,

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

Whether the second of the above mentioned limitations formerly affected the authority of Parliament under section 101 is of little, if any, importance since the statute of Westminster. I shall advert to the point later.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

I turn first to the general powers of Parliament respecting peace, order and good government. It is, I think, not wholly irrelevant to notice the nature of the sovereignty which the Parliament of Canada has been conceived to possess (within, at all events, the territorial limits of Canada) and has actually exercised since the earliest times of Confederation. Under the authority of section 146 of the *British North America Act,* the territories comprised within Rupert's Land and the North-Western Territories (to the north and west of the federated provinces) were (June, 1870) admitted into the Union. Already, in May, 1870, the Parliament of Canada had (acting under its general law making authority) provided for the establishment (to take effect upon the admission of those territories) of the province of Manitoba, for a constitution for the province including an executive authority exercisable in that province by a Lieutenant-Governor, parliamentary institutions with legislative authority respecting (*inter alia*) the administration of justice, taxation, municipal institutions, property and civil rights virtually identical with the authority granted to the original provinces under section 92. For more than thirty years thereafter, the territory west of Manitoba, extending to the Rocky Mountains, now within the provinces of Alberta and Saskatchewan, was governed under statutes of the Parliament of Canada which provided for executive authority vested in a Lieutenant-Governor, a legislative assembly with large legislative powers, for taxation, for the administration of justice and for courts of judicature. In 1905, by other statutes of Canada, the provinces of Alberta and Saskatchewan were established with constitutions similar to that of Manitoba.

True, it is, that, by the *British North America Act* of 1871, it was recited that doubts had been expressed as to the authority of Parliament to enact the Manitoba Act; but by the Act of 1871 the Manitoba Act was declared to have been validly enacted and the power to erect provinces and provide constitutions for them was explicitly vested in Parliament together with unqualified authority to legislate for the peace, order and good government of the territories not included in any province.

It would, indeed, be singular if the enactments of a legislature, charged with such responsibilities, responsibili-

ties of the very highest political nature, should be interpreted and applied in a narrow and technical spirit or in a spirit of jealous apprehension as to the possible consequences of a large and liberal interpretation of them.

The question whether the Bill falls within the ambit of the powers of Parliament under the authority to make laws for the peace, order and good government of Canada must be answered in the affirmative unless the subject-matter of the Bill is in whole or in part, in the words of section 91, a matter "coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." The main contention against the validity of the Bill on this branch of the argument is founded on clause 14 of section 92, which is in these words:

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

* * *

(14) 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.

So far as concerns this contention, the subject-matter of this Bill in its substance is found in sections 2 and 3 which profess to abrogate the jurisdiction of His Majesty in respect of appeals from the courts of Canada and the statutory jurisdiction of the Judicial Committee to hear and report upon such appeals under the statutes of 1833 and 1844. I repeat, I am at the moment addressing my attention only to the prerogative appeal.

The members of His Majesty's Privy Council, as everybody knows, are nominated by the King on the advice of the Prime Minister of the United Kingdom (Anson, Vol. II, Part I, p. 153). The Judicial Committee is, as was observed in the judgment mentioned above (*British Coal Corporation* v. *The King* (1), a statutory appellate Court established and exercising jurisdiction as a court of justice under statutes of the Parliament of the United Kingdom.

The Court (the Judicial Committee) exists and exercises its jurisdiction under authority derived from the Parliament of the United Kingdom and its members are Privy Councillors who are nominated by statute in virtue

(1) [1935] A.C. 500, at 510, 511.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

of holding, or having held, specified high judicial offices in England or Scotland or are appointed by Order in Council pursuant to statutory authority. The constitution and organization of the Court in every respect is exclusively subject to the Parliament of the United Kingdom.

The constitution of the Judicial Committee is not, I think, without importance in its bearing upon the point I am now to consider; whether, namely, the subject-matter of the Bill referred to us in whole or in part falls within the category of matters defined by clause 14 of section 92.

First of all, it is obvious that the Judicial Committee is not a provincial court within the sense of that clause, it being self evident that the phrase denotes courts which, as to their jurisdiction are primarily subjects of provincial legislation and whose process in civil matters, save in certain exceptional cases which will be adverted to, does not run beyond the limits of the province. No legislature in Canada has, of course, anything to say about the constitution of the Judicial Committee or about its organization. Provision for all such matters is, as I have said, made by the legislature of the United Kingdom and orders in council pursuant to authority derived therefrom.

The argument is, however, put in this way. Decisions of the provincial courts are subject to be reversed or varied, it is said, under prevailing law, by the decisions of the Judicial Committee and the orders of His Majesty in Council; and this appellate jurisdiction includes the subsidiary power to make such orders and give such directions as the appellate tribunal may consider just and convenient for the purpose of giving effect to such decisions: and the court appealed from may be required by its own process and its own officers to carry out such orders.

It is contended that legislation which abrogates this jurisdiction so to intervene in and ordain the course of proceedings in provincial courts is legislation in relation to the jurisdiction of such courts.

I cannot agree with this view for two reasons. First, while it would, perhaps, not be an abuse of language to say that this jurisdiction of His Majesty in Council, by which he is enabled, for the purpose of giving effect to adjudications in prerogative appeals, to make orders requiring the court appealed from to carry out such adjudications is a

jurisdiction which affects the jurisdiction of the Court from which the appeal lies, it is, nevertheless, quite another thing to say that this jurisdiction or power of His Majesty's is a matter within the definition of clause 14 so that legislation to abrogate that jurisdiction is legislation "in relation to" provincial courts within the meaning of clause 14. I am unable to convince myself that such legislation would in its "pith and substance" be legislation "in relation to" the "constitution, maintenance and organization of provincial courts" or "procedure in those courts in civil matters." Its true subject matter would be the appellate jurisdiction of the Judicial Committee.

My second reason really involves a consideration of the alternative argument based upon clause 14. The general subject of clause 14 is "the administration of justice *in* the province." It is argued that the scope of these words must not be restricted by reason of the specific designation of provincial courts and matters connected therewith, as included in the general subject, and it is said interposition in proceedings in provincial courts in the manner just alluded to constitutes an intervention in the administration of justice and that the orders in council by which this is effected are truly acts done in "the administration of justice in the province"; and that legislation abrogating the jurisdiction from which they emanate is consequently legislation "in relation to" that subject.

Something must be said at this point as to the essence of the prerogative appeal which the Bill before us purports to abrogate. The judgment of the Judicial Committee in *Nadan* v. *The King* (1) (as interpreted in *British Coal Corporation* v. *The King* (2)) requires us to hold that any legislation intended to abrogate the prerogative appeal must, if it is to be effective, be "extra-territorial in its operation"; that the legislative powers vested in the Parliament of Canada under the enumerated clauses of section 91 did not, before the Statute of Westminster, enable that legislature to annul the prerogative right of the King in Council to grant leave to appeal because, however widely such powers are construed, they are confined to "action taken in Canada"; and it would, indeed, appear that the central governing act in the appeal to

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

the Judicial Committee is the decision. If there is authority in the Court as an appellate court to pronounce an effective decision, it is because such is the law that governs, not the appellate tribunal alone, but the inhabitants of Canada and the courts in Canada which carry out the decision. To say that the authority to adjudicate exists without the authority to make the adjudication effective in Canada would seem to be a self-contradictory statement; and you cannot get rid of this authority unless you are endowed, it was held in *Nadan* v. *The King* (1), with extra-territorial powers which the Parliament of Canada did not in 1926 possess.

To return to section 92 (14). The legislative powers of the provinces are strictly confined in their ambit by the territorial limits of the provinces. The matters to which that authority extends are matters which are local in the provincial sense. This principle was stated in two passages in the judgment in the *Local Option* case (1) delivered by Lord Watson speaking for a very powerful Board at pp. 359 and 365, respectively. I quote them:

* * * the concluding part of s. 91 enacts that

"any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons* (2) that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature.

* * *

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have

(1) [1926] A.C. 482.

(2) [1896] A.C. 348 (*Attorney-General for Ontario* v. *Attorney-General for the Dominion*).

(3) (1881) 7 App. Cas. 96, at 108.

been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated

The legislation of the provinces under all the heads of section 92 is, by law, confined to matters which are local "in the provincial sense." In the *Royal Bank of Canada* v. *Rex* (1) a statute of Alberta was held, in conformity with this principle, to be invalid and beyond the powers of the legislature.

inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

The subject-matter in question was beyond the powers of the province as the Judicial Committee held, because the legislation dealt with an interest of some of the parties in a deposit in the Bank of Montreal carried on its books at Edmonton which was in the nature of an equitable debt having a constructive situs at the head office of the bank which was outside the province. The principle has been applied also in *Provincial Treasurer* v. *Kerr* (2), in *Bonanza Creek* v. *The King* (3) and in other cases; and, indeed, in all the clauses of section 92, with the exception of clause 3, the territorial restriction is expressed or implied.

Construing clause 14 in light of the general principle stated as above by the Judicial Committee in the *Local Option case* (4), I am unable to accede to the proposition that the jurisdiction of the Judicial Committee and of His Majesty in Council in respect of prerogative appeals from a province belongs to the field described by the words "administration of justice in the province" as a local matter in the sense of that principle. Indeed, I think we are bound by the judgment of the Judicial Committee in *Nadan* v. *The King* (5) as interpreted by the *British Coal Corporation* v. *The King* (6), to hold that legislation intended to prevent the exercise of the prerogative in relation to the judgments of Canadian courts is not legislation in relation to a local matter in that sense.

An argument was based upon clause 13 of section 92 "property and civil rights." With great respect to those

(1) [1913] A.C. 283, at 298.
(2) [1933] A.C. 710.
(3) [1916] 1 A.C. 566.
(4) [1896] A.C. 348.
(5) [1926] A.C. 482.
(6) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

who take a different view, I am unable to agree that clause 13 is pertinent. The subject-matter of administration of justice including jurisdiction of provincial courts is specifically dealt with in clause 14 and, if the particular matter with which we are now concerned does not fall within the ambit of clause 14, then I think it must be taken to be excluded from the general clause 13 as well as the residuary clause, 16. That is a principle which has been acted upon more than once in the construction of the clauses of section 92 as well as those of section 91. In the case of section 92 it was applied in determining the scope and effect of clause 11, "the incorporation of companies with provincial objects." This clause was the subject of a great deal of controversy until its effect was finally settled by the judgment of the Privy Council in *Bonanza Creek* v. *The King* (1); a controversy which would have been quite pointless if, for the purpose of ascertaining the powers of the provinces in relation to the incorporation of companies, you could properly resort to clause 13. The Dominion authority in respect of the incorporation of companies under its powers in relation to peace, order and good government rests upon the limitation imposed upon the provincial power by the language of section 11. If the provinces were entitled to invoke the general authority of clause 13 in order to fill up the gap created by the limiting words of clause 11, the reasoning upon which the Dominion authority rests under the residuary powers under section 91 would be deprived of its foundation; and, indeed, as Lord Haldane says in *John Deere Plow Co.* v. *Wharton* (2) if that were a legitimate procedure "the limitation in clause 11 would be nugatory."

Nor is the contention advanced by calling in aid the residuary clause (No. 16). That clause, as the Judicial Committee says in the passages already quoted, serves the purpose of supplementing the preceding enumerated clauses and includes "matters of a merely local or private nature within the province" not included in the preceding clauses. These words, as the judgment declares, are "wide enough to cover" all matters embraced within the preceding

(1) [1916] 1 A.C. 566. (2) [1913] A.C. 339.

clauses, all of which, it also declares, are correctly described by the words of section 91 as "matters of a local or private nature comprised in the enumeration of subjects by this Act assigned exclusively to the legislatures of the provinces." Whatever ancillary powers the provinces may possess in virtue of section 92 (16) they can only be ancillary to the local matters comprised in the preceding clauses as therein defined and they can only be exercised in relation to "matters of a merely local or private nature within the province."

As regards clause 1 of section 92, which is also relied upon, the exception "the office of Lieutenant-Governor" points to the subject-matter and the scope of the clause. The term "provincial constitution" is employed as the heading of Title V. That title deals with the Executive Government of the provinces, with constitution of their legislative institutions and very largely with appointments to Legislative Councils and elections to Legislative Assemblies. The heading of Title V may be contrasted with that of Title VI, "Distribution of Legislative Powers." There is nothing in the enactments of the earlier title supporting the contention that clause 1 of section 92 can be read as enlarging the authority of the legislature under the other clauses of that section, or as freeing the legislature from the restrictions imposed by those clauses.

I now come to section 101. That section has two branches, one which deals with a general court of appeal for Canada, while the other relates to the establishment of additional courts for the better administration of the laws of Canada. The phrase "laws of Canada" here embraces any law "in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion" (*Consolidated Distilleries* v. *The King* (1)).

It may be added that it has been held to give authority to Parliament in relation to the jurisdiction of provincial courts; and to impose on such courts judicial duties in respect of matters within the exclusive competence of Parliament: insolvency (*Cushing* v. *Dupuy* (2)); in election petitions (*Valin* v. *Langlois* (3)).

(1) [1933] A.C. 508, at 522. (2) (1880) 5 App. Cas. 409.
(3) (1879) 5 App. Cas. 115, at 119, 120.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

Furthermore, the general jurisdiction of Parliament in relation to peace, order and good government has been exercised in imposing duties on provincial courts in relation of appeals from the courts of territories not within the limits of the provinces. Examples are: the appeal to the Court of Queen's Bench for Manitoba from the court of the North-West Territories (*Riel* v. *The Queen* (1)); and the appeal from the courts of the Yukon to the Supreme Court of British Columbia (*McDonald* v. *Belcher* (2)).

As respects the general court of appeal, the authority is "notwithstanding anything in this Act, from time to time" to make provision "for the constitution, maintenance, and organization of a general court of appeal for Canada." And the question for determination is whether this enactment imports an ambit of legislative authority that embraces the power to endow the court constituted under it with "ultimate and exclusive" jurisdiction in respect of appeals from provincial courts.

Prima facie, the authority is to make legislative provision for a court which shall have general authority as a court of appeal for Canada; and to provide for the constitution and organization of that court. This necessarily involves the power to subject every court of judicature or of public justice to the appellate jurisdiction of the court so to be constituted.

The section, until it is acted upon by Parliament, subtracts nothing from the legislative authority of the provinces. It subtracts nothing from any judicial authority exercisable in the Dominion. But when the Court is constituted and its jurisdiction and powers are defined by Dominion legislation, such legislation takes effect according to its scope and purport notwithstanding anything in the Confederation Act or anything done under that Act. Therefore, it is within the ambit of the legislative authority conferred by this section to define the cases in which, and the conditions under which, the appellate jurisdiction may be invoked, the powers of the court in respect of the judgments and orders it may pronounce, to provide for making such judgments and orders effective, and for that

(1) (1885) 10 App. Cas. 675. (2) (1904) A.C. 429.

purpose to require the court appealed from to give effect to such judgments and orders according to their tenor.

In other words, it is competent to Parliament to give jurisdiction to entertain an appeal in any and every case in which it thinks fit to do so, and also to confer the correlative right of appeal in such cases and in any and every case to require the court appealed from to carry out any judgment pronounced upon the appeal. This, it appears to me, is involved, without qualification, in the very words of the section.

Are you then to imply a constitutional exception imperatively exempting from the operation of legislation under the section judgments or decisions from which, by the existing law, appeal may be taken or may have been taken to the Judicial Committee?

It is of the first importance, I think, to notice that in ascertaining what powers are derived from the section, you are to give effect to its language "notwithstanding anything in this Act."

I think, since the Statute of Westminster, I cannot, without disregarding the reports of the Imperial Conferences recited therein, imply such a qualification. On the contrary, the governing object of section 101 being to invest the Parliament of Canada with legislative authority to endow a court of appeal for Canada with general appellate jurisdiction over all courts in Canada, and all persons concerned in proceedings in those courts, and with power to give complete effect to the judgments of that court,—such being the general object of the enactment, all subsidiary powers must, especially in view of the phrase just mentioned, be implied to enable Parliament to legislate effectively for that object.

Three considerations seem to me to be decisive:

(*a*) Since this legislative authority may be executed in Canada "notwithstanding anything in this Act," you cannot imply any restriction of power because of anything in section 92. Assuming even that section 92 gives some authority to the legislatures in respect of appeals to the Privy Council, that cannot detract from the power of Parliament under section 101. Whatever is granted by the words of the section, read and applied as *prima facie* intended to endow Parliament with power to effect high

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

political objects concerning the self government of the Dominion (section 3 of the B.N.A. Act) in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely. So read it imports authority to establish a court having supreme and final appellate jurisdiction in Canada;

(*b*) Since, in virtue of the words of section 101, Parliament may legislate for objects within the ambit of section 101 regardless of any powers the provinces may possess to affect appeals to the Judicial Committee, it follows that the general power of Parliament to make provision for the peace, order and good government of Canada in relation to such objects is in no way limited by the exception of "local matters" assigned exclusively by the introductory words of section 91 to the legislatures of the provinces; and, consequently, no existing judicial authority competent to affect the course of judicature in Canada can be an obstacle precluding the Parliament of Canada from making its legislation relating to these objects effective;

(*c*) Having regard to the reports of the Imperial Conferences recited in the Statute of Westminster, to the provisions of that statute, and to the terms of section 101, you cannot properly read anything in the Statute of Westminster or in the B.N.A. Act as precluding Parliament, for the purpose of effecting its objects within the ambit of that section from excluding from Canada the exercise of jurisdiction by a tribunal constituted, organized and exercising jurisdiction under the exclusive authority of another member of the British Commonwealth of Nations.

The exercise of such jurisdiction for Canada by a tribunal exclusively subject to the legislation of another member of the Commonwealth is not a subject which can properly be described (as subject matter of legislative authority) as a matter merely local or private within a province. And again, the power to make laws for the peace, order and good government of Canada in relation to matters within section 101 being without restriction, the power of Parliament in such matter is, as I have said more than once, paramount. In truth, the point seems to be governed by the decision in the *Aeronautics*

Reference (1) as well as by the decision in the *Radio* Reference (2). The primacy of Parliament under section 101 is just as absolute as under the enumerated clauses of section 91.

As to appeals from the Supreme Court of Canada, or from any additional courts established under section 101, it ought, perhaps, to be noticed that since the provinces can have no jurisdiction respecting them, they obviously fall within the ambit of the general power in relation to peace, order and good government.

Second, I come to the appeal as of right, so called.

Before this topic is discussed, it is advisable, I think, to refer to the contention that His Majesty's prerogative in relation to appeals was merged in the statutory powers of the Judicial Committee under the Judicial Committee Acts of 1833 and 1844. I should have thought it more accurate to say that this legislation affirmed and regulated the exercise of His Majesty's prerogative power in relation to appeals. The appeal is still an appeal to His Majesty in Council though in point of substance (*British Coal Corporation's* case (3), the appellate jurisdiction is now exercised by the statutory court of the Judicial Committee, and I should have thought it resulted from the terms of section 92 of the *British North America Act* and the judgments in *Nadan* v. *The King* (4) and in the *British Coal Corporation* v. *The King* (3) that before the enactment of the Statute of Westminster neither the Parliament of Canada, nor the legislature of a province, could subtract from or add to His Majesty's prerogative as exercised by the Judicial Committee or, to put it another way, to the jurisdiction of the Judicial Committee.

We have to consider the legislation of Ontario and Quebec touching this subject, the appeal as of right, the orders in council affecting the other provinces, except British Columbia, and the rather special position of British Columbia.

As to Ontario and Quebec, the statutory provisions with which we are concerned were first enacted by the provinces of Upper and Lower Canada in professed exercise of authority conferred by the Constitutional Act of 1791;

(1) [1932] A.C. 54.
(2) [1932] A.C. 304.
(3) [1935] A.C. 500, at 510.
(4) [1926] A.C. 482.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

they were continued in force in the province of Canada by section 46 of the Act of Union of 1840 and are still in force under the authority of section 129 of the *British North America Act*.

To begin with Ontario and Quebec. The legislation in force was considered by the Judicial Committee in the year 1880 in *Cushing* v. *Dupuy* (1). The appeal was from a judgment of the Court of Queen's Bench of the province of Quebec, reversing the judgment of a judge of the Superior Court in certain proceedings in insolvency instituted under an Act of the Parliament of Canada entitled *An Act respecting Insolvency* (38 Vict., c. 16). An application to the Court of Queen's Bench for leave to appeal to His Majesty in Council was refused on the ground that under the *Insolvency Act* its judgment was final. Article 1178 of the Code of Civil Procedure of 1867 in so far as relevant is in these words:

> 1178. An appeal lies to Her Majesty in the Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench:—
>
> 1. In all cases where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to her Majesty;
>
> 2. In cases concerning titles to lands or tenements, annual rents and other matters by which the rights in future of parties may be affected;
>
> 3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.

The corresponding Ontario enactment is to the same effect except as to the pecuniary limit and as to another point to which reference will be made.

The effect of the *Insolvency Act* in declaring the judgment of the Court of Queen's Bench to be final in insolvency proceedings was held to preclude any appeal under article 1178 if valid; and it was also held that legislation precluding such appeal could be validly enacted in respect of insolvency proceedings by the Parliament of Canada under the authority of section 91 (21) relating to Bankruptcy and Insolvency unless it infringed the Queen's prerogative.

It was held that such an enactment would not "infringe the prerogative" for the reason that

> since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature as part of the

(1) (1880) 5 App. Cas. 409.

civil procedure of the province shall not be applicable in the new proceedings in insolvency which the Dominion Act creates, such a provision in no way trenches on the Royal prerogative.

The judgment is important, first, since it characterizes the article of the code as a provision enacted under the authority of the provincial legislature "as part of the civil procedure of the province." Second, that the legislature of the Dominion, in legislating upon a subject within its powers, could remove proceedings under that legislation from the operation of this provision and that in doing so it was in no way trenching on the Royal prerogative.

It ought also to be added as of equal importance that, the Judicial Committee having held the Court of Queen's Bench to be right in refusing to admit the appeal, it follows in point of law that there was no appeal from a judgment of the Court of Queen's Bench which the Parliament of Canada could not declare inadmissible in insolvency proceedings without infringing Her Majesty's prerogative.

Now, it is quite plain that, neither in 1867 nor in 1875 (it is conclusively settled by *Nadan* v. *The King* (1), as interpreted by the *British Coal Corporation's* case (2)), neither the legislature of a province nor the Parliament of Canada could enact laws binding upon His Majesty respecting his appellate jurisdiction. We must, consequently, hold that this provincial legislation does not, and cannot, be legislation upon the subject of His Majesty's jurisdiction.

It is legislation in relation to procedure in the provincial courts giving directions to such courts as to proceedings that may be taken in them in respect of appeals to His Majesty.

The same considerations apply to Ontario.

If the Royal Proclamation of 1763 had the effect of creating jurisdiction then we are bound to hold under the authorities mentioned that no legislature in Canada had, prior to the Statute of Westminster, authority to abrogate that jurisdiction and the powers of the provinces have not, as explained above, been since enlarged because such jurisdiction is not a local matter within section 92.

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

The same considerations apply to British Columbia in so far as regards the statute of 1858. The order in council of 1856 must, I think, be taken to have been passed under the authority of the *Judicial Committee Act* of 1844; and the orders in council of that character I am now to consider.

The provinces, other than Ontario and Quebec, are governed in respect of the appeal as of right by orders in council under the statute of 1844. These orders in council merely regulate the exercise of the jurisdiction of the Judicial Committee; but, for the reasons given, no province can be competent to abrogate them in so far as the jurisdiction of the Judicial Committee would be thereby impaired; and it is only with this jurisdiction that we are concerned, because jurisdiction is the subject matter of this Bill. In truth, it would appear that the orders in council and the legislation of Ontario and Quebec assume the existence of the jurisdiction of the Judicial Committee. The Bill before us professes to take away that jurisdiction. The power of Parliament even under the introductory clause of section 91 in respect of that subject does not conflict with any authority of the provinces in relation to procedure in the provincial courts which postulates the existence of the jurisdiction.

The statute of Ontario professes to declare that, except in the cases specified, no appeal shall lie to His Majesty in his Privy Council. If the subject matter of this enactment really is the jurisdiction of the Judicial Committee then it is invalid. Probably, it ought to be read as a declaration that the rights given under the statute, whatever they may be, apply only in the cases specified.

To sum up with regard to the appeal as of right. In respect of that appeal, in so far as we are concerned with His Majesty's prerogative or the jurisdiction of the Judicial Committee, what I have said applies to the appeal as of right as well as to the prerogative appeal; and, I repeat, we are concerned here only with legislation abrogating the prerogative as regards Canada and with legislation abrogating the jurisdiction of the Judicial Committee as regards Canada. If such legislation is not within the ambit of the powers given to the provinces, or is within the ambit of the powers of the Dominion in respect of objects contemplated by section 101, then the Bill is valid.

I have proceeded thus far without any reference to the judgment of their Lordships of the Judicial Committee in the *British Coal Corporation* v. *The King* (1). I cannot satisfy myself whether or not their Lordships intended to express a final view that the appeal as of right is, from the provincial point of view, a local matter assigned to the provinces for legislative action by section 92. As far as I can see, that particular point did not arise for decision or for examination in that case.

We have been obliged to say in some cases, and have said with the approval of the Judicial Committee, that observations forming no part of the *ratio decidendi* in judgments of the Judicial Committee do not necessarily acquit us of the responsibility of deciding for ourselves on the point dealt with (*Dominion of Canada* v. *Province of Ontario* (2)). For my own part, if I were satisfied their Lordships had really intended to express an opinion upon the point new before us I should regard that as conclusive for the purposes of this reference; but I am not satisfied they did, and I am inclined to think they did not. In these circumstances it is my duty to form an opinion upon the point. I should add that their Lordships expressed no opinion as to the effect of section 101 and, apparently, did not consider it.

I return now to a point as to the effect of section 129 of the *British North America Act* already alluded to. Their Lordships in the *British Coal Corporation's* case (3) say that before the Statute of Westminster the Dominion legislature was subject, in legislating under section 91, to the limitations imposed not only by the *Colonial Laws Validity Act,* but also by section 120 of the *British North America Act.* I do not know that the point is now of any practical importance, but if it has not been finally decided, I venture to suggest, as regards section 101, that "notwithstanding anything in this Act" includes within its purview every part of section 129 as well as all the other sections of the Act.

My opinion, therefore, is:

First, that since, by the Statute of Westminster, the obstacles have been removed which prevented the Parlia-

(1) [1935] A.C. 500, at 520, 523.
(2) [1910] A.C. 637.
(3) [1935] A.C. 500, at 520.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Duff C.J.

ment of Canada giving full effect to legislation for objects within its powers affecting the appeal to His Majesty in Council, there is now full authority under the powers of Parliament in relation to the peace, order and good government of Canada in respect of the objects within the purview of section 101 to enact the Bill in question.

Secondly, that neither the prerogative power of His Majesty to admit appeals from Canadian courts, nor the exercise of that power in admitting such appeals, nor the jurisdiction of the statutory tribunal, the Judicial Committee of the Privy Council, in respect of such appeals, or in respect of appeals as of right, is subject matter for the legislative jurisdiction of the provinces as comprised within the local matters assigned to the legislatures by section 92, and all such matters are, therefore, within the general authority in relation to peace, order and good government.

The answer to the interrogatory addressed to us by His Excellency in Council is that the Bill mentioned in the question is *intra vires* of the Parliament of Canada in its entirety.

RINFRET J.—The question referred to this Court is as follows:

> Is said Bill 9, entitled "An Act to amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada.

The object and intent of Bill 9 is to amend the *Supreme Court Act* so that the Supreme Court shall have, hold and exercise "exclusive, ultimate" appellate civil and criminal jurisdiction within and for Canada, and that its judgments shall in all cases be final and conclusive.

My opinion is that the question should be answered in the affirmative, as to all the provisions of the Bill; and I base that opinion upon the following reasons:

It has been repeatedly laid down by the Judicial Committee adjudicating upon the powers conferred by the *British North America Act,* that

> 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

and

whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the *British North America Act.*

(*Attorney-General for Ontario* v. *Attorney-General for Canada*) (1).

Since the adoption of the Statute of Westminster, 1931, and the judgment of the Privy Council in *British Coal Corporation* v. *The King* (2), it must be taken as now settled that appeals from Canadian courts to The King in Council are

essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice.

It follows, therefore, that the real question presented for decision is whether the power to constitute the Supreme Court of Canada the "exclusive, ultimate" appellate court and to prohibit all appeals to His Majesty in Council is within the legislative competence of the Dominion Parliament or of the provincial legislatures.

The rule of construction followed in such cases is to decide, first, whether the Act falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the legislatures of the provinces. (*Citizens Insurance Company* v. *Parsons* (3). If it does not, then it must fall within the legislative competence of the Dominion Parliament, for

the Federtaion Act exhausts the whole range of legislative power, and whatever is not thereby given to provincial legislatures rests with the Parliament.

(*Bank of Toronto* v. *Lambe* (4)).

The only head of provincial legislative jurisdiction which we have to consider is head (14) of section 92:

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.

If the matter of appeals to the Privy Council be within the legislative competence of the provinces, it must fall

(1) [1912] A.C. 571, at 581, 584.
(2) [1935] A.C. 500, at 521.
(3) (1881) 7 App. Cas. 96, at 109.
(4) (1887) 12 App. Cas. 575, at 587.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Rinfret J.

under this head, for the several compartments of section 92 cannot overlap and it must be obvious that head (14) excludes the others.

The controlling words in head (14) are "The administration of justice in the provinces." The words are not: in respect of or for the province; they restrict the power to the administration of justice "in the province." These words cannot include matters of appeal from Canadian courts to the Privy Council in London. (*Royal Bank of Canada* v. *The King* (1); *Brassard* v. *Smith* (2), and *Provincial Treasurer of Alberta* v. *Kerr* (3)).

As for the remainder of head (14) concerning the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction and the procedure in civil matters in those courts, it need only be said that obviously it cannot have any reference whatever to His Majesty in Council or to the Judicial Committee of the Privy Council.

In recent years we have had the advantage of two pronouncements of the Judicial Committee on the question of the power to abolish appeals to the Privy Council and it seems to me that they are decisive of the point which is now submitted to this Court.

In *Nadan* v. *The King* (4), there was an application for special leave to appeal from a provincial court from two convictions, one under a provincial Liquor Act and the other under the Dominion Liquor Act. The point was raised that there was no jurisdiction to give leave having regard to section 1025 of the Criminal Code of Canada. It was held that section 1025 was ineffective to annul the right of His Majesty to grant special leave to appeal in a criminal case upon two grounds, first, that the powers of the Dominion Parliament are confined to action to be taken in the Dominion and, second, that the section was repugnant to the Judicial Committee Acts and, therefore, inoperative by virtue of the *Colonial Laws Validity Act,* 1865.

The judgment in *Nadan's* case (4) was interpreted by the Board in the *British Coal Corporation* case (5), as being based upon those two grounds: the repugnancy of

(1) [1913] A.C. 283.
(2) [1925] A.C. 371.
(3) [1933] A.C. 710.
(4) [1926] A.C. 482.
(5) [1935] A.C. 500.

section 1025 to the Privy Council Acts and, therefore, to the *Colonial Laws Validity Act* and that it could only be effective if construed as having extra-territorial operation, whereas according to the law as it was in 1926 the Dominion statute could not have extra-territorial operation. The effect of those two decisions is clearly that the matter of the appeal to the Privy Council was then considered outside the territory of Canada and could only be effectively dealt with by Canadian legislation if that legislation could have extra-territorial operation, which it had not at the time. By the Statute of Westminster the restriction imposed by the *Colonial Laws Validity Act* has been removed both as regards the Dominion Parliament and the provincial legislatures. The Dominion Parliament was further given full power to make laws having extra-territorial operation; but such power was not given to the provincial legislatures. The following consequences seem to be the result from the two decisions of the Privy Council above referred to and from the subsequent enactment of the Statute of Westminster:—

The question of appeals to the Privy Council was considered by the Judicial Committee as a matter of extra-territorial operation.

It was decided that previous to the Statute of Westminster the Dominion Parliament could not effectively deal with the whole question of the appeals to the Privy Council because it had not then the power to make laws having extra-territorial operation.

It is only because such power was given to the Dominion Parliament by the Statute of Westminster that the *British Coal Corporation* case (1) was subsequently decided upholding the Dominion's jurisdiction.

We must conclude that a *fortiori* the provincial legislatures could not effectively legislate with regard to the abolition of appeals to the Privy Council as the law stood before the Statute of Westminster; and, as they continue as before to have no legislative capacity to make any law having extra-territorial operation, they have no power to deal with the matter of appeals to the Privy Council.

The result would be that this matter not being within the legislative competence of the provinces it must fall

(1) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Rinfret J.

necessarily within the competence of the Dominion Parliament.

This result is further supported in my view by section 101 of the *British North America Act*.

Under that section

> the Parliament of Canada may notwithstanding anything in this Act from time to time provide for the constitution, maintenance and organization of a general Court of Appeal for Canada, etc.

The legislative authority conferred on the Dominion by that section is exclusive, paramount and plenary. It cannot be taken away or impaired by provincial legislation (*Crown Grain Co.* v. *Day* (1)). Its jurisdiction extends as well to the laws passed by the Parliament of Canada as to any provincial law. It is "a general Court of Appeal for Canada" and the Dominion Parliament may exclusively determine the appellate jurisdiction of the Court.

One of the principal functions of a general Court of Appeal should be to settle jurisprudence and that object fails completely if it is not the final and ultimate Court of Appeal. There appears to be no sound ground for the suggestion that legislation by Parliament directed to that purpose would not be legislation relating to the constitution, maintenance and organization of the Supreme Court of Canada in its character as a general Court of Appeal for Canada.

An attempt was made at the argument to make a distinction with regard to admiralty law, but I think the legislative competence of the Dominion Parliament on that subject would naturally fall under the power to deal with navigation and shipping and the further power given by section 101 as to the

> establishment of any additional courts for the better administration of the laws of Canada.

For those reasons, I have come to the conclusion that Bill 9 in toto is *intra vires* of the Parliament of Canada.

CROCKET J.—Although this bill, as it comes to us on this reference, simply entitled "An Act to amend the *Supreme Court Act of Canada*" purports to amend "*The Supreme Court of Canada Act*," c. 35 of the Revised Statutes of Canada, 1927, only by repealing s. 54 of that Act and substituting for it a new section of three com-

(1) [1908] A.C. 504.

paratively short subsections, the most cursory examination of the proposed substitution shews that it goes far beyond the mere elimination from the existing section of its express recognition of the royal prerogative to grant leave to appeal from the judgments of this court. Its real purpose is to give this court " exclusive ultimate appellate civil and criminal jurisdiction within and for Canada," as it is expressed in s.s. 1. To accomplish this purpose the bill itself recognizes that the mere abrogation of the existing prerogative in relation to the judgments of this court will not suffice, and that it requires to make an end also of the long established prerogative of the reigning Sovereign to grant special leave to appeal to His Majesty's Privy Council from any judgment pronounced by any of His courts of justice in any of the provinces of the Dominion, and to annul as well the provisions of any and every statute or law now in force in any province under which appeals may be taken directly as of right to the Judicial Committee of the Privy Council in certain cases from the judgments of provincial courts. (The Code of Civil Procedure of Quebec, as amended by 8 Edward VII, c. 75 and 8 George V, c. 78 expressly provides for an appeal to His Majesty in His Privy Council from final judgments of the Court of King's Bench in all cases where the amount or value of the thing demanded exceeds $12,000, as well as in all cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected. The *Privy Council Appeals Act,* Revised Statutes of Ontario, 1937, provides also that an appeal shall lie to His Majesty in His Privy Council where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual fee or rent, customary or other duty or fee or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, while in all the other Provinces of Canada Imperial Orders in Council, made under the provisions of the *Judicial Committee Act,* 1933, 3 & 4 William IV, c. 41, and the *Judicial Committee Act,* 1844, c. 69, of the Imperial Statutes, 7 & 8 Vict., which provide for direct appeals from the judgments of the Supreme and other courts of the several

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

provinces to the Judicial Committee without any special leave of the Imperial Privy Council, undoubtedly are now operative in the other seven provinces and have the same force and effect as if their provisions had been expressly enacted by their respective legislatures.) Hence the far-reaching, all-embracing proposal of s.s. 2:—

(2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom (this manifestly would cover the B.N.A. Act itself) or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

And that of s.s. 3, actually declaring that:—

(3) *The Judicial Committee Act,* 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and *The Judicial Committee Act,* 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada.

The undoubted effect of the enactment of such a measure by the Parliament of Canada would be an open defiance by that body of the authority of any of the provincial legislatures of Canada to legislate in respect either of appeals as of right directly to the Judicial Committee of the Privy Council from the judgments of provincial courts now or hereafter established within Canada, or in respect of the royal prerogative to grant leave to appeal thereto independently of the provisions of any statute or law duly enacted by the legislature of any province or duly established by Order in Council under the provisions of the Imperial *Judicial Committee Acts* of 1833 and 1844. It would amount to an attempt on the part of the Parliament of Canada to arrogate to itself the complete control of the administration of justice in all the Provinces of the Dominion in so far as the finality of judgments in civil as well as in criminal cases is concerned and the right of the subject or anybody submitting to the jurisdiction of a provincial court to petition His Majesty for leave to appeal to him for redress through his Judicial Committee, and thus to strike at the constitutional integrity of all the provinces of Canada as self-governing entities under the British Crown.

If any warrant exists for the presentation to the Parliament of Canada of such a drastic bill it must be found either in the Statute of Westminster, 1931, 22 George V, ch. 4, or in the *British North America Acts*, 1867 to 1930.

Sec. 4 of the first mentioned Imperial Statute, enacting that the Parliament of a Dominion has full power to make laws having extra-territorial operation, has been much stressed as a justification for the presentation of the bill in question. It is contended that its enactment would have extra-territorial operation inasmuch as it would prohibit the hearing of appeals by His Majesty's Judicial Committee of the Privy Council, which sits in the United Kingdom beyond the territorial limits of Canada.

The answer to this contention, I think, is that in so far as the direct right of appeal to the Judicial Committee of the Privy Council provided by the statutes of Quebec and Ontario and by orders in council in the other provinces of the Dominion is concerned, the principal, and indeed the only effective, operation of the now proposed enactment would be the virtual repeal of these provincial statutes and orders in council, which manifestly could have effect only in Canada. This would be true also of the proposed abrogation of the royal prerogative in relation to the granting not only of appeals from the judgments of any provincial court in Canada, but also in relation to the granting by royal prerogative of appeals from judgments of the Supreme Court of Canada. So far as the exercise by the Sovereign of the royal prerogative is concerned, it cannot in any sense be said to be localized either in the place where the Sovereign resides nor in the place where His Judicial Committee sits, as was so clearly pointed out by Viscount Haldane in delivering the judgment of the Judicial Committee of the Privy Council in *Hull* v. *McKenna* (1): "The Judicial Committee of the Privy Council," said Lord Haldane,

> is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or for the future, an Irish Free State body. There sit among our numbers Privy Councillors who may be learned Judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had them from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing

(1) [1926] I.R. 402, at 404.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India as he may sit here, and it is only for convenience, and because we have a Court, and because the members of the Privy Council are conveniently here that we do sit here; but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial Court which represents the Empire, and not any particular part of it.

In *British Coal Corporation* v. *The King* (1), Lord Sankey in delivering the judgment of the Judicial Committee said:

It may now be considered whether there is since the statute (authorizing appeals as of right to the Privy Council) any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated, as being something quite special and as being a matter standing, as it were, on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion? The appeal, if special leave is granted, is from the decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court: if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian courts. Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada: emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of Law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian court and which concludes and reaches its consummation in the Canadian court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.

The last mentioned case, which was an application for leave to appeal from a criminal conviction, decided that the extent of the legislative competence conferred on the Canadian Parliament in regard to appeals to the King in Council in criminal matters must now be ascertained from its constituent Act, the *British North America Act,* and

(1) [1935] A.C. 500, at 521.

that s. 91 of that Act, read with the rest of the Act by necessary intendment, invested the Parliament with power to regulate or prohibit appeals to the King in Council in criminal matters. In the course of his judgment Viscount Sankey said, at p. 520:

> A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian courts are within the legislative control of Canada, that is, of the Dominion of the Provinces, as the case may be.

So that, while the decision in *British Coal Corporation* v. *The King* (1) may be taken to have settled the question of the right of the Dominion Parliament (by reason of its exclusive legislative jurisdiction in relation to criminal law, including procedure in criminal cases) to prohibit appeals to the King in Council in criminal matters, that decision does not extend to appeals, either as of right or by the exercise of the royal prerogative in relation to classes of subjects, which the *British North America Act* has assigned exclusively to the Legislatures of the Provinces.

Apart, however, from these considerations and pronouncements it seems to me that it is only necessary to examine ss. 2 of s. 2 of the Statute of Westminster in connection with and in the light of ss. 2 of s. 7 of that statute to see that s. 3 of that statute respecting the power of the Parliament of the Dominion to make laws having extra-territorial operation could not reasonably be held to apply to such a matter as the royal prerogative to grant leave to appeal to the Judicial Committee of the Privy Council. Ss. 2 of s. 7 provides that ss. 2 of s. 2 shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such provinces. The provisions, therefore, of ss. 2 of s. 2 of the Statute of Westminster enacting that no law and no provision of any law made after the commencement of that Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and that the powers of the Parliament of the Dominion

(1) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

shall include the power to repeal or amend any such Act, order, rule or regulation, in so far as the same is part of the law of the Dominion, applies in the same way to laws made by any of the Provinces of Canada and to the powers of the Legislatures of those Provinces as it does to laws made by the Parliament of Canada and to the powers of that Parliament. The power, therefore, to repeal or amend any Act of the Parliament of the United Kingdom or any order, rule or regulation made thereunder, whether such repeal or amendment be made by the Parliament of Canada in relation to matters within its legislative jurisdiction or by the legislature of any province in relation to matters within its legislative jurisdiction is expressly limited by the words "in so far as the same is part of the law of the Dominion," i.e., Canada and its several component provinces.

If the extra-territorial argument is not fully met by what I have already said, it is in my opinion effectually disposed of by reference to ss. 1 and 3 of s. 7 of the Statute of Westminster. The argument in behalf of the Dominion in this regard rests entirely upon the fact that ss. 2 of s. 7, which extends the provisions of ss. 2 of s. 2 to the Legislatures of the Provinces, makes no specific mention of s. 2 relating to the power of the Parliament of the Dominion to make laws having extra-territorial operation. It is claimed that this omission shews conclusively that it was the intention of the Imperial statute to confer some new power upon the Parliament of a Dominion as distinguished from the Legislatures of the Provinces. Ss. 2 of s. 7, however, explicitly enacts that

> the powers conferred by this Act (including of course that conferred by s. 3) upon the Parliament of Canada or upon the Legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively,

so that by the operation of this ss. 3 of s. 7 alone s. 3 could not well be held to confer upon the Parliament of Canada any power to make laws in relation to matters, which were not already within its competence at the time of the passing of this Imperial statute. This accords entirely with the principle laid down by Lord MacMillan in delivering the judgment of the Judicial Committee in

Croft v. *Dunphy* (1), in holding that the Parliament of Canada was competent to provide by ss. 151 and 207 of the *Customs Act* (R.S. Canada 1927, ch. 42 as amended in 1928) that any vessel registered in Canada hovering within twelve miles of Canada having on board dutiable goods, the vessel and her cargo were to be seized and forfeited. Lord MacMillan there said:

> But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the *British North America Act* the Dominion legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast.
>
> In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the *British North America Act,* their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

Although the Statute of Westminster was then in force and their Lordships' attention was drawn to s. 3, which it was suggested had retrospective effect, their Lordships held in the view which they had taken of that case it was not necessary to say anything on that point beyond observing that the question of the validity of extra-territorial legislation by the Dominion could not at least arise in the future. The decision, however, as I have already intimated, is clearly in line with the express provisions of ss. 3 of s. 7 of the Statute of Westminster, which so explicitly restricts the Parliament of Canada in making laws having extra-territorial operation to matters within its competence. This obviously can only refer to matters within the competence of the Parliament of Canada under the provisions of the *British North America Acts,* 1867 to 1930, in the light of the provisions of ss. 1 of that section enacting that

> Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts,* 1867 to 1930, or any order, rule or regulation made thereunder.

(1) [1933] A.C. 156, at 163.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

Far, then, from conferring any new legislative powers upon the Parliament of Canada in derogation of the legislative powers of its several provinces, the Statute of Westminster plainly preserves the *British North America Acts*, 1867-1930, intact and, moreover, explicitly restricts the legislative powers of both the Dominion Parliament and the provincial legislatures to their respective legislative fields, as prescribed by those Acts.

If I am right in this view it follows that if any authority exists for the enactment of this far-reaching bill by the Parliament of Canada it must be sought within the four corners of the *British North America Act* itself.

Now, there are but two sections of that Act which are or possibly can be relied upon to support it or any part of it, viz: ss. 91 and 101.

Dealing first with s. 91, this is the well-known section, which prescribes the general authority of the Parliament of Canada to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces. In addition to this general authority, and subject to the express limitation mentioned, it declares that

> for greater certainty, but not so as to restrict the generality of the foregoing terms of this section * * * (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated.

Then follows the enumeration of 29 specific classes of subjects.

If the subject matter of this bill does fall within any of the classes of subjects assigned exclusively to the Legislatures of the Provinces, it seems perfectly clear that the residuary power conferred on the Parliament of Canada by the introductory words of s. 91 to make laws for the peace, order and good government of Canada does not authorize its enactment by that body. Our first duty, therefore, is to determine whether the bill does or does not relate to matters falling within the exclusive legislative prerogative of the Provinces. These 16 classes of subjects include:

1. The amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as regards the office of Lieutenant-Governor.

13. Property and civil rights in the province.

14. 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.

That the proposed enactment directly and vitally concerns the administration of justice in all the Provinces of Canada is self-evident. Its avowed purpose is to constitute this court a court

> of exclusive ultimate appellate civil and criminal jurisdiction within and for Canada,

and to that end,

> notwithstanding any Royal prerogative or anything contained in any Act of the United Kingdom * * * or any Act of the Legislature of any Province of Canada

to prohibit all appeals "from any court now or hereafter established within Canada" to the Judicial Committee of His Majesty's Privy Council. How then could it possibly be said that the bill does not essentially relate to the administration of justice in every province of the Dominion, or that it is not designed to nullify or render inoperative the laws of all the nine provinces of Canada, under which appeals now lie directly to that body from provincial courts —both appeals as of right in specified cases, as well as appeals in all other cases in which His Majesty may be advised to grant special leave to appeal thereto?

Counsel for the Attorney-General of Canada, however, argued that the meaning of the expression "The Administration of Justice," as used in enumeration 14, is not only limited territorially by the words "in the Province," but also by the words

> 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.

It was never intended, of course, that the laws which s. 92 exclusively empowered the legislature "in each Province" to make in relation to matters coming within the classes of subjects therein enumerated should have

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

any application beyond the limits of the province in which they are enacted. That fact, however, in no way adds to the residuary power of the Dominion Parliament under the introductory words of s. 91 to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects "assigned exclusively to the Legislatures of the Provinces," that is to say, to the legislatures of all the provinces of Canada alike. Obviously no single legislature could make laws in relation to the administration of justice in any other than its own province, but the legislatures of all the nine provinces of Canada are indisputably authorized by s. 92 (14) to exclusively make laws in relation to the administration of justice in their several provinces. The question is, not whether any single province could legislate in relation to the administration of justice in any other province, but whether the Dominion Parliament under s. 91 is authorized to make laws in relation to the administration of justice in all the provinces of Canada alike merely because the legislature of each province necessarily can make laws in relation to the administration of justice only in and for its own province. The answer to such a question, I think, must be No.

As to the argument that the quoted words immediately following narrow and limit the meaning of the general words "The Administration of Justice in the Province," Street, J. in his judgment in *Regina* v. *Bush* (1), sitting with Armour, C.J. and Falconbridge, J. in the Ontario Divisional Court in 1888, effectually, I think, disposed of this precise point when he said:

> But these words (including the constitution * * * of provincial courts) do not, as I read the clause, in any way limit the scope of the general words preceding them, by which the whole matter of the administration of justice is included. The fundamental weakness of the defendant's argument appears to be his assumption that the word "including" in this para. 14 is to be read as if it were "videlicet" or as if the words "The Administration of Justice" were to be treated, for the purpose of this discussion, as being entitled to no weight.

His Lordship in the course of this judgment said that para. 14 of s. 92 appeared to him to be sufficient to

(1) (1888) 15 O.R. 398, at 403.

confer upon the provincial legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the provinces, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense.

and pointed out that the general, governing words of that paragraph were subject to no other limitation than that to be found in para. 27 of s. 91 ("The Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters") and that contained is Part VII under the title "Judicature" (ss. 96 to 101 inclusive) relating to the appointment of judges of Superior, District and County courts and the payment of their salaries and to the authority of Parliament to provide for the constitution, maintenance and organization of a general Court of Appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada.

Everything coming within the ordinary meaning of the expression "the administration of justice," not covered by (these) sections, (he said) remains, in my opinion, to be dealt with by the provincial legislatures in pursuance of the powers conferred upon them by para. 14 of s. 92 * * * . It is clearly the intention of the Act that the provincial legislatures shall be responsible for the administration of justice within their respective provinces, excepting in so far as the duty was cast upon the Dominion Parliament. The only duty cast upon the Dominion Parliament in the matter is contained in the clauses to which I have referred.

My Lord the Chief Justice in delivering the unanimous judgment of this court in 1938 in the matter of the Reference concerning the authority of judges and junior and acting judges, etc., to perform the functions vested in them respectively by the Ontario *Children's Protection Act* and other Acts of the Ontario Legislature (1) expressly approved the judgment of Street, J. in this case and quoted two of the passages I have ventured now to reproduce. Relating as it does so essentially to the Administration of Justice, as that expression is ordinarily understood, in all the provinces of Canada alike, it is, as I have already indicated, impossible to say that the main purpose and the real subject matter of the proposed enactment now before us does not fall within the classes of subjects, which the *British North America Act* has assigned exclusively to the Legislatures of the Provinces. For that reason the

(1) [1938] S.C.R. 398.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

residuary power of the Dominion Parliament cannot properly be invoked in its support.

This being so, the question remains, as regards s. 91, whether, notwithstanding the fact that the proposed denial of the Royal prerogative to grant direct appeals from all courts in and throughout Canada to the Judicial Committee of His Majesty's Privy Council as well as the proposed abolition of all direct appeals as of right, for which the laws of all the provinces now provide, *prima facie* fall within enumerated head 14 of s. 92, do not also fall within any one of the 29 specific classes of subjects enumerated in s. 91, in which event the power of the provincial legislatures would be overborne according to the principle laid down by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1); *Dobie* v. *Board for the Management of the Temporalities Fund of Presbyterian Church of Canada* (2), and *Russell* v. *The Queen* (3).

In expounding the principle of the pre-eminence of Dominion legislation in cases of conflict between the enumerated heads of ss. 91 and 92, as declared by the *non obstante* clause in the second branch of the former section, Sir Montague Smith in the *Parsons* case (4) pointed out that it was obvious that in some cases where apparent conflict exists it could not have been intended

> that the powers exclusively assigned to the provincial legislature should be absorbed in those powers given to the Dominion Parliament * * *. It could not (he said) have been the intention that such a conflict should exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may in most cases be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to all of them.

Does then the real subject matter of this bill fall within any of the classes of subjects specifically enumerated in s. 91?

The only one of the 29 enumerated heads of this section having any possible relevancy on this subject is that which has already been mentioned, (27), The Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters. Reading the

(1) (1881) 7 App. Cas. 96, at 109.
(2) (1882) 7 App. Cas. 136, at 149.
(3) (1882) 7 App. Cas. 829, at 836.
(4) (1881) 7 App. Cas. 96.

two sections together and setting 21 (27) against 92 (14), there can be no doubt that the intention was that the exclusive power of the legislatures to make laws in relation to the "Administration of Justice" should be subject to the exclusive power of the Dominion Parliament to make laws in relation to the Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters, and that with that single exception, so far as s. 91 is concerned, it conferred upon the Dominion no express legislative power in relation to the administration of justice in the provinces.

While it is true that the decision of the Privy Council in *British Coal Corporation* v. *The King* (1) settled the question that s. 91 invests the Dominion Parliament with the power to regulate or prohibit appeals to the King in Council in criminal matters, that decision, as previously pointed out, manifestly proceeded on the ground that The Criminal Law, including procedure in criminal matters, was specifically placed within its jursidiction by enumerated head 27. Lord Sankey was careful to say that their Lordships were in that judgment

> dealing only with the legal position in Canada in regard to this type of appeal in criminal matters

and that it was

> neither necessary nor desirable to touch on the position as regards civil cases.

The Parliament of Canada has already by s. 17 of c. 53, 23-24 Geo. V (1933), provided that

> Notwithstanding any royal prerogative, or anything contained in the *Interpretation Act* or in the *Supreme Court Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

Indeed, that was the particular enactment, the constitutional validity of which was challenged in the *British Coal Corporation* case (1), and definitely held by that judgment to be within its legislative competence for the reason above indicated. This fact would seem to make it clear that the presently proposed enactment is directly aimed at the regulation and control of appeals to the Judicial Committee of the Privy Council in all civil cases throughout Canada, regardless of the provisions of any and all existing

(1) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

provincial laws. I have endeavoured to shew that this is quite beyond the legislative power vested in the Parliament of Canada by s. 91 of the B.N.A. Act.

This brings me to the more difficult question as to whether justification can be found in s. 101 for the proposal of this bill to completely do away with all appeals from Canada to the Judicial Committee of His Majesty's Privy Council and to give this court "exclusive ultimate appellate and civil and criminal jurisdiction within and for Canada." That this section enacting that the Parliament of Canada may, notwithstanding anything in this Act, provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, constitutes a further exception to the exclusive power of the provincial legislatures to make laws in relation to the Administration of Justice has already appeared. It is not questioned that the unrestricted power to constitute and organize a court necessarily implies power to define its jurisdiction and provide for the regulation of its procedure, nor, of course, that the exercise of such a power directly concerns the administration of justice. The difficulty arises from the fact that while s. 92 vests the exclusive legislative power in relation to the general subject of the administration of justice as well as in relation to civil rights in the Provincial Legislatures, s. 101, notwithstanding that fact, specifically invests the Dominion Parliament with power to constitute and organize a General Court of Appeal for Canada, and that we are again confronted with two apparently conflicting enactments, which must be read together and so interpreted as to give, as far as possible, reasonable and practical effect to each. This, as I take it, is the meaning of Sir Montague Smith's pronouncement above quoted in my discussion of the apparent conflict between ss. 91 and 92 regarding Procedure in Criminal Matters and Administration of Justice in the Provinces, and in my opinion it is quite as applicable to the question now under review, for, as he said, it could not have been intended that the powers exclusively assigned to the Provincial Legislatures should be absorbed in those powers given to the Dominion Parliament.

It is clear enough that s. 101 must be read as conferring upon the Dominion Parliament whatever legislative authority is necessary to the constitution and organization of a

General Court of Appeal for Canada, no matter to what extent the exercise of such authority may infringe upon the exclusive legislative rights of the provincial legislatures as defined in ss. 92. Indeed, this court and the Judicial Committee of the Privy Council have both decided, as regards this conflict of legislative authority, that the provincial legislatures have no authority to limit the right of appeal to this court or in any way impair the jurisdiction conferred upon it by the Supreme Court Act. See *Clarkson* v. *Ryan* (1); *City of Halifax* v. *McLaughlin Carriage Co.* (2), and *Crown Grain Co. Ltd.* v. *Day* (3). An examination of these cases shews that the decisions all proceeded on the ground that, if the provinces could so legislate, they could take away the jurisdiction of this court entirely and thus virtually defeat the object of its constitution and organization. No such consideration arises here.

The question with which we are immediately concerned is, not the power to prescribe what type or class of case may be appealed from provincial courts to this court, but the power, not only to abrogate the Royal prerogative, in respect of the judgments of this court on such appeals, but to abrogate it also in respect of the judgments of all provincial courts, and to abolish as well all *per saltum* appeals, which now lie to the Judicial Committee of His Majesty's Privy Council under provincial laws, the validity of which has never before been brought into question. Unless such power is necessarily incidental to the constitution, maintenance and organization of a General Court of Appeal for Canada, I cannot, for my part, see how it can be justified by the terms of s. 101 or any of the cases relied upon by counsel for the Attorney-General of Canada. To hold otherwise would, in my most respectful opinion, be to practically ignore s. 92 (14) as well as s. 92 (13) and virtually transfer to the Dominion Parliament the regulation and control of these two classes of subjects—the most general and important of all the 16 classes of subjects which the B.N.A. Act has marked out as the exclusive legislative jurisdiction of the provinces—by the simple expedient of amending the *Supreme Court of Canada Act* and thus placing the final disposition of all litigation in

(1) (1890) 17 S.C.R. 251. (2) (1907) 39 S.C.R. 174.
(3) [1908] A.C. 504.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

Canada, no matter how important the constitutional and property and civil rights involved may be, in the hands of a court established and exclusively controlled by Dominion legislation, without the long cherished right of recourse to the Crown for the redress of any grievance, which may be suffered by any litigant in connection therewith. Could it fairly be said in reading s. 101 together with s. 92 with a view to give, as far as possible, reasonable and practical effect to each, that the Parliament of Canada would be justified by s. 101 in arrogating to itself, as necessarily incidental to the constitution, maintenance and organization of this court, the power to regulate and control the Administration of Justice, as well as Property and Civil Rights in all the provinces to such an extent as is proposed in this bill?

In discussing the introductory words of s. 91 in delivering the judgment of the Privy Council in the *Board of Commerce* case (1), Viscount Haldane said:

> No doubt the initial words of s. 91 of the *British North America Act* confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92, untrammelled by the enumeration of special heads in s. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell* v. *The Queen* (2) appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the provincial legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of inhabitants of the provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one.

And further, in discussing the question as to whether the Dominion legislation there under consideration fell under s. 91 (27) (The Criminal Law) His Lordship used this language at pp. 198 and 199:

(1) [1922] 1 A.C. 191, at 197. (2 (1882) 7 App. Cas. 829.

It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that s. 101 of the *British North America Act*, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Government. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

The King v. *Consolidated Distilleries Limited* (1) was an appeal from the judgment of Audette, J. of the Exchequer Court, granting a motion made by the defendant appellant as third party to set aside the third party notice on the ground that the issue raised by the third party notice between the original defendant and it was one over which that court had no jurisdiction. This court, Anglin, C.J. and Rinfret, Lamont and Cannon JJ., Newcombe, J. dissenting, dismissed the appeal on the ground that the matter in controversy between the original defendant and the third party was purely one of exclusive provincial jurisdiction concerning a civil right in one of the provinces. Anglin, C.J. in delivering the judgment of himself and his three brethren said:

While there can be no doubt that the powers of Parliament under s. 101 are of an overriding character, when the matter dealt with is within the legislative jurisdiction of the Parliament of Canada, it seems equally clear that they do not enable it to set up a court competent to deal with matters purely of civil right as between subject and subject. While the law, under which the defendant in the present instance seeks to impose a liability on the third party to indemnify it by virtue of a contract between them, is a law of Canada in the sense that it is in force in Canada, it is not a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it. The matter is purely one of exclusive provincial jurisdiction, concerning, as it does, a civil right in some one of the provinces (s. 92 (13)).

(1) [1930] S.C.R. 531.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

The really decisive question on this branch of the argument regarding the conflict between the legislative power vested in the Dominion Parliament by s. 101 and that exclusively vested in the Provincial Legislatures by s. 92, as I have already said is, whether the subject-matter of this proposed enactment is comprised in the language of s. 101, as necessarily incidental to the exercise of the power thereby confided to the Dominion Parliament. Reading the section in connection with and in the light of s. 92, as it must be, it is in my opinion our clear duty to so construe it as to interfere as little as possible with the general scheme of the *British North America Act* regarding the distribution of legislative powers between the Dominion and the Provinces, and thus, while fully safeguarding the overriding legislative powers of the Dominion, in so far as they are explicitly declared, to prevent any undue or unnecessary encroachment upon what s. 92 has so unequivocally declared to be the exclusive legislative powers of the Provinces. This, I take it, to be the true guiding principle when a court is confronted with the duty of endeavouring to arrive at a reasonable and practical solution of a problem of this kind, as deducible from the pronouncements I have above reproduced and many other cases of similar import, which might have been quoted, dealing with apparently conflicting provisions of the *British North America Act*.

It is contended that the words

> to provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada

necessarily imply power to declare that the judgments of these courts shall be absolutely final and conclusive, and, if the Dominion Parliament in its wisdom chooses to say so, unappealable to His Majesty's Privy Council, even by the exercise of the Royal prerogative. Power to constitute a court, it is said, covers power to define its jurisdiction, and this in turn power, not only to prescribe what cases it may hear and determine, but power to declare the consequences and effects of its judgments. If this be true of the power vested in the Dominion Parliament by s. 101 to provide for "the constitution, maintenance and organization" of the courts therein indicated, must it not also be true of the exclusive power vested in the Provincial

Legislatures by s. 92 to make laws in relation to "the constitution, maintenance and organization" of provincial courts, whether of civil or of criminal jurisdiction? Surely it cannot be said that these words have one meaning when applied to any court or courts, which the Dominion Parliament may create, and another meaning when applied to provincial courts. And I cannot for my part see that there is anything in the context, in which they are used in s. 101, which carries any larger implication than that arising from the context in which they are used in s. 92. Indeed, the contrary would seem to me to be the case. For, in s. 92 they are clearly used to indicate a specific sub-head or subdivision of the larger and more comprehensive class of subjects, viz: the Administration of Justice in the provinces.

The argument that either the general subject of the Administration of Justice in the Province or the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, is restricted by the additional words "and including procedure in civil matters in those courts" has already been dealt with in discussing the opposing submissions concerning ss. 91 and 92. I may add, however, in relation to the particular point now under consideration as to the conflict between ss. 92 and 101 that the obvious and the only reason, as it seems to me, for the alleged qualification of the general subject of "The Administration of Justice in the Province" by the words which immediately follow in enumeration 14 was to make it conform with s. 91 (27) regarding the general subject of "The Criminal Law." The latter excepts from "The Criminal Law," as a general subject for the exclusive jurisdiction of the Dominion Parliament, "the constitution of courts of criminal jurisdiction," but includes "the procedure in criminal matters," while s. 92 (14) specifically includes the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and procedure in civil matters in those courts. The clear intention, so far as s. 91 and 92 are concerned, was to vest exclusive legislative authority in the Province over the whole subject of the Administration of Justice therein, subject only to the overriding legislative jurisdiction of the Dominion in relation to the Criminal Law and all

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

matters necessarily incidental thereto (except the constitution of courts of criminal jurisdiction), and to such other encroachments on this general provincial legislative power over the Administration of Justice as might become necessary in order that the Dominion Parliament might legislate effectively in relation to any other one of the 28 other specific subjects assigned to it by s. 91. If I may supplement what I have before suggested as to the basic ground of the decision in the *British Coal Corporation* case (1), it is obvious that this decision could not have been founded on any implication arising from the Dominion's power to constitute courts of criminal jurisdiction, which latter power is expressly excepted from that in relation to Criminal Law and exclusively vested in the Provinces. Its whole tenor, to my mind, is that it is the specific assignment to the Parliament of Canada by s. 91 (27) of the exclusive legislative jurisdiction in relation to such a general subject as that of "The Criminal Law," in the terms therein stated, which actually or by necessary intendment carries the power to prohibit appeals from provincial courts to His Majesty's Privy Council in criminal matters. Certainly that decision in no way supports the argument that power to constitute any court necessarily implies control of the right of appeal from its adjudications. On the contrary, it seems to me to flatly negative it for the reason just stated, viz: that the control of appeals from provincial courts of criminal jurisdiction in criminal matters is necessarily involved in the Dominion Parliament's exclusive legislative jurisdiction in relation to the general subject of The Criminal Law, notwithstanding that the constitution of courts of criminal jurisdiction is expressly excepted in s. 91 (27) from that general subject. If that be the case, as regards criminal matters, how can it consistently be claimed that the assignment by s. 92 (14) to the Provincial Legislatures of the exclusive legislative jurisdiction in relation to such a general subject as "The Administration of Justice," subject only to the limitations before mentioned, does not invest the Provincial Legislatures with the power to allow or prohibit, as they choose, appeals from the judgments of provincial courts in civil matters? Only, it seems to me, on one

(1) [1935] A.C. 500.

intelligible ground, viz: that, though s. 92 (14) indisputably comprises it, s. 101 takes it away and vests it entirely in the Dominion Parliament. But can the language of s. 101 itself, when read in conjunction with that of ss. 91 and 92, properly be so interpreted? In my opinion it cannot. The power thereby granted to the Parliament of Canada "notwithstanding anything in this Act," so far as the establishment of a General Court of Appeal for Canada is concerned, is, not only a special power relating to a single court, but is definitely limited to legislation providing for "the constitution, maintenance and organization" of such a court. While it can readily be understood that this language in association with the *non obstante* clause must be construed as necessarily entitling the Dominion Parliament to cut into the exclusive legislative jurisdiction of the provinces over the general subject of the Administration of Justice therein to such an extent as may be necessary to enable this court to fully function as a General Court of Appeal for Canada, and thus to regulate to that extent appeals to this court from provincial courts, that to my mind is the farthest limit to which the words "constitution, maintenance and organization of a General Court of Appeal for Canada" can reasonably be extended. The section itself says nothing about the finality of the judgments of the court authorized to be constituted or about its "exclusive, ultimate appellate jurisdiction," and certainly contains no suggestion of any power to divest the Crown of its prerogative to grant leave to appeal to the Judicial Committee of the Privy Council, either in respect of its own judgments, or in respect of the judgments of provincial courts, nor of any power to repeal or annul any of the laws relating to courts of civil and criminal jurisdiction existing in Canada, Nova Scotia or New Brunswick at the time of the Union, which s. 129 expressly continued in the four original provinces, as if the Union had not been made until they should be repealed, abolished or altered either by the Parliament of Canada or by the Legislatures of the respective Provinces, according to the authority of Parliament, or of the Legislatures under that Act. To say that all these things are necessarily implied by the power to constitute such a court itself is to my

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

mind quite inadmissible unless some reason can be found, either in the general scheme of the Act concerning the distribution of legislative authority between the Dominion and the Provinces or in some particular provision thereof, clearly demonstrating that the grant of this special power was so intended. Singularly enough, notwithstanding the argument already dealt with that none of the matters covered by this bill fall under s. 92 (14) and that consequently they fall under the general residuary power conferred upon the Parliament of Canada by the introductory words of s. 91, s. 92 (14) is now invoked, shorn of its principal subject, for the purpose of attributing the provincial legislative power concerning the whole subject of appeals from the judgments of provincial courts to the words "constitution, maintenance and organization" of such courts, and thus by enlarging their scope, enlarging that of s. 101. Assuming this to be true of the provincial legislative power under s. 92 (14), where, as the factum in support of the now proposed enactment puts it, the quoted words are in effect qualified and curtailed by the express mention in the context of "procedure in civil matters in those courts," it is urged that

> it must *a fortiori* be true of the exclusive paramount and plenary legislative power conferred upon the Parliament of Canada by the corresponding words of s. 101, where they stand unqualified.

This argument simply brings us back to the construction of s. 92 (14), and obviously is founded upon the bald assumption that the only operative part of enumeration 14 is that which immediately follows the principal subject of the Administration of Justice, viz.: "the constitution, maintenance and organization of provincial courts both of criminal and civil jurisdiction." Such an assumption has already been shewn to be entirely insupportable as manifestly involving the complete absorption of the principal general subject by a lesser, subordinate one, which is only mentioned for the purpose of meeting the exception provided for in s. 91 (27) to the Dominion's exclusive legislative jurisdiction in relation to the general subject of the Criminal Law. That the specification of the lesser subject in no way qualifies or curtails the general subject of the Administration of Justice any more than the specification of procedure in civil matters in those courts qualifies or

curtails the subordinate, lesser subject of the constitution, maintenance and organization of provincial courts seems to me, with all respect, to be too clear to require demonstration. The legislative power of the Provinces in relation to the appealability or non-appealability of the judgments of their own courts is derivable in my opinion from the principal general subject of the Administration of Justice, which unmistakeably would have comprised that power, had the subordinate subject of the constitution, maintenance and organization of provincial courts not been introduced into enumeration 14 for the reason above indicated, not with the words "that is to say," but with the word "including."

The highly ingenious attempt to extend the scope of the power to constitute a court by separating the words "constitution, maintenance and organization of provincial courts" from their context in s. 92 (14) and thus practically deleting from that section the introductory and really governing words of enumeration 14 must, therefore, fail.

If it had been the intention of the Imperial Parliament, in constituting the Dominion and the Provinces as self-governing units thereof in 1867 and assigning to them their respective legislative rights, to annex to the special power conferred upon the Dominion to constitute this court such sweeping authority as that now insisted upon, is it to be supposed that it would in the unequivocal language of s. 92 have purported to invest the Provinces with the exclusive power "to make laws in relation to" all the classes of subjects therein enumerated, and then proceed to divest them of all effective control of such a vital subject as the Administration of Justice by merely conferring upon the Dominion Parliament a special power to create a General Court of Appeal for Canada in such language as that used in s. 101, viz.: "to provide for the constitution, maintenance and organization of a General Court of Appeal for Canada"?

While s. 101 undoubtedly clashes to some extent with s. 92 (14), I find it quite impossible to spell out of its language an intention to confer on the Dominion Parliament authority to encroach on the general subject of The Administration of Justice in the provinces any farther than is reasonably and necessarily incidental to the con-

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Crocket J.

stitution, maintenance and organization of a General Court of Appeal for Canada or any other Federal court, which it may from time to time desire to set up for the better administration of its own laws. It surely never could have been intended by the enactment of s. 101 to empower the Dominion Parliament to extinguish the exclusive legislative rights of the provinces to the extent contemplated by this bill, the enactment of which, if validated upon such grounds as those which have been advanced on this hearing, would practically reduce the important and general subject of the Administration of Justice, as the exclusive legislative prerogative of the Provinces, to the bare matter of procedure in civil matters in provincial courts, and invest the Dominion Parliament with the actual control of the whole litigation of the country, in so far as its final disposition is concerned, without any recourse to the Crown, and this regardless of whether the matters in controversy in such litigation relate to Property and Civil Rights in the Provinces, to the Constitution of the Provinces themselves, to Taxation for Provincial Purposes or any other of the sixteen classes of subjects exclusively assigned to the legislative competence of the Provinces, subject only to the exceptions already indicated.

For these reasons I am of opinion with all possible respect that what is described in the factum of counsel representing the Attorney-General of Canada as "the cardinal object" of this bill, viz.: the total and indiscriminate prohibition of appeals from all courts now or hereafter established within Canada to the Judicial Committee of His Majesty's Privy Council as a necessary means to accomplish the end of constituting this court a court of exclusive, ultimate appellate, civil and criminal jurisdiction, without any recourse to the Crown, is not embraced within the legislative power confided to the Parliament of Canada, either expressly or by necessary implication, by the terms either of s. 91 or those of s. 101 of the *British North America Act,* and that bill No. 9 should therefore be declared to be wholly *ultra vires* of the Parliament of Canada as seeking in the form of an amendment of the *Supreme Court Act* to extend the prohibition, which that Parliament has already applied against appeals in criminal cases by s. 17 of ch. 53, 23-24 Geo. V, in amendment of the Criminal Code, and in the exercise of its exclusive

legislative jurisdiction in relation to Criminal Law, to appeals in all civil cases from this and all other courts throughout the Dominion, regardless of whether such civil cases concern matters, which fall within the legislative powers granted it by s. 91, or not.

The bill being one, the avowed object of which must fail unless every one of its provisions is *intra vires* of the Parliament of Canada, to which it has been presented for enactment, and it being impossible for the reason just stated to sever the valid from the invalid parts thereof beyond the general lines I have endeavoured in these reasons to make clear without completely recasting its material provisions, I most respectfully am of opinion that for these reasons, and in accordance with the rule laid down in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), and re-affirmed in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), the bill must be pronounced *ultra vires* of the Parliament of Canada in its entirety.

My answer, therefore, to the question referred is that the bill is wholly *ultra vires* of the Parliament of Canada.

DAVIS J.—In the submission by the Governor General in Council for the opinion of this Court as to the competence of the Dominion Parliament to enact Bill No. 9, in whole or in part, the real question, and it is a question of the greatest constitutional importance in Canada, is whether or not in civil cases the Dominion Parliament has the power to abolish the right of appeal to the Judicial Committee of the Privy Council from any of the courts in Canada (i.e., courts whether created by the Dominion or by the provinces) and to abolish the prerogative in such cases to grant special leave to appeal from any such courts.

The question of the power of the Dominion Parliament in criminal cases to abolish appeals was raised and determined by the Judicial Committee in the *British Coal Corporation* case (3). That decision sustained the constitutional validity of an amendment made by the Dominion

(1) [1924] A.C. 328, at 346. (2) [1925] A.C. 561, at 568.
(3) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Davis J.

Parliament to the Criminal Code in 1933 (23-24 Geo. V, ch. 53, sec. 17) which reads as follows:

> Notwithstanding any royal prerogative, or anything contained in the *Interpretation Act* or in the *Supreme Court Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

While it is always material in considering constitutional powers to ascertain the origin and development of the constitution and to examine the decisions of the courts on its interpretation, it would be inutile for me to attempt to traverse again the difficult territory which their Lordships in the Privy Council have so fully explored in their judgments in the *Nadan* case (1), in the *Irish Free State* case (*Moore* v. *Atty.-Gen. for the Irish Free State*) (2), and in the *British Coal Corporation* case (3). It is sufficient to say that these cases were examined and discussed at length during the argument and have been very carefully considered. The judgments are fully reported and any attempt to summarize them might only mislead. But I would venture to make the observation that it is plain from those decisions that—

(1) before the passing of the Statute of Westminster 1931 it was not competent to the Dominion to pass an Act repugnant to an Imperial Act,

(2) the effect of the Statute of Westminster was to remove the fetters which lay upon the Dominion by reason of the *Colonial Laws Validity Act* and by sec. 129 of the *British North America Act* and also by the principle or rule that the Dominion's powers were limited by the doctrine forbidding extra-territorial legislation, and

(3) whatever might be the position of the King's prerogative if it were left as matter of the common law, it may by appropriate action be made matter of Parliamentary legislation so that the prerogative is *pro tanto* merged in the statute.

We cannot escape from the conclusion that in the *British Coal Corporation* case (3) once the former limitations which had restrained legislative action by the

(1) [1926] A.C. 482.
(2) [1935] A.C. 484.
(3) [1935] A.C. 500.

Dominion were recognized as now removed by the Statute of Westminster, the judgment rests upon the fact that criminal law is one of the enumerated heads of sec. 91 of the *British North America Act* which section sets forth specific subject-matters of legislation which lie exclusively within the competence of the Dominion Parliament. It is to be observed that the validated legislation prohibited an appeal in any criminal case "from any judgment or order of any court in Canada." That being the decision, and binding upon us, the same result necessarily follows in respect of any such Dominion legislation in relation to matters properly within any of the other specific subjects enumerated in said sec. 91 or within the general power of the Dominion Parliament to make laws for the peace, order and good government of Canada. As was said by Lord Macmillan in the Privy Council in *Croft* v. *Dunphy* (1):

> Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in sec. 91 of the *British North America Act*, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

We were invited to say that head 14 of sec. 92,

> 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,

controls the solution of the problem. The proposed abolition of appeals to the Privy Council is not however legislation in relation to the administration of justice "in the province." Nor can head 13 of sec. 92, "Property and civil rights in the province," be regarded as controlling the Dominion power in relation to matters within the exclusive legislative authority of the Parliament of Canada.

As to appeals in admiralty. The whole subject of admiralty jurisdiction has stood upon a special footing of its own. Whatever may have been the limitations on the Dominion power (prior to the Statute of Westminster) under the *Colonial Courts of Admiralty Act* 1890, see The

(1) [1933] A.C. 156, at 163.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Davis J.

Woron case (1), there never was any doubt that admiralty was not a provincial matter. As early as 1879 this Court held in *The Picton* (2), that the Dominion legislation, 40 Vic. (1877), chap 21, creating a "Court of Maritime Jurisdiction in the province of Ontario" was *intra vires* the Dominion Parliament. In 1934, the Dominion Parliament by the *Admiralty Act,* 1934 (24-25 Geo. V, chap. 31), repealed the *Colonial Courts of Admiralty Act* 1890 in so far as the latter Act was part of the law of Canada, with the exception of the provisions relating to appeals to His Majesty in Council. Legislation abolishing appeals or the prerogative to grant special leave in relation to admiralty matters in Canadian courts stands in the same position as do those subjects specifically enumerated in sec. 91.

Apart then from the power of the Dominion Parliament to abolish any right of appeal to the Privy Council and to abolish the prerogative to grant special leave to appeal in civil cases coming within any of the above mentioned classes, there remains the vital question whether there is any such right in the Dominion Parliament in relation to the specific subject-matters enumerated in sec. 92 of the *British North America Act*—subject-matters over which the provincial legislatures are given exclusive legislative authority. It is fundamental in the Canadian Constitution and has always been recognized as fundamental that the authority of the legislatures of the provinces is

> as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow,

as was said as early as 1883 in *Hodge* v. *The Queen* (3); the principle has been recognized over and over again and particularly, for our present purposes, in the *British Coal Corporation* case (4).

The Statute of Westminster does not make it competent to the Dominion to legislate in relation to classes of subjects which before the statute were outside its competence (such, for example, as "Property and civil rights in the province," head 13, and "All matters of a merely local or private nature in the province," head 16, of sec. 92). The assigned limits of subject and area under the *British North*

(1) [1927] A.C. 906.
(2) (1879) 4 S.C.R. 648.
(3) (1883) 9 App. Cas. 117, at 132.
(4) [1935] A.C. 500, at 518.

America Act, as between the Dominion and the provinces, are not disturbed. The true character and position of the provincial legislatures remain and ought to be given full recognition.

Sec. 101 of the *British North America Act,* which enables the Dominion Parliament to provide for the constitution, maintenance and organization of "a general court of appeal for Canada," cannot in my opinion be so interpreted as to extend power to the Parliament of Canada to make the jurisdiction of such court exclusive and final in relation to subject-matters which are within the sole legislative authority of the provincial legislatures.

There may be some difficulty at times in working out a division of legislative authority in appeals in civil cases but that is inherent in the practical working out of any federal system with a division of legislative powers between the central and the local legislating bodies.

It is inadvisable and indeed unnecessary to consider what powers may be possessed in the relevant regard by the legislatures of the provinces; it is sufficient for the purpose of the question submitted to the Court to determine only the powers of the Dominion Parliament itself.

I would answer the question submitted by saying that the Bill if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceeding commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province.

KERWIN J.—By Bill No. 9, introduced and read a first time in the House of Commons in the fourth session of the eighteenth Parliament of Canada, it was proposed to repeal section 54 of the *Supreme Court Act,* R.S.C., 1927, chapter 35, and substitute a new section therefor. This Court was established under the power conferred by the following section (101) of the *British North America Act,* 1867 (hereafter referred to as the Act):—

The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance and

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

The present *Supreme Court Act* continues this Court as a general court of appeal for Canada, and section 54 provides:—

> The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative.

The primary object of the Bill is set forth in the first subsection of the proposed new section 54:—

> (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.

It is undoubted that the effect of this and the other provisions of the new section would be to confer upon this Court not only appellate jurisdiction but exclusive and ultimate appellate civil and criminal jurisdiction within and for Canada, and to abolish any right of His Majesty in Council to entertain appeals from any court within Canada now or hereafter established whether by Dominion or provincial authority.

In *British Coal Corporation* v. *The King* (1), the Judicial Committee of the Privy Council determined that Parliament had effectively and validly abolished appeals in criminal cases to His Majesty in Council from any judgment or order of any court in Canada, by enacting in 1933, after the coming in force of the Statute of Westminster, 1931, the following as subsection 4 of section 1025 of the Criminal Code:—

> 4. Notwithstanding any royal prerogative or anything contained in the *Interpretation Act* or in the *Supreme Court Act,* no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

In substance, the question now submitted by the Governor General in Council for our opinion, is whether a similar power exists as regards civil cases.

(1) [1935] A.C. 500.

It will be convenient to investigate at the outset the position of appeals from Dominion Courts, that is, the Supreme Court of Canada and those additional courts for the better administration of the laws of Canada, which Parliament may constitute. This inquiry resolves itself into two heads, (*a*) the prerogative right of the Sovereign in Council to grant special leave to appeal from judgments of the Dominion Courts and (*b*) the power, if any, to appeal therefrom as of right. As applicable to both heads, it is of importance to recollect that in *Crown Grain Company Limited* v. *Day* (1), it was determined that a provincial legislature could not circumscribe the appellate jurisdiction of this Court by attempting to make the judgment of a provincial court final in cases where the *Supreme Court Act* permitted an appeal; and that, notwithstanding the subject-matter of the litigation was within the domain of provincial legislation.

Firstly then as to the prerogative right of the Sovereign in Council to grant special leave to appeal. While appeals in civil cases, either *de jure* or by grace, were not in question and were, therefore, not considered in the *British Coal Corporation* case (2), their Lordships did state the present position of the prerogative right in general. They explained that in early days "it was to the King that any subject who had failed to get justice in the King's Court brought his petition for redress." So far as English courts were concerned, this practice was altered whereby such petitions were brought to the King in Parliament or to the King in his Chancery, but from the Courts of the Plantations or Colonies, the petition went to the King in Council. This jurisdiction or prerogative right was settled and regulated by the Imperial Parliament in the Privy Council Acts of 1833 and 1844 and as a result, as their Lordships pointed out (page 512):

> Although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee, which as such exercised as a Court of Law in reality, though not in name, the residual prerogative of the King in Council. No doubt it was the order of the King in Council which gave effect to their reports, but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council.

(1) [1908] A.C. 504. (2) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

That is, the Sovereign, by and with the consent of the Lords Spiritual and Temporal, and Commons in Parliament Assembled, through the instrumentality of Imperial statutes transferred the prerogative right to the Judicial Committee of the Privy Council. It therefore follows that in these matters the Sovereign has no personal discretion whatever and that under constitutional usage His Majesty in Council may not decline to give effect to the Judicial Committee's recommendations.

Prior to the passing of the Statute of Westminster, 1931, the proper body to abolish the right, as settled and fixed by the Judicial Committee Acts referred to, to grant leave to appeal in a civil case from a decision of a Dominion court would have been the Imperial Parliament, but in my opinion that statute affords a complete answer to the first branch of the pending inquiry. The statute followed upon a series of declarations and resolutions set forth in the reports of the Imperial Conferences of 1926 and 1930 and according to one of the recitals of the statute, its enactment was deemed necessary

> for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conference that a law be made and enacted in due form by authority of the Parliament of the United Kingdom.

In truth the statute embodies in legislative form the established constitutional position of the members of the British Commonwealth of Nations with respect to several matters. For present purposes, only sections 2 and 3 need be referred to:—

> 2. (1) *The Colonial Laws Validity Act,* 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.
>
> 3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

By the *Colonial Laws Validity Act,* 1865, it was declared that the law of any colony should be void to the extent that it was repugnant to any Act of the Imperial Parlia-

ment extending to the colony or any order or regulation made under such Act, but by subsection 1 of section 2 of the Statute of Westminster, the *Colonial Laws Validity Act* is not to apply to any law passed after the commencement of the statute by the Parliament of the Dominion. The meaning of subsection 2 is beyond question. In view of several expressions of opinion by the highest authorities, it is perhaps unnecessary to call in aid the provisions of section 3 but certainly the combined effect of sections 2 and 3 is to remove the fetters that previously prevented Parliament from abolishing the right of the Judicial Committee to grant leave to appeal from a judgment of a Dominion court. In view of the plain wording of section 101 of the Act, the provinces enjoyed no such powers, and the reasoning and conclusion in the *British Coal Corporation* case (1) that that Act invests Parliament with the power by necessary intendment, apply equally to civil as to criminal cases.

With reference to the second branch of the inquiry, my opinion is that Parliament has the power to prohibit appeals as of right from any Dominion court. In view of the grant and growth of self government in the Dominion, and subject to the special position of appeals in Admiralty to be mentioned later, this power existed and was recognized even before the Statute of Westminster. As stated in the *British Coal Corporation* case (1) (page 520):—

> It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian courts are within the legislative control of Canada, that is of the Dominion or the provinces as the case may be.

For the same reason that has been adverted to when considering the right to grant leave to appeal, the provinces have no power to prevent Parliament abolishing appeals as of right from Dominion courts and the necessary authority therefore resides in Parliament.

Appeals in Admiralty require a more detailed investigation. The Exchequer Court of Canada, organized under the provisions of section 101 of the Act, was by a Canadian statute declared to be a Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act* 1890. By

(1) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

subsection 1 of section 6 of this last mentioned statute: "The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is, as of right, no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council"; and by section 15 the expression "local appeal" means "an appeal to any Court inferior to Her Majesty in Council." In *Richelieu and Ontario Navigation Company* v. *Owners of S.S. "Cape Breton"* (1), it was decided that by virtue of the *Colonial Courts of Admiralty Act* 1890, an appeal as of right could be brought from a decision of this court varying, on appeal, a judgment of a Local Judge in Admiralty. Following the enactment of the Statute of Westminster 1931, and particularly in view not only of sections 2 and 3 but also 5 and 6 of that statute, Parliament passed *The Admiralty Act,* 1934, chapter 31, establishing an Admiralty jurisdiction in the Exchequer Court. Sections 34 and 35 thereof provide:—

> 34. Notwithstanding anything in this Act contained, the provisions of any law now in force in Canada providing for an appeal to His Majesty the King in Council in Admiralty matters shall continue to be in force and shall be deemed not to have been repealed.
>
> 35. Saving the effect of the immediately preceding section, the *Colonial Courts of Admiralty Act,* 1890, chapter twenty-seven of the Acts of the United Kingdom for the year 1890, is repealed in so far as the said Act is part of the law of Canada.

So that, as Dominion legislation stands, a suitor may still appeal as of right from a decision of this Court rendered upon appeal from the Exchequer Court on its Admiralty side. By Bill No. 9 this appeal would be abolished.

The ingenious contention is that as Parliament by *The Admiralty Act,* 1934, had repealed the *Colonial Courts of Admiralty Act,* 1890 (with the exception noted), it thereby lost its jurisdiction in Admiralty, which, it is argued, was derived solely from the repealed Act. But that overlooks the fact that Parliament has jurisdiction under head 10 of section 91 of the Act over the subject matter of "Navigation and Shipping" and that it could, therefore, invest the Exchequer Court with jurisdiction over actions and suits in relation to that subject matter (*Consolidated Distillers*

(1) [1907] A.C. 112.

Limited v. *The King* (1)). The limitations upon the exercise of its powers under head 10 of section 91 and the peace, order and good government clause imposed by the *Colonial Laws Validity Act,* 1865, and the *Colonial Courts of Admiralty Act,* 1890, having been removed by the Statute of Westminster, Parliament is now clothed with the same ample authority to abolish appeals as of right in Admiralty cases as it possesses with respect to appeals in civil cases generally from Dominion courts.

Attention must now be directed to the problem as to whether Parliament has the requisite authority to abolish appeals as of right, or to abrogate the right of His Majesty in Council to grant leave to appeal, from decisions of provincial courts. Section 129 of the Act reads:—

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

All laws in force on July 1st, 1867, in the four named provinces were by this section continued therein subject to the exception and proviso. By appropriate legislation or Imperial order in council the section was made to apply to each of the other provinces as of the date of its entry into the Union. It would therefore appear convenient to ascertain what laws touching appeals were in force in the nine provinces on the relevant dates.

Ontario and Quebec

The *Constitutional Act,* 1791, divided the old province of Quebec into Upper and Lower Canada. Section 34 provided:—

> XXXIV. And whereas by an Ordinance passed in the Province of Quebec, the Governor and Council of the said Province were constituted a Court of Civil Jurisdiction, for hearing and determining Appeals in certain Cases therein specified, be it further enacted by the Authority

(1) [1933] A.C. 508, at 522.

1940
REFERENCE
LEGISLATIVE
COMPETENCE
AS TO THE
OF THE
PARLIAMENT
OF CANADA
TO ENACT
BILL No. 9,
ENTITLED
"AN ACT
TO AMEND
THE
SUPREME
COURT ACT."
Kerwin J.

aforesaid That the Governor, or Lieutenant-Governor, or Person administering the Government of each of the said Provinces respectively, together with such executive Council as shall be appointed by His Majesty for the Affairs of such Province shall be a Court of Civil Jurisdiction within each of the said Provinces respectively for hearing and determining Appeals within the same, in the like Cases, and in the like Manner and Form, and subject to such Appeal therefrom, as such Appeals might before the passing of this Act have been heard and determined by the Governor and Council of the Province of Quebec; but subject nevertheless to such further or other Provisions as may be made in this Behalf, by Any act of the Legislative Council and Assembly of either of the said Provinces respectively assented to by His Majesty, His Heirs or Successors.

The important part of this section for our present purpose is the proviso at the end. The power thereby conferred was exercised in Upper Canada by chapter 2 of the statutes of 1794, and in Lower Canada by chapter 6 of the statutes of the same year.

By virtue of section 46 of the Act of Union, 1840 (Imperial), these enactments were continued in force subject to being varied by legislation of the provinces of Canada. Such legislation was duly passed so that when the Act was passed in 1867 there were in force chapter 13 of the statutes of 1859 providing for appeals as of right in Upper Canada, and chapter 77 of the statutes of 1861, and section 1178 of the Code of Civil Procedure 1867, providing for appeals as of right in Lower Canada. In each province the right of appeal was limited to certain cases.

Nova Scotia

Except possibly for the period 1861 to 1863, either the commissions or instructions issued to the Governors of the province of Nova Scotia, from time to time, contained regulations providing for an appeal to the Sovereign in Council. By an Imperial order in council of 1863 authority was conferred upon the Supreme Court of the province to grant leave to appeal in certain cases, but the right of Her Majesty to admit an appeal in any case, upon special petition, was expressly reserved. At the time of Union, therefore, there existed in Nova Scotia under an Imperial order in council, the right, by leave of the provincial Supreme Court, to appeal *de jure* in certain cases, and the right of the Sovereign in Council in any case to give leave to appeal as of grace.

New Brunswick

Appeals from the Supreme Court of New Brunswick were provided for and regulated by an Imperial order in council dated November 27th, 1852. In all relevant respects it corresponded to the order in council of 1863 relating to Nova Scotia.

Manitoba

On June 3rd, 1870, under the relevant provisions of the Act, an order in council admitted Rupert's Land and the Northwestern Territory into the Union. In anticipation of this step the Dominion Parliament had already passed *The Manitoba Act* in the same year, carving out of the newly admitted lands the Province of Manitoba. Any doubt as to the power of Parliament so do to was removed by the *British North America Act* of 1871. No order in council appears to have been issued regulating appeals from Rupert's Land or the Northwest Territories.

British Columbia

An Imperial Statute of 1839, chapter 48, authorized Her Majesty from time to time to make provision for the administration of justice in Vancouver's Island, and for that purpose to constitute such court or courts of record and other courts as she should think fit. Section 3 enacted:—

> III. Provided always, and be it enacted, That all Judgments given in any Civil Suit in the said Island shall be subject to Appeal to Her Majesty in Council, in the Manner and subject to the Regulations in and subject to which Appeals are now brought from the Civil Courts of Canada, and to such further or other Regulations as Her Majesty with the Advice of Her Privy Council shall from Time to Time appoint.

Pursuant to this Act, an Imperial order in council of April 4, 1856, established a Supreme Court of Civil Justice of the Colony of Vancouver's Island, provided for an appeal to Her Majesty in Council in certain cases and preserved Her Majesty's prerogative right to grant leave to appeal in any case.

In 1858 the Colony of British Columbia (excluding Vancouver Island) was established by 21-22 Victoria, chapter 99 (Imperial), section 5 whereof, relating to appeals

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

to Her Majesty in Council, corresponds to section 3 of the Act providing for the administration of justice in Vancouver's Island.

On November 19th, 1866, the Colony of Vancouver Island was united to the Colony of British Columbia under the name of "British Columbia" by a proclamation issued pursuant to 29-30 Victoria, chapter 66 (Imperial). This statute enacted that the laws in force in the separate colonies should be retained until otherwise provided by lawful authority, and the powers of Her Majesty in Council were left unaffected by anything in the statute.

Pursuant to an Imperial Order in Council, the Colony of British Columbia entered Confederation as of July 20th, 1871, at which date appeals from British Columbia courts would appear to be subject to the same terms and regulations as applied to appeals from Ontario and Quebec.

Prince Edward Island

In Prince Edward Island a system of courts was established under the authority of the instructions issued to the Governors of the province, which instructions also provided for an appeal to Her Majesty in Council in certain circumstances.

No order in council was issued regulating these appeals down to July 1st, 1873, as of which date the province joined Confederation. Since only laws that were in force at that time were continued, the *Common Law Procedure Act*, 1873, passed by the General Assembly of the province on June 14th, 1873, would appear to have no relevancy as by its terms it was not to come into operation until January 1st, 1874. In any event, it is understood that the judges of the provincial Supreme Court did not exercise the powers conferred upon them by section 158 of the 1873 Act to make rules and regulations

> directing the mode of procedure, *either pro hoc vice*, or generally, as may be required, and as may not be inconsistent with the Royal instructions and the rules and mode of procedure of the Judicial Committee of the Privy Council.

Alberta and Saskatchewan

The *British North America Act* of 1871 conferred upon Parliament the power to establish new provinces in any territories forming part of the Dominion, and accordingly, by Dominion Acts of 1905, the provinces of Alberta and

Saskatchewan were constituted as of September 1st of that year. It has been mentioned previously, when speaking of Manitoba, that no order in council appears to have been issued regulating appeals from Rupert's Land or the Northwest Territories (out of which these two provinces were formed).

These being the laws with respect to appeals to His Majesty in Council, in force in the several provinces as of the date of their entry into the Union, it may be stated that subsequent thereto appeals were regulated by Imperial orders in council passed with respect to British Columbia in 1887, Manitoba in 1892, and finally with respect to each province except Ontario and Quebec in 1910 and 1911,

with a view of equalizing as far as may be the conditions under which Her Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to Her Majesty in Council.

It is now necessary to revert to the provisions of section 129 of the Act. By virtue of that part of the section which appears in brackets, all such laws, that were enacted by or existed under Imperial Acts, could not be repealed, abolished or altered either by Parliament or by the provincial legislatures; if they were not of that description, they might be repealed, abolished or altered by the proper legislative body "according to the authority of the Parliament or of that legislature under this Act." Primarily, it is contended that these laws fall in the second division and that the provincial legislatures have the required authority under the Act; in the alternative it is contended that, if they fall within the first division, the effect of sections 2 and 7 of the Statute of Westminster is to invest the legislatures with the necessary power.

The alternative argument may first be noticed. Section 2 of the Statute of Westminster has already been referred to; section 7 is as follows:—

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts*, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

The effect of subsection 2 of section 7 is that the *Colonial Laws Validity Act,* 1865, will not apply to any law made after the commencement of the statute by the legislature of a province, and that no law so made will be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under such Act, and the powers of a provincial legislature shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the province. Subsection 2 must, of course, be read in conjunction with the other subsections and in my opinion the proper construction of section 7, upon a consideration of all its provisions, requires that a province or the Dominion be restricted to the powers of legislation conferred upon the legislature or Parliament, as the case may be, by the Act. The Statute of Westminster does not enlarge the classes of subjects within which fall those matters in relation to which Parliament or a legislature may make laws. If, but for the *Colonial Laws Validity Act,* 1865, or any other Imperial Act applying to the Dominion, a provincial legislature would have been empowered by the Act to legislate upon a given matter, the restrictions imposed by those statutes are removed by the Statute of Westminster, but no alteration is made in the division of subjects between the two authorities. It must also be borne in mind that while by section 3 of the Statute of Westminster the doctrine prohibiting extra-territorial legislation ceased to apply to Parliament, that section, unlike section 2, was not made applicable to the provincial legislatures.

The summaries of the laws in force in each of the provinces at the relevant dates demonstrate that, except in the cases of Ontario and Quebec, and possibly British Columbia, they existed by virtue of the *Judicial Committee Acts* of 1833 and 1844 or Imperial orders in council passed in pursuance thereof. They, therefore, fall within that part of section 129 that appears in brackets, and for the reasons given immediately above may not be repealed, abolished or altered by the provincial legislatures unless these bodies already possess the necessary power under the Act.

This brings us to a consideration of the first contention. It is said generally on behalf of all those provinces that

deny the jurisdiction of Parliament to enact the provisions of Bill 9, that their legislatures have the necessary authority under one of three heads of section 92 of the Act:—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.

13. Property and Civil Rights in the Province.

14. 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.

Taking these in reverse order, it will be noticed that by the very terms of head 14, the administration of justice is confined to the provinces, the courts which the provincial legislatures are authorized to constitute, maintain and organize are provincial courts, and the procedure in civil matters is confined to procedure in those, i.e., provincial courts. At page 520 of the judgment in the *British Coal Corporation* case (1) appears a statement, already set out, which together with the preceding sentence is relied upon by the provinces. It seems advisable to reproduce the entire passage:—

A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada that is of the Dominion or of the provinces as the case may be.

One argument based upon this passage is that the reference to the provinces would have been unnecessary if their Lordships had not felt that authority to deal with appeals here under review was in the provincial domain. But their Lordships pointed out at the end of the judgment that they had been dealing only with the legal position in Canada in regard to appeals in criminal matters and that it was neither necessary nor desirable to touch on the position as regards civil cases. There must always be kept in mind the particular thing with which a judgment is dealing. The difficulty of discovering language applicable only to particular circumstances is shown by the fact that if one's attention is confined to the sentence in the British Coal judgment preceding the passage quoted

(1) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

above, it would appear as if it were categorically stated that the power to constitute law courts and regulate their procedure was by the Act vested only in the Dominion legislature; whereas it is well known, and the succeeding part of the judgment indicates, that certain powers with reference to the law courts are vested in the provinces.

The second argument, founded upon the first sentence in this passage, is that the phrase in head 14 of section 92, "administration of justice," conferred the power upon the legislatures to establish and regulate a system of appeals. Now it has been made clear in the *Crown Grain* case (1) that the administration of justice, confined as it is to the provinces, is certainly not sufficient to permit the legislatures to deal with appeals from the provincial courts to the Supreme Court of Canada, and the proper conclusion appears to be that His Majesty in Council or the Judicial Committee cannot in any sense of the term be deemed "Provincial Courts" and that the legislatures are still territorially restricted.

As to head 13, while the right to launch an appeal to His Majesty in Council may be said to be a right in the province since a litigant in the provincial courts is either a resident of the province or has attorned to the jurisdiction, the effective part of the proceeding is the hearing and determination of the appeal; and as to these, it cannot be said that they are rights in the province. It follows, I think, from the decision in *Brassard* v. *Smith* (2), that unless all the elements of the right exists in the province, head 13 can have no application.

In truth, if the provinces have not power under head 14, it is difficult to see how head 13 can have any application. As Viscount Haldane stated in *John Deere Plow Company, Limited* v. *Wharton* (3):—

> The expression "civil rights in the province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of s. 92 and also to much of the field of s. 91. But the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words.

With reference to the subject matter of the appeal in that case, His Lordship had already pointed out that unless heads 11 and 13 were read disjunctively the limitation in

(1) [1908] A.C. 504. (2) [1925] A.C. 371.
(3) [1915] A.C. 330, at 340.

the former, "the incorporation of companies with provincial objects," would be nugatory. Similarly in the present instance, the limitation "in the province" in head 14 would have no application if the power under head 13 to enable an appeal to be launched carried with it the power to permit or abolish its hearing and determination.

As to head 1 of section 92, it must first be observed that the salient word "Constitution" is found in many parts of the Act. It appears in the first recital, "A Constitution similar in Principle to that of the United Kingdom"; in section 22 "In relation to the Constitution of the Senate"; in the heading of Part V "Provincial Constitutions"; in section 64 (which is included in Part V) "The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick"; in section 88 (also included in Part V) "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick"; in head 27 of section 91 "except the Constitution of Courts of Criminal Jurisdiction"; then in head 1 of section 92; and in section 101. This is not meant to be an exhaustive list but it is sufficient to indicate that the word is used in different senses throughout the Act. In head 1 of section 92, it must, I think, refer, as to the executive power, to such things as the appointment of Lieutenant-Governors and Provincial Administrators, and as to the legislative power, to such things as the legislatures for the provinces; all of these matters being dealt with by sections appearing under Part V. It can have no reference to such a particular subject as is identified by head 14.

If a province does not possess that authority, it has been made clear by a number of decisions of the Judicial Committee, some of which are referred to in the *British Coal Corporation* case (1), that such power must necessarily reside in the Dominion. It will be remembered that Bill 9 proposes to amend the Dominion statute respecting the Supreme Court of Canada. Under the opening clause of section 91, Parliament may make laws for the peace, order and good government of Canada, and by section 101 "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution,

(1) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

maintenance and organization of a General Court of Appeal for Canada." In my opinion the power thereby conferred includes the power to make the decisions of such appellate court exclusive and ultimate. The reasons set forth in *Nadan's* case (1), as explained in the *British Coal Corporation* case (2), as to why Parliament could not, prior to the Statute of Westminster, abolish appeals as of grace in criminal cases, apply with equal force to explain the inability of Parliament during that period to compel a litigant desirous of appealing from the judgment of a provincial court to apply to the Supreme Court of Canada, if his suit fell within the jurisdiction of that court, and otherwise to abide by the decision against him. These restrictions have been removed by the Statute of Westminster and therefore, so far as all the provinces except Ontario and Quebec and possibly British Columbia are concerned, Parliament may validly enact the provisions of Bill 9.

It is now necessary to refer to an additional argument presented on behalf of Ontario, which is to this effect. By assenting to the *Constitutional Act* of 1791 His Majesty must be taken not only to have abandoned the prerogative right to regulate appeals as of right from Upper Canada to the Sovereign in Council but to have transferred it to the Legislative Council and Assembly of that province; that such transferred prerogative was so regulated by statute, which was continued in force by the Act of Union, 1840; that it was regulated by the Parliament of Canada by legislation, applying to Upper Canada, which existed at the time of Confederation and which was continued in force by section 129 of the Act; that thereafter Ontario continued to regulate appeals as of right and effectively abolish them, except under the condition set forth in its legislation. So much may be conceded. The remainder of the argument that Ontario has also acquired the power to abolish the right of His Majesty in Council to grant special leave to appeal is, under the authorities, not so obvious.

Granting, however, the entire premises and conclusion of this contention, it will be recollected that the power deemed to reside in Parliament to make the decisions of

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

the Supreme Court of Canada exclusive and ultimate may be exercised "notwithstanding anything contained in this Act." This *non obstante* clause places the Dominion power on the same footing as those conferred by the specially enumerated heads of section 91. As to these, their Lordships pointed out in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (*Combines Investigation Act* case) (1):—

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92, head 14, the administration of justice in the province.

In *Crown Grain Company Limited* v. *Day* (2), it is stated:—

> It is inconceivable that a Court of Appeal could be established without its jurisdiction being at the same time defined.

The pith and substance of the proposed Bill is the jurisdiction of that General Court of Appeal, so that even if Ontario had authority the two powers overlap and "the enactment of the Dominion Parliament must prevail." *Crown Grain Company Limited* v. *Day* (3); *Attorney-General of Canada* v. *Attorney-General of British Columbia* (*Fish Canneries* case) (4); *In Re Silver Bros.* (5).

Stress was placed upon a passage in the judgment of Viscount Haldane in the *Board of Commerce* case (6). The paragraph in which these words appear is as follows (the particular passage being italicized):—

> For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which

(1) [1931] A.C. 310, at 326, 327.
(2) [1908] A.C. 504, at 506.
(3) [1908] A.C. 504, at 507.
(4) [1930] A.C. 111, at 118.
(5) [1932] A.C. 514, at 521.
(6) [1922] 1 A.C. 191, at 199.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Kerwin J.

require a title to so interfere as basis of their application. *For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures.* Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

It is quite evident that Viscount Haldane was there applying a well-known principle to the legislation in question by pointing out that Parliament could not, under the guise of establishing a provincial court for the better administration of the laws of Canada, really legislate upon matters of provincial concern. That principle has no application in the present case where Bill 9 deals with the jurisdiction of the Supreme Court of Canada, a subject matter within its exclusive power.

In all relevant respects Quebec is in the same position as Ontario. On behalf of British Columbia, it was urged that in view of section 3 of The *Vancouver's Island Act* of 1839 and section 5 of *The Colony of British Columbia Act* of 1858, the situation of that province, under section 129 of the Act, was identical with that of Ontario. It is not necessary to determine whether that be so or not, but certainly British Columbia stands in no higher position.

The views expressed with reference to the other six provinces add force to the opinion as to Ontario, Quebec and British Columbia. Without the use of express words, it could surely not have been intended that in a matter of this kind three provinces should be able to exercise a power denied to the others. From time to time all provincial courts are engaged in the duty of construing and enforcing Acts of Parliament and as to these particularly it is not to be expected that in some provinces an appeal could be taken only to this court, while in others an alternative right to appeal or ask for leave to appeal, to His Majesty in Council would still exist. If that were so, the court could not properly be described as "a General Court of Appeal for Canada."

For these reasons I would answer the question submitted to us "Yes, in its entirety."

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Hudson J.

HUDSON J.—His Excellency the Governor General in Council has submitted to this Court for its opinion a question in the following language:

Is said Bill No. 9, entitled *An Act to amend the Supreme Court Act,* or any of the provisions thereof, and in what particular or particulars or to what extent, *intra vires* of the Parliament of Canada?

Bill No. 9 referred to proposes, first, to give the Supreme Court of Canada exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; secondly, to abolish appeals to the Privy Council; and thirdly, to repeal the *Judicial Committee Act* of 1833 and the *Judicial Committee Act* of 1844, of the statutes of the United Kingdom of Great Britain and Ireland, and all orders, rules or regulations made thereunder in so far as they affect Canada.

The validity of the Bill was supported by the Dominion and the provinces of Manitoba and Saskatchewan, and opposed by Ontario, Nova Scotia, New Brunswick, British Columbia and Alberta. Neither Quebec nor Prince Edward Island took any part.

In the division of legislative power between the Dominion and the provinces consequent upon Confederation, there was allotted to the provinces by the *British North America Act,* section 92 (14),

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

* * *

14. 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 these Courts.

Under the authority of this provision, the provinces have defined the constitutions of their several courts and provided for their maintenance and organization.

But to enable these courts to function, the judges who interpret and apply the law must be appointed by the Dominion who must pay their salaries and under whose authority alone they can be removed; sections 96, 99 and 100; *Toronto Corporation* v. *York* (1).

(1) [1938] A.C. 415.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Hudson J.

The laws administered in the provincial courts are the laws applicable to the causes coming before them, whether these laws be within the legislative competence of the province or of the Dominion.

The Dominion may impose additional duties on the judges and utilize the machinery of these courts to enforce Dominion laws of a special character, such as Dominion election petitions and bankruptcy; see *Valin* v. *Langlois* (1) and *Cushing* v. *Dupuy* (2).

From final decisions of these provincial courts an appeal lies to the Supreme Court of Canada, which was established under the authority of section 101 of the *British North America Act:*

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

A province cannot take away or impair the jurisdiction conferred on the Supreme Court by the Dominion Act in respect of matters otherwise purely provincial: *Crown Grain* v. *Day* (3). Nor has a provincial legislature any power to grant an appeal to the Supreme Court of Canada: *Union Colliery* v. *Attorney-General for British Columbia* (4).

The Bill under consideration, if it became law, would make this Court the exclusive, final tribunal in all Canadian cases.

An appeal may also be brought from the provincial courts to the Judicial Committee of the Privy Council in all except criminal cases. There are two classes of such appeals: First, what are called "prerogative appeals" by which the Judicial Committee may, if they see fit, grant leave to any litigant to appeal thereto from any decision of any court, either Dominion or provincial. The second class is where provision has been made for what are called appeals as of right. In the provinces of Ontario and Quebec, this has been done by legislation purporting to authorize appeals to the Judicial Committee subject to defined conditions, and in the other provinces there are somewhat similar provisions made by orders in council.

(1) (1879) 5 App. Cas. 115.
(2) (1880) 5 App. Cas. 409.
(3) [1908] A.C. 504, at 507.
(4) (1897) 17 Can. L.T. 391.

The Bill under consideration would abolish appeals of both classes.

In criminal matters there is no longer any right of appeal to the Judicial Committee from any court, either Dominion or provincial. In 1933, an amendment was made to the Criminal Code of Canada, section 17 of the Statutes of 23 and 24, Geo. V, as follows:

> Subsection 4 of section 10 of the said Act (the Criminal Code) is repealed and is hereby re-enacted as follows:—
>
> Notwithstanding any royal prerogative or anything contained in the *Interpretation Act* or in the *Supreme Court Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard.

The validity of this provision was upheld in the case of *British Coal Corporation* v. *The King* (1). Therefore, future appeals in all criminal matters are effectually barred. In giving the judgment of the Committee, the Lord Chancellor, Lord Sankey, stated:

> It is here neither necessary nor desirable to touch on the position as regards civil cases.

But the reasons for arriving at this judgment lead inevitably to the conclusion that the Canadian Parliament has a right to abolish any right to appeal to the Judicial Committee in any matter falling within the legislative jurisdiction of the Dominion Parliament, including an appeal from the decision of the Supreme Court of Canada in any matter whatsoever.

There remains for consideration the matter of appeals from the decisions of provincial courts where the law involved is within the exclusive legislative jurisdiction of the provinces.

Prior to 1833, the right of the Sovereign in Council to entertain, by way of special leave, appeals from any court in His Majesty's Dominions beyond the seas, was a settled part of the royal prerogative: "a *residuum* of the royal prerogative of the Sovereign as the fountain of justice"; *British Coal Corporation* v. *The King* (2). This appellate jurisdiction was usually exercised in a Committee of the Whole Privy Council which having heard the allegations and proofs, made their report to His Majesty in Council, by whom a judgment was finally given.

(1) [1935] A.C. 500 (2) [1935] A.C. 500, at 511.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Hudson J.

In 1833 there was passed an Act of the Imperial Parliament, 3-4 William IV, chap. 41, entitled *An Act for the better administration of justice in His Majesty's Privy Council,* later given the short title of *The Judicial Committee Act, 1833.* This Act created a statutory body called "The Judicial Committee of the Privy Council," and is the basis of the present constitution and procedure of this tribunal. It recites, *inter alia,* that

> from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council;

and proceeds to provide for the more effectual hearing and reporting of appeals to His Majesty in Council and on other matters, and for giving powers and jurisdiction to His Majesty in Council. The Act goes on to provide for the formation of a Committee of His Majesty's Privy Council to be styled "The Judicial Committee of the Privy Council"; and enacts that

> all appeals, or complaints in the nature of appeals whatever which, either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council

from the order of any court or judge, should thereafter be referred by His Majesty to, and heard by the Judicial Committee as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open court.

It would appear, therefore, that this Act and the Supplementary Act of 1844 did not change the character of the jurisdiction but merely provided a more efficient method of exercising it. Reference here might be made to a statement of Lord Watson in the case of *Attorney-General for Canada* v. *Attorney-General for Ontario* (1). At page 208 he said:

> By a clause in the statutes of 1890 and 1891 (Statutes of Ontario and Canada), it is enacted that when the arbitrators proceed on their view of a disputed question of law, "the award shall set forth the same at the instance of either party, and the award shall be subject to appeal so far as it relates to such decision to the Supreme Court, and thence to the Privy Council of England, in case their Lordships are pleased to entertain the appeal." The concluding part of that enactment ignores the constitutional rule that an appeal lies to Her Majesty, and not to this

(1) [1897] A.C. 199.

Board; and that no such jurisdiction can be conferred upon their Lordships, who are merely the advisers of the Queen, by any legislation either of the Dominion or of the Provinces of Canada.

On the granting of self-government, many of the royal prerogatives passed to the Provinces, and, at Confederation, these and some others were distributed between the Dominion and the provinces largely in accordance with the distribution of legislative power.

There remained, however, some prerogatives which did not pass either to the Dominion or to the provinces. They have sometimes been referred to as "Imperial prerogatives." During the past few decades with the broadening of Dominion status these Imperial prerogatives, in so far as they affected Canadian affairs, passed progressively under Dominion control. To illustrate by recent events, His Majesty now makes a declaration of war so far as it affects Canada on the advice of his Canadian Ministers. Again, by the Statute of Westminster, any alteration made in the succession to the Throne was made subject to the approval of the Dominion. When a change became necessary, this was done, first, with the approval of the Canadian Ministers and afterwards confirmed by the Parliament of Canada.

The prerogative of appeal is the only one affecting Canadian affairs which continues to be exercised without the active participation of the Dominion. There were two initial legal obstacles in the way of Dominion legislation abrogating this particular prerogative. The first was that by reason of the operation of the *Colonial Laws Validity Act* such legislation by Canada would be repugnant to the Judicial Committee Acts of 1833 and 1844, and void for that reason. The second was that it would be in the nature of extra-territorial legislation and for that reason beyond the power of Parliament: see *Nadan* v. *The King* (1). However, these obstacles were removed by the Statute of Westminster: see *British Coal Corporation* case (2).

Now it is contended on behalf of a majority of the provinces that whatever remains of this prerogative is something in which they have rights and, for that reason, cannot be taken away by the Canadian Parliament.

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Hudson J.

The rights of the provinces must be found within the four corners of the *British North America Act*. Before dealing with the particular sections of this Act, there are some general observations which merit consideration.

Prior to Confederation, each of the original Provinces was in the nature of a unitary state. Each had general power to make laws for the peace, order and good government within the province. There was no restriction on the establishment of courts and the appointment of judges. They were in fact subject to no limitations except those imposed by the Imperial Parliament, or retained in the way of royal prerogatives. Upon Confederation, however, such powers of the provinces were greatly restricted. In addition to the distribution of legislative power, some of the Imperial prerogatives were transferred to the Dominion and many of those formerly enjoyed by the Provinces were also transferred to the Dominion.

The Governor in Council now appoints and can dismiss the Lieutenant-Governors of the provinces. The Dominion pays their salaries. The Governor General in Council now has power to disallow provincial statutes. This could not be done by His Majesty in Council (other than his Council in Canada). As has been said before, the Governor General in Council now appoints the judges of the provincial courts as well as those of the Dominion, and the Dominion pays the salaries of all. Perhaps the most important is that the reserve power to legislate for peace, order and good government was allotted to the Dominion Parliament and specific powers alone went to the provinces.

There is no mention whatever in the *British North America Act* of appeals to the Judicial Committee or in fact to any other tribunal, except only the provision in section 101 for the establishment of a general court of appeal for Canada.

The *British Coal Corporation* case (1), establishes that the right to control appeals to the Judicial Committee must now be a matter coming within the jurisdiction of either the Canadian Parliament or the provincial legislatures.

As has been stated, the reserve power to legislate for peace, order and good government is vested in the Cana-

(1) [1935] A.C. 500.

dian Parliament and, therefore, unless something can be found in the provisions of the Act which confer this power on the provinces, the Dominion must have that power. As was stated by Sir Montague Smith in the case of *Citizens Insurance Company* v. *Parsons* (1):

> The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne.

Section 92 enumerates the subjects assigned exclusively to the provinces. Of these the only relevant head of provincial legislative jurisdiction would appear to be section 92 (14).

> 14. 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.

The first and controlling phrase is "the administration of justice in the province." These words in their natural sense mean the enforcement of justice according to law in the province. They would imply authority to provide machinery necessary for that purpose. They would not imply making law. They might or might not imply the creation of courts for the interpretation and application of law. But the following words make clear the extent and limitation of any such implication, that is,

> including the constitution, maintenance and organization of Provincial courts, both of civil and of criminal jurisdiction, and the procedure in civil matters in those courts.

It is obvious that the provincial courts must be courts functioning within the province and whose jurisdiction is limited by territorial boundaries of the province.

Now the administration of justice means the enforcement of all justice according to law, civil or criminal, Dominion or provincial, and the judges of the courts who are to interpret and apply the law for the purposes of such

(1) (1881) 7 App. Cas. 96, at 109.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Hudson J.

administration in the provinces are to interpret and apply both Dominion and provincial laws, and this in fact is what is done. The courts are for all parties commonly the subjects of both jurisdictions. While a province constitutes these courts and supplies the machinery for and does enforce the law, the function of judicature is entrusted to judges appointed and paid by Canada and not by the provinces. The Dominion may also impose additional duties on the judges and utilize the machinery of those courts to enforce Dominion laws of a special character, such as Dominion Election Petitions and Bankruptcy. Although called provincial courts they are in truth created by joint action, by and for the benefit of both jurisdictions.

The composition of these courts and the character of the business entrusted to them rebut any implication there might be that a province had a right to control appeals therefrom to any external tribunal.

Then there is the objection of extra-territoriality found fatal to the attempted repeal in question in the *Nadan* case, *supra*. Although this objection was removed by section 3 of the Statute of Westminster so far as it affected the Dominion, it still subsists in the case of the provinces. I am of the opinion that this section does not give the provinces the power for which they contend.

It was also contended on behalf of the provinces that subsections 1 and 13 of section 92 might supply jurisdiction. But I am unable to see that either of these confers any such power. In any event, heading 14 is the compartment dealing with the subject-matter and for this reason would exclude application on the others.

Another argument advanced on behalf of the provinces was based on section 129 of the *British North America Act*, as follows:

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

The obvious purpose of this section was to provide for continuity of law and administration until the new Parliament and new legislatures were organized, assembled and able to function. I think it was clearly not the intention to alter the distribution of powers made by sections 91 and 92. The introductory words "Except as otherwise provided by this Act" make this perfectly plain.

If my view is correct that none of the headings in section 92 confer on the provincial legislatures, expressly or impliedly, power to abolish the right of appeal, then the reserve powers of the Dominion would come automatically into operation, and it is, therefore, "otherwise provided" in the Act that the Dominion should have any rights which the provinces theretofore may have had in the matter.

A very able and interesting argument was presented to us on behalf of Ontario and by counsel for several of the other provinces, based in the case of Ontario on the *Constitutional Act* of 1791, and in several of the other provinces on subsequent orders in council; but holding the views that I do it is not necessary to discuss the points raised by them. I would just make one observation here. It must never be overlooked that with the passing of this Act there was a new orientation of powers, prerogative as well as legislative.

For complete accuracy, it should be stated that references herein to provincial courts do not apply to those inferior jurisdictions under consideration in a reference before this Court, the judgment in which is reported (1).

There remains to be considered the extent of the power conferred upon the Dominion by section 101. This provides:

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

The extent of the power thus conferred came before the Judicial Committee for consideration in the case of *Crown Grain* v. *Day* (2). The circumstances in this case were that the Manitoba Legislature had passed a *Mechanics' and Wage Earners' Lien Act* applying to the suit under appeal.

(1) [1938] S.C.R. 398. (2) [1908] A.C. 304.

1940

REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9, ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

Hudson J.

This statute enacted that in suits relating to liens the judgment of the Manitoba court of King's Bench should be final and that there should be no appeal therefrom. It was held that a provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act. Lord Robertson, in giving the opinion of the Board, said at page 507:

> The appellants maintain that the implied condition of the power of the Dominion Parliament to set up a Court of Appeal was that the Court so set up should be liable to have its jurisdiction circumscribed by provincial legislation dealing with those subject-matters of litigation which, like that of contracts, are committed to the provincial Legislatures. The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purposes of the Court of Appeal.
>
> It is to be observed that the subject in conflict belongs primarily to the subject-matter committed to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada. But, further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail. This has already been laid down in *Dobie* v. *Temporalities Board* (1), and *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (2).

Section 101 is included in a group of sections forming a distinct division of the Act under the heading "7. Judicature" wherein provision is made for the appointment, payment, retirement and removal of judges and concludes with the provision for a general court of appeal. It would seem to me that, reading the sections of this division together with other sections of the Act, there is envisaged the ultimate establishment of a complete system of judicature within Canada with a final, general court of appeal of a last resort in Canada, and this should be established when and with whatever jurisdiction Parliament might from time to time decide.

As has already been observed, there is no provision in the Act relating to appeals beyond Canada, but, undoubtedly, when the Act was passed in 1867 the prerogative right to appeal by special leave existed. But that did not necessarily mean that litigants who wished to appeal might not first be obliged to come to the Supreme Court of Canada. The words "a general court of appeal for

(1) (1882) 7 App. Cas. 136. (2) [1907] A.C. 65.

Canada" surely imply only one court of appeal and it would appear to be anomalous that there should be concurrently a right of appeal to two different courts. This situation could not be effectively corrected until the passing of the Statute of Westminster, not because of any provisions in the *British North America Act* but because of external constitutional limitations. These having been removed, I can see no reason why the Dominion should not exercise the full powers given by this section, either expressly or impliedly and make the decisions of the Supreme Court of Canada final and conclusive and without appeal.

A special argument was raised in regard to admiralty appeals, but I think this argument is shortly and definitely answered by the fact that "navigation and shipping" is a subject which is expressly allotted to the Dominion under section 91 of the Act, and the reasoning by which the conclusion was arrived at in the *British Coal Corporation* case (1), that Canada had the power to make the decision of the Supreme Court final in regard to criminal matters, applies equally in regard to admiralty cases.

For these reasons, I would answer the question submitted in the affirmative and say that a Bill in substantially the form of Bill No. 9 would be *intra vires* of the Parliament of Canada.

MARIE-LOUISE CLOUTIER.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1939
* Oct. 30.
* Nov. 30.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Murder—Admission of facts having prima facie no connection with crime, but liable to constitute circumstantial evidence—Rule, as to warning to the jury in case of evidence by accomplice, not binding on the trial judge when accomplice is not a witness—Objections to evidence in criminal trials—Ought to be decided at once by the trial judge and not be allowed under reserve of decision.

In a trial for murder, where the accused was charged with having caused the death of her husband by poisoning, facts, which *prima facie* may have no connection with the alleged crime, may nevertheless be

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

(1) [1935] A.C. 500.

1939

CLOUTIER v. THE KING.

allowed as evidence by the trial judge under certain circumstances. In the present case, the facts, whose admittance was objected to, were of such a nature as to establish the existence of feelings of animosity, and even of hatred, on the part of the accused towards her husband; and, in that case, such evidence was legal, not only to prove the intentions of the accused, but also to establish one circumstance which, added to other circumstances resulting from the evidence, was of a nature to justify a verdict of guilty against the accused.—*The King* v. *Barbour*, [1938] S.C.R. 465; *Rex* v. *Hall*, [1911] A.C. 47; *Rex* v. *Bond*, [1906] 2 K.B. 389, and *Paradis* v. *The King*, [1934] S.C.R. 165, ref.

The well known rule, that the trial judge must warn the jury of the danger of finding an accused guilty on the uncorroborated testimony of an accomplice, need not be followed by the trial judge in his charge to the jury, when the alleged accomplice has not given evidence and when only certain statements made by him in furtherance of the common purpose were adduced in evidence.

Semble that, in criminal matters, at a trial before a jury, all objections to evidence should not be reserved for later adjudication by the trial judge, but should be overruled or maintained before such evidence be admitted. Some prejudice may be caused to the accused in the minds of the jury by certain evidence which may be given before it, even, if, later on, the trial judge rules that such evidence should be rejected and that the jury should not take it into account.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellant on a charge of murder.

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

R. Beaudoin K.C. for the appellant.

Noël Dorion K.C., *A. Lacoursière* and *C. Noël* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—L'appelante a été trouvée coupable d'avoir, le dix-neuvième jour d'août 1937, dans la paroisse de St-Méthode, P.Q., causé la mort de son mari en l'empoisonnant; et la peine capitale a été prononcée contre elle.

Elle a interjeté appel devant la Cour du Banc du Roi, qui a confirmé le verdict dans un jugement où quatre des juges ont concouru et un juge fut dissident.

L'appelante porte maintenant sa cause devant cette Cour sur les moyens de droit soulevés par la dissidence en Cour du Banc du Roi et nous soumet que ces moyens devraient

prévaloir pour faire annuler le verdict, ou, au moins, pour lui obtenir un nouveau procès. C'est ce dernier remède que lui aurait accordé le jugement qui a prononcé le dissentiment en appel.

Dans le jugement formel de la Cour du Banc du Roi, les motifs de la dissidence sont exprimés comme suit:

1. Admission de preuve illégale;

2. Mauvaise direction de la part du juge présidant le procès, au préjudice de l'appelante;

3. La preuve de circonstances apportée contre l'accusée ne justifiait pas en droit une condamnation.

L'appelante est limitée par la loi aux griefs d'appel qui sont mentionnés dans cette dissidence.

Il est douteux que le moyen résultant de l'admission de preuve illégale pouvait valablement être soulevé devant la Cour du Banc du Roi.

En effet, comme l'a fait remarquer le procureur de la Couronne, la seule allusion que l'on trouve à ce sujet dans l'avis d'appel est la suivante, sous le titre: "Griefs d'appel en droit": "Toute la preuve permise par la Couronne et faite par elle est illégale."

Et, sur motion de la Couronne, par un jugement unanime de la Cour du Banc du Roi, il fut ordonné que ce paragraphe soit retranché et rejeté de l'avis d'appel parce qu'il n'était pas exposé de façon précise et circonstanciée et qu'il ne pouvait donc être retenu.

Il semble cependant que, malgré ce jugement, la Cour du Banc du Roi a laissé faire devant elle la discussion de ce moyen, car chacun des juges en fait mention dans ses notes et en discute la portée. Dans les circonstances, comme nous avons entendu les arguments pour et contre à l'audition, nous croyons préférable de nous prononcer sur ce premier grief.

A ce sujet, nous désirons seulement faire allusion, en passant, à une remarque à l'effet que, au cours de l'enquête, bon nombre d'objections auraient été prises sous réserve par l'honorable juge qui présidait le procès et que, de cette façon, toutes les réponses auraient été données devant le jury sans que, plus tard, dans sa charge, le savant juge ait indiqué la décision qu'il entendait donner sur ces objections.

Nous n'ignorons pas combien il est difficile parfois de décider sur-le-champ certaines objections à l'enquête.

1939

CLOUTIER v. THE KING.

Rinfret J.

D'autre part, il n'est pas nécessaire d'insister pour démontrer le préjudice qui peut être causé à un accusé dans l'esprit du jury par certaine preuve qu'on laisse faire devant lui, même si, plus tard, le juge déclare qu'elle doit être rejetée et que le jury ne doit pas en tenir compte. Nous sommes d'avis que, dans une cause criminelle devant un jury, les objections à l'enquête ne devraient jamais être prises sous réserve. Nous croyons devoir en parler ici parce que le point a été soulevé devant nous; mais nous ne pensons pas que la question se présente dans cette cause-ci, car le savant procureur de la Couronne a affirmé que

> No objection was taken under reserve by the trial judge. All the objections were decided as soon as they were made. Consequently the accused surely could not be prejudiced.

Sur ce point, le dossier n'était peut-être pas aussi satisfaisant qu'il aurait pu l'être; et il a dû être complété par un document signé par le sténographe officiel; mais naturellement nous acceptons la déclaration du procureur de la Couronne.

La preuve qui, selon l'avis du juge dissident, n'aurait pas dû être permise peut en somme se rapporter à deux questions principales.

La première a trait à une histoire de sortilège. Elle est rapportée par deux témoins. Grondin, que l'accusée a épousé peu de temps après la mort de son premier mari, aurait voulu rejeter contre ce dernier un sortilège qu'il prétendait avoir reçu de lui. Dans l'esprit de Grondin, ce sortilège aurait été retourné au moyen d'un écrit concernant "les sorts"; et l'honorable juge dissident se demande à quoi cette histoire pouvait rimer et pourquoi on a jugé à propos d'en encombrer la preuve.

Mais il fut établi que l'écrit dont Grondin voulait se servir était de la main de l'accusée et qu'elle était au courant de l'usage qu'il prétendait en faire. A la vérité, elle était disposée à lui donner sa participation dans cette affaire. Quelle que soit l'opinion que l'on puisse avoir de cette naïve machination, il nous semble que cette preuve pouvait tendre à démontrer la nature des sentiments que l'accusée entretenait à l'égard de son mari; et, comme nous le verrons plus loin, nous croyons qu'une preuve de ce genre pouvait être permise dans les circonstances.

L'autre reproche que l'appelante fait à l'enquête de la Couronne, c'est que le juge de première instance n'aurait pas dû permettre la preuve des relations entre l'accusée et un nommé Gilbert; vu que cela ne pouvait avoir aucun rapport avec le crime reproché.

Nous croyons cependant que cette preuve pouvait être permise en l'espèce pour la même raison que nous avons donnée plus haut au sujet des histoires de sortilèges. Elle était certainement de nature à établir l'existence de sentiments d'animosité, et même de haine, de la part de l'accusée à l'égard de son mari; et, dans ce cas, elle était légale, non seulement pour prouver l'intention de l'accusée, mais même pour établir une circonstance qui, jointe aux autres circonstances résultant de la preuve, était susceptible de justifier un verdict contre l'appelante.

Dans la cause de *The King* v. *Barbour* (1), que nous avons décidée tout récemment, nous avons ordonné un nouveau procès par suite de l'admission de preuve illégale. Cependant, en discutant un point semblable à celui dont il est ici question, l'honorable juge-en-chef, qui a prononcé le jugement de la majorité, s'exprime comme suit:

> The existence of such feelings would, as we shall see, be relevant not merely in respect of intent, but in respect of the fact as well.

Et, à la page 469, il continue:

> If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well.

Et, en particulier, il s'appuie sur les deux autorités suivantes, que nous croyons devoir citer: *Rex* v. *Hall* (2), où Lord Atkinson dit, à la page 68:

> Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought."

Dans le même sens, Lord Loreburn cite avec approbation le passage suivant du jugement de Kennedy, J., *re Rex* v. *Bond* (3).

(1) [1938] S.C.R. 465. (2) [1911] A.C. 47.
(3) [1906] 2 K.B. 389, at 401.

1939

CLOUTIER v. THE KING.

Rinfret J.

The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

Nous pourrions également référer aux observations contenues dans le jugement de cette Cour dans la cause de *Paradis* v. *The King* (1).

Pour ces raisons, nous croyons que le premier grief d'appel doit être rejeté.

Il en est de même, à notre avis, du second grief à l'effet que l'honorable juge présidant au procès aurait donné au jury une mauvaise direction au préjudice de l'appelante. Ce dont se plaint le savant procureur de l'accusée, c'est que l'honorable président du tribunal aurait trop librement donné son opinion sur les faits au cours de sa charge.

D'une façon générale, l'on peut dire qu'il faudrait un cas bien exceptionnel pour considérer une objection de ce genre comme une question de droit, et surtout pour mettre de côté un verdict de jury en se fondant sur un pareil motif. Mais, en plus, dans la présente cause, le président du tribunal a parfaitement délimité le champ d'action du jury et celui du juge. A maintes reprises, il a répété au jury que les questions de faits étaient exclusivement du domaine de ce dernier; et il leur a dit:

> C'est votre opinion qu'il faut, et non la mienne; et, dans l'exposé que je vais vous faire, ne voyez pas dans ce que je vais vous dire une opinion; ce sera plutôt un exposé des faits pour vous permettre de suivre intelligemment tous ceux qui ont été établis devant vous; et si vous croyez y voir une opinion, ôtez-vous cela de l'esprit.

Avec la direction qui a été donnée au jury par le président du tribunal, nous ne voyons pas quel préjudice pouvait résulter à l'appelante de l'exposé des faits par le juge.

Le procureur de l'appelante se plaint, en outre, que le juge aurait omis complètement de mettre le jury en garde contre la preuve apportée par un complice. Il dit que la Couronne aurait tenté d'établir la complicité de Grondin et également celle de Gilbert, et que le juge n'a donné aucune direction au jury quant à la preuve qui pouvait émaner de ces deux personnes.

(1) [1934] S.C.R. 165, at 169, 170.

La règle qui doit être suivie dans la direction à donner au jury à l'égard d'un complice est bien connue; mais elle ne s'applique que lorsque le complice a rendu témoignage. Elle consiste à prévenir le jury du danger de condamner un accusé en se basant uniquement sur le témoignage du complice. Ici, il n'y a pas le moindre doute que la Couronne cherchait à établir la complicité de Grondin. Mais, comme Grondin n'a pas rendu témoignage, il s'ensuit qu'il ne s'agit pas dans l'espèce de l'un des cas où le juge devait mettre la règle en pratique.

Cependant le procureur de l'appelante est allé plus loin. Il a fait remarquer que certaines déclarations de Grondin avaient été mises en preuve; et il a prétendu que si le juge était tenu de mettre le jury en garde contre le témoignage d'un complice, il en devrait être de même de la preuve des déclarations que ce complice aurait pu faire.

Nous ne croyons pas que la règle puisse être étendue jusque-là. Comme nous venons de le dire, l'un des points que la Couronne tentait d'établir contre l'accusée était qu'elle avait agi de complicité avec Grondin. Dans les circonstances, il nous paraît que la Couronne avait le droit de prouver les actes et les déclarations de Grondin dans l'exécution du projet commun; et il n'importe pas que le complice dont on tente de prouver les actes ou les paroles soit ou non mis en accusation en même temps que le défendeur.

Dans la cause de *Wark* (1), monsieur le juge Phillimore eut à se prononcer sur une question de ce genre; et voici la décision qu'il rend à la page 616:

> On all indictments for crime, and not only in cases in which the indictment is for high treason or conspiracy, where the case for the prosecution is that the crime was the result of a conspiracy, and where evidence has been adduced fit for the jury to consider in proof of the common purpose, any act done by any of the confederates in furtherance of the common purpose may be given in evidence against all. *Regina* v. *Desmond* (2)—*per* Chief Justice Corkburn and Baron Bramwell—is an instance of this. "Such acts may include speech. A request in words is clearly as admissible as a request by sign or pantomime."

Voir également ce que dit Lord Alverstone, C.J., dans la cause de *Rex* v. *Duguid* (3).

C'est d'ailleurs l'opinion qui a été adoptée par cette Cour dans la cause de *Paradis* v. *The King* (4), déjà citée.

(1) (1898) 67 L.J.N.C. 615.
(2) (1868) 11 Cox C.C. 146.
(3) (1906) 94 L.T.R. 887.
(4) [1934] S.C.R. 465.

1939

CLOUTIER v. THE KING.

Rinfret J.

Quant à l'omission de donner une direction au sujet de la complicité de Gilbert, ce moyen doit être écarté pour la simple raison que, suivant nous, il n'y a rien dans le dossier qui permet de conclure à cette complicité.

Il ne reste que le troisième grief d'appel, à savoir que la preuve de circonstances apportée contre l'accusée ne justifiait pas sa condamnation. Sur ce point, nous ne croyons pas utile d'entrer dans les détails de la preuve. Les notes des juges de la Cour du Banc du Roi en contiennent une analyse minutieuse et circonstanciée.

Il ne saurait y avoir de doute que le verdict concluant à l'empoisonnement de Brochu pouvait amplement se justifier. Nous ne comprenons pas d'ailleurs que ce soit là le point sur lequel a porté l'opinion du juge dissident; et ce n'est pas, non plus, celui sur lequel le procureur de l'appelante a insisté. Le grief consiste plutôt à dire que toute la preuve contre l'accusée se bornait à une preuve de circonstances et que cette preuve n'était pas suffisante, en l'espèce, pour permettre au jury de conclure que l'empoisonnement avait été causé par l'appelante.

Voici comment le juge présidant le procès exposa aux jurés leurs devoirs sur ce point:

> Quand vous aurez étudié la preuve qui a été faite devant vous, *preuve de circonstances,* dans son entier, pour en tirer une conclusion, voici ce qu'il faut: Vous devez être convaincus, hors de tout doute raisonnable, et quand je parle de doute raisonnable, c'est toujours le doute raisonnable que je viens de vous expliquer il y a un instant, c'est un doute raisonnable, dis-je, que non seulement tous les faits prouvés à votre satisfaction conduisent à la seule conclusion que l'accusée est coupable, si vous trouvez que l'accusée est coupable, mais aussi qu'il ne peut y avoir d'autres hypothèses, d'autres suppositions raisonnables que c'est elle qui est coupable. En d'autres termes, la preuve doit produire la conviction hors de tout doute, que tous les faits conduisent à la culpabilité de l'accusée, et non seulement ça, mais qu'il n'y a pas d'autres explications possibles du crime, aucune autre hypothèse raisonnable.
>
> * * *
>
> Si vous en venez à la conclusion que vous pouvez trouver non pas, quatre, cinq ou six hypothèses, mais une seule hypothèse raisonnable pour expliquer qu'elle n'est pas coupable, c'est suffisant; mais il faut que cette hypothèse là en soit une raisonnable. Je suis certain que le verdict que vous allez rendre va être un verdict basé, comme je l'ai dit et comme votre serment vous y oblige, basé sur la preuve, non pas sur des sentiments, non pas sur des suppositions, non pas sur des nouvelles publiées dans les journaux, mais sur la preuve et sur la preuve telle que faite devant vous. Comme je vous l'ai dit, et j'y reviens encore: cette preuve doit être prise dans son ensemble. Vous n'avez pas à vous baser sur un fait particulier; ce serait le moyen le plus sûr de se tromper. C'est sur l'ensemble que vous devez vous baser, *la vue d'ensemble de*

1939
CLOUTIER
v.
THE KING.
Rinfret J.

toute la preuve des deux parties. Vous devez avoir cette vue d'ensemble, et c'est de cette vue d'ensemble que doit sortir une conclusion de culpabilité ou de non-culpabilité. Et en ayant cette vue d'ensemble-là, *vous ne pouvez pas perdre de vue que vous devez le bénéfice du doute raisonnable à l'accusée.* Si vous avez un doute raisonnable, je vous dirai encore que vous devez ce doute à l'accusée; il lui appartient, c'est à elle.

Déjà antérieurement le juge avait dit aux jurés:

Si après avoir étudié la preuve, vous avez un doute raisonnable de la culpabilité de l'accusée, c'est votre devoir de l'acquitter.

C'est après avoir reçu une direction de ce genre que le jury en est arrivé à son verdict de culpabilité. Il avait devant lui tous les faits et toutes les circonstances. Il avait également les déclarations de l'appelante, nullement provoquées, et qui, il faut le dire, étaient d'une extrême gravité.

Avec la majorité des juges de la Cour du Banc du Roi, nous sommes d'avis que le jury pouvait certainement tirer des circonstances et des déclarations qui ont été prouvées la conclusion raisonnable que l'appelante était coupable du crime dont on l'accusait; et nous ne nous croirions pas justifiables pour cette raison de mettre de côté le verdict qui l'a condamnée.

Pour ces motifs, nous croyons que l'appel doit être rejeté.

Appeal dismissed.

1939
* May 10.
* Dec. 9.

FRED. CHRISTIE (PLAINTIFF) .....APPELLANT;

AND

THE YORK CORPORATION (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Damages—Tavern—Refusal to serve beer to coloured persons—Discrimination—Freedom of commerce—Monopoly or privileged enterprise—Licence Act, R.S.Q., 1925, c. 25—Alcoholic Liquor Act, R.S.Q., 1925, c. 37—Alcoholic Liquor Possession and Transportation Act, R.S.Q., 1925, c. 38.

The appellant, who is a negro, entered a tavern owned and operated by the respondent in the city of Montreal and asked to be served a glass of beer; but the servants of the respondent refused him for

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1939

CHRISTIE v. THE YORK CORPORATION.

the sole reason that they had been instructed not to serve coloured persons. The appellant brought action for damages for the humiliation he suffered. The respondent alleged that in giving such instructions it was acting within its rights; that its business was a private enterprise for gain and that, in acting as it did, it was merely protecting its business interests. The trial judge maintained the action on the ground that the rule whereby the respondent refused to serve negroes in its tavern was illegal according to sections 19 and 33 of the Quebec *Licence Act*. But the appellate court reversed that judgment, holding that the above sections did not apply and that, as a general rule, in the absence of any specific law, a merchant or trader was free to carry on his business in the manner he conceived to be best for that business.

Held, Davis J. dissenting, that the appeal to this Court should be dismissed.

Per Duff C.J. and Rinfret, Crocket and Kerwin JJ.: The general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal: he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order; and the rule adopted by the respondent in the conduct of its establishment was not within that class. Also, as the law stands in Quebec, the sale of beer in that province was not either a monopoly or a privileged enterprise. Moreover, the appellant cannot be brought within the terms of section 33 of the Quebec *Licence Act,* as he was not a traveller asking for a meal in a restaurant, but only a person asking for a glass of beer in a tavern. As the case is not governed by any specific law or more particularly by section 33 of the Quebec *Licence Act,* it falls under the general principle of the freedom of commerce; and, therefore, the respondent, when refusing to serve the appellant, was strictly within its rights.

Per Davis J. dissenting—Having regard to the special legislation in Quebec establishing complete governmental control of the sale of beer in the province and particularly the statutory provision which prohibits anyone of the public from buying beer in the glass from anyone but a person granted the special privilege of selling the same, a holder of such a permit from the government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell. The old doctrine that any merchant is free to deal with the public as he chooses has still now its application in the case of an ordinary merchant; but when the state enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then such doctrine has no application to a person to whom the state has given a special privilege to sell to the public.

Judgment of the Court of King's Bench (Q.R. 65 K.B. 104) aff., Davis J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), (under special leave of appeal granted by this Court (2)), reversing the judgment of the Superior Court, Philippe Demers J., and dismissing the appellant's action for damages.

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

Lovell C. Carroll for the appellant.

Hazen Hansard for the respondent.

The judgment of the Chief Justice and of Rinfret, Crocket and Kerwin JJ. was delivered by

RINFRET J.—The appellant, who is a negro, entered a tavern owned and operated by the respondent, in the city of Montreal, and asked to be served a glass of beer; but the waiters refused him for the sole reason that they had been instructed not to serve coloured persons. He claimed the sum of $200 for the humiliation he suffered.

The respondent alleged that in giving such instructions to its employees and in so refusing to serve the appellant it was well within its rights; that its business is a private enterprise for gain; and that, in acting as it did, the respondent was merely protecting its business interests.

It appears from the evidence that, in refusing to sell beer to the appellant, the respondent's employees did so quietly, politely and without causing any scene or commotion whatever. If any notice was attracted to the appellant on the occasion in question, it arose out of the fact that the appellant persisted in demanding beer after he had been so refused and went to the length of calling the police, which was entirely unwarranted by the circumstances.

The learned trial judge awarded the appellant the sum of $25 and costs of the action as brought. The only ground of the judgment was that the rule whereby the respondent refused to serve negroes in its tavern was "illegal," according to sections 19 and 33 of the Quebec *Licence Act* (Ch. 25 of R.S.P.Q., 1925).

(1) (1938) Q.R. 65 K.B. 104. (2) [1939] S.C.R. 50.

1939

CHRISTIE v. THE YORK CORPORATION.

Rinfret J.

The Court of King's Bench, however, was of opinion that the sections relied on by the Superior Court did not apply; and considering that, as a general rule, in the absence of any specific law, a merchant or trader is free to carry on his business in the manner he conceives to be best for that business, that Court (Galipeault, J., dissenting) reversed the judgment of the Superior Court and dismissed the appellant's action with costs (1). The appeal here is by special leave, pursuant to sec. 41 of the *Supreme Court Act* (2).

In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order. This is well illustrated in a case decided by the Tribunal de Commerce de Nice and which was confirmed by the Cour de Cassation in France (S. 93-2-193; and S. 96-1-144):

* * * le principe de la liberté du commerce et de l'industrie emporte, pour tout marchand, le droit de se refuser à vendre, ou à mettre à la disposition du public, ce qui fait l'objet de son commerce; * * * le principe de la liberté du commerce et de l'industrie autorise le propriétaire d'un établissement ouvert au public, et à plus forte raison le directeur d'un casino, à n'y donner accès qu'aux personnes qu'il lui convient de recevoir; son contrôle à cet égard est souverain et ne peut être subordonné à l'appréciation des tribunaux.

Cependant la liberté du commerçant ou de l'industriel de n'entrer en rapport qu'avec des personnes de son choix comporte certaines restrictions, basées sur des raisons d'ordre public. Il en est de la sorte, par exemple, lorsque le commerçant ou l'industriel jouit, ainsi que les compagnies de chemin de fer, d'un monopole de droit ou même de fait.

This principle was followed by the Court of King's Bench in the case of *Loew's Montreal Theatres* v. *Reynolds* (3), where the facts presented a great deal of similarity with those of the present case. The plaintiff, a coloured man, sued Loew's Theatres Ltd. in damages because he had been denied a seat in the orchestra at its theatre, on account of his colour, for the reason that

(1) (1938) Q.R. 65 K.B. 104. (2) [1939] S.C.R. 50.
(3) (1919) Q.R. 30 K.B. 459.

the management had decided that no person belonging to that race would be admitted to the orchestra seats. The Court decided that the management of a theatre may impose restrictions and make rules of that character. In the course of his reasons, Chief Justice Lamothe said:

Aucune loi, dans notre province, n'interdit aux propriétaires de théâtres de faire une règle semblable. Aucun règlement municipal ne porte sur ce sujet. Alors, chaque propriétaire est maître chez lui; il peut, à son gré, établir toutes règles non contraires aux bonnes mœurs et à l'ordre public. Ainsi, un gérant de théâtre pourrait ne recevoir que les personnes, revêtues d'un habit de soirée. La règle pourrait paraître arbitraire, mais elle ne serait ni illégale ni prohibée. Il faudrait s'y soumettre, ou ne pas aller à ce théâtre. Tenter de violer cette règle à l'aide d'un billet, serait s'exposer à l'expulsion, ce serait s'y exposer volontairement.

In the particular case of the hotel keepers, the jurisprudence is now well established; and we read in Carpentier and du Saint, Répertoire du droit français, Vo. Aubergiste, nos 83 et 84, that

Le principe de la liberté de l'industrie a fait décider aux auteurs de l'Encyclopédie du droit que l'hôtelier est toujours libre de refuser le voyageur qui se présente.

* * *

C'est en ce dernier sens que se prononce une jurisprudence constante; et la question aujourd'hui ne présente plus de doute sérieux.

In a similar case, in the province of Ontario, where the facts were practically identical with the present one, Lennox, J., decided according to the same principle and referred to a number of English cases on which he relied (*Franklin* v. *Evans*) (1).

This, moreover, would appear to have been the view of the learned trial judge in his reasons for judgment, and it would seem that he would have dismissed the case but for his opinion that sec. 33 of the Quebec *Licence Act* specifically covered the case. Referring to the decisions above mentioned, he said in the course of his reasons:

Je suis d'avis qu'aucune de ces causes n'a d'application. Elles sont basées sur le fait qu'il n'y a pas de loi restreignant la liberté du propriétaire; que chaque propriétaire de théâtre ou de restaurant est maître chez lui. C'est la prétention que la défenderesse voulait faire triompher dans cette cause. Malheureusement pour elle, la loi des licences, ch. 25 S.R.P.Q., Art. 33, dit: "Nulle personne autorisée à tenir un restaurant "ne doit refuser sans cause raisonnable de donner à manger aux voya-"geurs."

(1) (1924) 55 O.L.R. 349.

1939

CHRISTIE v. THE YORK CORPORATION.

Rinfret J.

We will discuss later the effect of sec. 33 of the Quebec *Licence Act*, but for the moment it may be stated that, in this case, either under the law or upon the record, it cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order. Nor could it be said, as the law stood, that the sale of beer in the province of Quebec was either a monopoly or a privileged enterprise.

The fact that a business cannot be conducted without a licence does not make the owner or the operator thereof a trader of a privileged class.

The license in this case is mainly for the purpose of raising revenue and also, to a certain extent, for allowing the Government to control the industry; but it does not prevent the operation of the tavern from being a private enterprise to be managed within the discretion of its proprietor.

The only point to be examined therefore is whether sec. 33 of the Quebec *Licence Act*, upon which the learned trial judge relied in maintaining the appellant's action, applies to the present case.

The view of the majority of the Court of King's Bench was that it did not; and we agree with that interpretation.

Section 33 reads:

> No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers.

For the purpose of our decision, there are three words to be considered in that section: "restaurant," "food," and "travellers."

The word "restaurant" is defined in the Act (sec. 19-2):

> A "restaurant" is an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travellers.

The word "traveller" is also defined in the same section as follows:

> A "traveller" is a person who, in consideration of a given price per day, or fraction of a day, on the American or European plan, or per meal, *à table d'hôte* or *à la carte*, is furnished by another person with food or lodging, or both.

With the aid of those two definitions in the Act, we think it must be decided that, in this case, the appellant

was not a traveller who was asking to be furnished with food in a restaurant.

Perhaps, as stated by the learned trial judge, a glass of beer may, in certain cases, be considered as food. But we have no doubt that, in view of the definitions contained in the Act, the appellant was not a traveller asking for food in a restaurant within the meaning of the statute. In the Act respecting alcoholic liquor (ch. 37 of R.S.P.Q., 1925) we find the definition of the words "restaurant" and "traveller" in exactly the same terms as above. But, in addition, the words "meal" and "tavern" are also defined (Sec. 3, subs. 6 and 9).

Those definitions, so far as material here, are as follows:

6. The word "meal" means the consumption of food of a nature and quantity sufficient for the maintenance of the consumer, in one of the following places:

* * *

(*b*) In the dining-room of a restaurant situated in a city or town, and equipped for the accommodation of fifty guests at one time, and which is not only licensed for the reception of travellers but where full meals are regularly served.

9. The word "tavern" means an establishment specially adapted for the sale by the glass and consumption on the premises of beer as hereinbefore defined, or, in a hotel or restaurant, the room specially adapted for such purpose.

It will be seen therefore that the appellant cannot be brought within the terms of sec. 33 of the Quebec *Licence Act*. He was not a traveller asking for a meal in a restaurant. According to the definitions, he was only a person asking for a glass of beer in a tavern.

As the case is not governed by any specific law or more particularly by sec. 33 of the Quebec *Licence Act*, it falls under the general principle of the freedom of commerce; and it must follow that, when refusing to serve the appellant, the respondent was strictly within its rights.

But perhaps it may be added that the Quebec statutes make a clear distinction between a hotel or a restaurant and a tavern. The Act (sec. 32) provides that "no licen- "see for a hotel may refuse without just cause to give "lodging or food to travellers" and that (sec. 33) "No "licensee for a restaurant may refuse without reasonable "cause, to give food to travellers."

No similar provision is made for taverns; and, in our opinion, it would follow from the statute itself that the

1939

CHRISTIE v. THE YORK CORPORATION.

Rinfret J.

legislature designedly excluded tavern owners from the obligation imposed upon the hotel and restaurant owners. For these reasons, the appeal ought to be dismissed with costs.

DAVIS J. (dissenting).—The appellant is a British subject residing in Verdun near the city of Montreal in the province of Quebec. He came from Jamaica and has been permanently resident in the said province for some twenty years. He is a coloured gentleman—his own words are "a negro" though counsel for the respondent, for what reason I do not know, told him during his examination for discovery that he wanted it on record that he is "not extraordinarily black." He appears to have a good position as a private chauffeur in Montreal. He was a season box subscriber to hockey matches held in the Forum in Montreal and in that building the respondent operates a beer tavern. Beer is sold by the glass for consumption on the premises. Food such as sandwiches is also served, being apparently purchased when required from nearby premises and resold to the customer. The appellant had often on prior occasions to the one in question, when attending the hockey matches dropped into the respondent's tavern and bought beer by the glass there. On the particular evening on which the complaint out of which these proceedings arose occurred, the appellant with two friends—he describes one as a white man and the other as coloured—just before the hockey game went into the respondent's premises in the ordinary course. The appellant put down fifty cents on the table and asked the waiter for three steins of light beer. The waiter declined to fill the order, stating that he was instructed not to serve coloured people. The appellant and his two friends then spoke to the bartender and to the manager, both of whom stated that the reason for refusal was that the appellant was a coloured person. The appellant then telephoned for the police. He says he did this because he wanted the police there to witness the refusal that had been made. The manager repeated to the police the refusal he had previously made. The appellant and his two friends then left the premises of their own accord. The appellant says that this was to his humiliation in the presence of some seventy customers who were sitting around and had heard what occurred.

The appellant then brought this action against the respondent for damages for breach of contract and damages in tort. No objection was taken to the suit having been brought both on contract and in tort on the same set of facts and I assume that this form of action is permissible under the Quebec practice and procedure. The appellant recovered $25 damages and costs at the trial. This judgment was set aside and the action was dismissed with costs upon an appeal to the Court of King's Bench (Appeal Side), Galipeault J. dissenting (1).

The learned trial judge found that the appellant had been humiliated by the refusal and was entitled to be compensated upon the ground that the tavern was a restaurant within the meaning of the Quebec *Licence Act,* R.S.Q. 1925, ch. 25, sec. 19, and that as such the respondent was forbidden by sec. 33 to refuse the appellant. By sec. 19 (2) a restaurant is defined as

> an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travellers.

By sec. 33,

> no licensee for a restaurant may refuse, without reasonable cause, to give food to travellers.

The Court of King's Bench did not consider the above statute, which deals with various licences granted by the government under the Act, applicable to the facts of this case and, I think rightly, dealt with the case of the tavern under another statute, the *Alcoholic Liquor Act,* R.S.Q. 1925, ch. 37, and the majority of the Court took the view that "chaque propriétaire est maître chez lui" on the doctrine of freedom of commerce—"la liberté du commerce et de l'industrie." Pratte, J. *ad hoc* agreed with the conclusion of the majority but upon the single ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant. Galipeault, J. dissented upon the ground that the conduct of the respondent towards the appellant was contrary to good morals and the public order—"contre les bonnes moeurs, contre l'ordre public," and considered that under the special legislation in Quebec governing the sale of liquor the respondent was not entitled to the "freedom of

(1) (1938) Q.R. 63 K.B. 104.

1939

CHRISTIE v. THE YORK CORPORATION.

Davis J.

commerce" applicable to ordinary merchants and places like theatres, etc. Galipeault, J. would have affirmed the trial judgment.

This Court gave special leave to the appellant to appeal to this Court from the judgment of the Court of King's Bench upon the ground that the matter in controversy in the appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of sec. 41 of the *Supreme Court Act* and also because the matter in controversy is of such general importance that leave to appeal ought to be granted (1).

The question in issue is a narrow one but I regard it as a very important one. That is, Has a tavern keeper in the province of Quebec under the special legislation there in force the right to refuse to sell beer to any one of the public? There is no suggestion that in this case there was any conduct of a disorderly nature or any reason to prompt the refusal to serve the beer to the appellant other than the fact that he was a coloured gentleman.

The province of Quebec in 1921 adopted the policy of complete control within the province of the sale of alcoholic liquors. (The *Alcoholic Liquor Act,* 11 Geo. V, Quebec Statutes 1921, ch. 24, now R.S.Q. 1925, ch. 37.) The words "alcoholic liquor" in the statute expressly include beer (sec. 3 (5)). The word "tavern" means an establishment specially adapted for the sale by the glass and consumption on the premises of beer or, in a hotel or restaurant, the room specially adapted for such purpose (sec. 3 (9)). The sale and delivery in the province of alcoholic liquor, with the exception of beer, is forbidden expressly, except that it may be sold or delivered to or by the Quebec Liquor Commission set up by the statute or by any person authorized by it, or in any case provided for by the statute (sec. 22). The sale of beer is specifically dealt with by sec. 25, which provides that

> The sale or delivery of beer is forbidden in the province, unless such sale or delivery be made by the Commission or by a brewer or other person authorized by the Commission under this Act, and in the manner hereinafter set forth.

The Commission is given power by sec. 9d to control the possession, sale and delivery of alcoholic liquor in accord-

(1) [1939] S.C.R. 50.

ance with the provisions of the statute and by sec. 9e to grant permits for the sale of alcoholic liquor. By sec. 33 the Commission may determine the manner in which a tavern must be furnished and equipped in order to allow the exercise therein of the "privilege conferred by the permit." Beer may be sold by any person in charge of a grocery or of a store where beer only is sold, on condition that no quantity of less than one bottle be sold, that such beer be not consumed in such store, and that a permit therefor be granted him by the Commission, and that such permit be in force (sec. 30 (4)). Now as to the sale of beer by the glass, sec. 30 (5) provides as follows:—

> Any person in charge of a tavern, but in a city or town only, may sell therein beer by the glass,—provided that it be consumed on the premises, and provided that a permit to that effect be granted him by the Commission * * * and that such permit be in force.

Section 30 further provides that in every such case the beer must have been bought directly by the holder of the permit from a brewer who is also the holder of a permit. Section 42 (3) fixes the days and hours during which any holder of a permit for the sale of beer in a tavern may sell. Then by sec. 43, certain named classes of persons are forbidden to be sold any alcoholic liquor:

> 1. Any person who has not reached the age of eighteen years;
>
> 2. any interdicted person;
>
> 3. any keeper or inmate of a disorderly house;
>
> 4. any person already convicted of drunkenness or of any offence caused by drunkenness;
>
> 5. Any person who habitually drinks alcoholic liquor to excess, and to whom the Commission has, after investigation, decided to prohibit the sale of such liquor upon application to the Commission by the husband, wife, father, mother, brother, sister, curator, employer or other person depending upon or in charge of such person, or by the curé, pastor, or mayor of the place.

But no sale to any of the persons mentioned in 2, 3, 4 or 5 above shall constitute an offence by the vendor unless the Commission has informed him, by registered letter, that it is forbidden to sell to such person. Sec. 46 provides that no beer shall be transported in the province except as therein defined.

By a separate statute, the *Alcoholic Liquor Possession and Transportation Act,* 11 Geo. V (1921), ch. 25, now R.S.Q. 1925, ch. 38, which Act is stated to apply to the whole province, no alcoholic liquor as defined in the

1939
CHRISTIE
v.
THE YORK
CORPORATION.
Davis J.

Alcoholic Liquor Act (which includes beer) shall be kept, possessed or transported in the province except as therein set forth. Subsection 3 of sec. 3 excepts:

> in the residence of any person, for personal consumption and not for sale, provided it has been acquired by and delivered to such person, in his residence, previous to the 1st of May, 1921, or has been acquired by him, since such date, from the Quebec Liquor Commission.

It is plain, then, that the province of Quebec, like most of the other provinces in Canada, took complete control of the sale of liquor in its own province. The permit system enables the public to purchase from either government stores or specially licensed vendors. A glass of beer can only be bought in the province from a person who has been granted by the Government Commission a permit (sec. 33 refers to it as a "privilege") to sell to the public beer in the glass for consumption on the premises. The respondent was a person to whom a permit had been granted. The sole question in this appeal then is whether the respondent, having been given under the statute the special privilege of selling beer in the glass to the public, had the right to pick and choose those of the public to whom he would sell. In this case the refusal was on the ground of the colour of the person. It might well have been on account of the racial antecedents or the religious faith of the person. The statute itself has definitely laid down, by sec. 43, certain classes of persons to whom a licensee must not sell. The question is, Has the licensee the right to set up his own particular code, or is he bound, as the custodian of a government permit to sell to the public, to sell to anyone who is ready to pay the regular price? Disorderly conduct on the premises of course does not enter into our discussion because there is no suggestion of that in this case. One approach to the problem is the application of the doctrine of "freedom of commerce." It was held by the majority in the Court below, in effect, that the licensee is in no different position from a grocer or other merchant who can sell his goods to whom he likes. The opposite view was taken by Galipeault, J. on the ground that the licensee has what is in the nature of a quasi monopolistic right which involves a corresponding duty to sell to the public except in those cases prohibited by statute. Pratte J., *ad hoc,* did not take either view;

his decision rests solely upon the ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant.

Several decisions were considered and discussed by the judges in the Court below. One of the cases relied upon for the majority view was the Quebec case of *Loew's Theatre* v. *Reynolds* (1), where it was held that a negro who buys a ticket of general admission to the theatre and knowing the rule of the theatre that only persons wearing evening dress are allowed in the dress circle, is refused the right to sit there, has no right of action. It was said in that case that a theatre can make rules, such as requiring evening dress in the dress circle, which applied to all, white and coloured alike, and it did not constitute discrimination because it was a rule that was not against public order and good morals. Carroll, J., dissented in that case. Martin, J. who rendered the majority opinion of the Court, said, at p. 465:

> While it may be unlawful to exclude persons of colour from the equal enjoyment of all rights and privileges in all places of public amusement, the management has the right to assign particular seats to different races and classes of men and women as it sees fit, * * *

Another case relied upon by the majority was the Ontario case of *Franklin* v. *Evans* (2). That was a restaurant case in which the plaintiff, a negro, had been refused food on the ground of colour. There was no statutory law in Ontario requiring a restaurant to receive. Lennox, J., who tried the case, said that he had been referred to no decided case in support of the plaintiff's contention that the restaurant was bound to serve him. But he said that in his opinion the restaurant-keeper in that case was

> not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves definite obligations.

The English case of *Sealey* v. *Tandy* (3) was referred to by those who took the majority view. That was a case of assault stated by a metropolitan magistrate. It was held that the occupier and licensee of licensed premises (not being an inn) has a right to request any person to leave whom he does not wish to remain upon his premises. But I would refer, in connection with that case, to the editors'

(1) (1919) Q.R. 30 K.B. 459. (2) (1924) 55 O.L.R. 349.
(3) [1902] 1 K.B. 296.

1939

CHRISTIE v. THE YORK CORPORATION.

Davis J.

footnote in the new Halsbury, vol. 18, p. 144 (*k*), where after citing *Sealey* v. *Tandy* (1), they say:

> But in *Attorney-General* v. *Capel* (1494, Y.B. 10 Hen. 7, fo. 7, pl. 14, Hussey, C.J., said that a "victualler" will be compelled to sell his victual if the purchaser has tendered him ready payment, otherwise not. Quod Brian affirmavit. And in Anon. (1460) Y.B. 39 Hen. 6, fo. 18, pl. 24, cited in Bro. Abr., tit. Action sur le case, pl. 76, it is said: "It is decided by Moyle, J., if an innkeeper refuses to lodge me I shall have an action on the case and the same law if a victualler refuses to give me victuals.

A victualler (see Murray's Oxford Dictionary) is one who sells food or drink to be consumed on the premises; a publican.

The question is one of difficulty, as the divergence of judicial opinion in the courts below indicates. My own view is that having regard to the special legislation in Quebec establishing complete governmental control of the sale of beer in the province and particularly the statutory provision which prohibits anyone of the public from buying beer in the glass from anyone but a person granted the special privilege of selling the same, a holder of such a permit from the government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell.

In the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions. It is not a question of creating a new principle but of applying a different but existing principle of the law. The doctrine that any merchant is free to deal with the public as he chooses had a very definite place in the older economy and still applies to the case of an ordinary merchant, but when the State enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then the old doctrine of the freedom of the merchant to do as he likes has in my view no application to a person to whom the State has given a special privilege to sell to the public.

If there is to be exclusion on the ground of colour or of race or of religious faith or on any other ground not already specifically provided for by the statute, it is for the legislature itself, in my view, to impose such prohibi-

(1) [1902] 1 K.B. 296.

1939

CHRISTIE v. THE YORK CORPORATION.

Davis J.

tions under the exclusive system of governmental control of the sale of liquor to the public which it has seen fit to enact.

The appellant sued for $200. The learned trial judge awarded him $25 damages. I would allow the appeal, set aside the judgment appealed from and restore the judgment at the trial with costs here and below.

Appeal dismissed with costs.

Solicitor for the appellant: *Lovell C. Carroll.*

Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

HOCHELAGA SHIPPING & TOWING COMPANY LTD. (SUPPLIANT) ..... RESPONDENT.

1939

* May 1.
* Dec. 9.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Construction of jetty by Dominion Government—Upper portion of it destroyed by storm and lower portion remaining under water entirely submerged—Vessel striking such portion—Damages not immediately ascertained—Subsequent sinking of vessel—Responsibility of the Crown—Whether damages limited to damages at the time of the collision.

The Dominion Government undertook, in 1931, the construction of a jetty, projecting at right angles to the large Dominion Government breakwater at Port Morien, Nova Scotia. Before the jetty was completed, about 50 feet of the upper portion of the outward end broke away during a storm in 1932, thus leaving the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. Some two years later, in September, 1934, the towboat *Ostrea,* the property of the suppliant, equipped for wrecking and salvage operations, became a total loss at sea as a result of having struck the submerged portion of the jetty which, the suppliant alleged, had been left without any buoy or other warning to indicate its presence there. It was established by the evidence that the master of the *Ostrea,* considering the collision as slight, did not ascertain immediately the extent of the damage caused to his vessel. The *Ostrea* continued on her way to

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1939

THE KING
v.
HOCHELAGA SHIPPING & TOWING CO. LTD.

her salvage work; but after proceeding for about 25 minutes, a distance of 3½ miles, she appeared to be filling with water, and, a few minutes after all the men on board left her in lifeboats, she sank with all her furnishings and salvage equipment. The underwriters, being advised that the ship should be written as a total loss, paid the suppliant the sum of $20,016. The suppliant then submitted a petition of right on behalf of and for the benefit of the group of underwriters who were subrogated to the rights of the suppliant in respect of the loss. The Exchequer Court of Canada, Angers J., held that, in the restoration and changes made in the jetty, there had been negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon a public work; but he limited the relief to "the damages to the vessel directly attributable to the collision * * * , had such damages been ascertained immediately after the said collision." The respondent appealed and the suppliant cross-appealed.

Held, affirming the judgment of the Exchequer Court of Canada and dismissing the appeal to this Court, that, upon the facts of the case, the submerged cribwork, which was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation, and in leaving that obstruction without providing any such warning, the officials and servants of the Crown in charge of these works were chargeable with negligence for which the Crown is responsible by force of section 19 (*c*) of the *Exchequer Court Act;* but

Held, varying the judgment of the Exchequer Court of Canada and allowing the cross-appeal, that the amount of damages should not be restricted to those mentioned in that judgment.

Per Rinfret, Crocket and Kerwin JJ.: After the collision there has been negligence on the part of the ship's officers in not having discovered sooner than they did the extent of the damages; and the total loss of the vessel and its equipment would have been avoided had an attempt been made either to return her to the wharf or to beach her at some nearby point. But the suppliant, although not entitled to damages as a total loss, should recover more than the cost of the repair of the vessel as allowed by the trial judge, and should be granted any other damages directly attributable to the collision.

Per The Chief Justice and Davis J.—The respondent is entitled to recover the total amount of damages claimed in the appeal.

Per the Chief Justice: The onus resting upon the Crown, to shew that the loss of the vessel did not follow in the ordinary course as the "natural and reasonable" result of running upon the obstruction under water, has not been discharged; the Crown has not established such negligence of officers in charge of the ship as constituting *novus actus interveniens. Canadian Pacific Ry. Co.* v. *Kelvin Shipbuilding Co.* (138 L.T. 369) ref.

Per Davis J.—The appellant would be subjected to a diminution of damages only it it be proved that those in charge of the vessel were guilty of negligence (as opposed to mere error of judgment) amounting to a *novus actus interveniens* which would have caused the extra damage; and there was no conclusive evidence that the vessel could have been saved from total destruction even if the leak in her had been discovered immediately after the collision.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada, Angers J., which had maintained in part the petition of right presented by the suppliant to recover damages from the Crown.

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

Charles J. Burchell K.C. and *Charles Stein* for the appellant.

W. C. MacDonald K.C. for the respondent.

THE CHIEF JUSTICE—I agree with the learned trial judge that the submerged cribwork which, after the superstructure of the jetty had been carried away, was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation; and that in leaving this obstruction without providing any such warning the officials concerned are chargeable with negligence for which the Crown is responsible by force of section 19 (*c*) of the *Exchequer Court Act*.

The only question presenting any difficulty is whether the onus resting upon the Crown to shew that the loss of the vessel did not follow in the ordinary course as the result of running upon this obstruction has been discharged.

The principle applicable can, I think, be taken from the judgment of Lord Haldane in *Canadian Pacific Railway Co.* v. *Kelvin Shipping Co. Ltd.* (1):

> The question is whether, after the original fault which started matters, there has been a *novus actus interveniens* which was the direct cause of the final damage.

He adds:

> When a collision takes place by the fault of the defending ship in an action for damages, the damage is recoverable if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created.

And later he says:

> It follows that the burden lies on the negligent ship to show by clear evidence that the subsequent damage arose from negligence or great want of skill on the part of those on board the vessel damaged.

(1) (1927) 138 L.T. 369 at 370

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Duff C.J.

This is not, of course, a case of collision between two ships, but I can see no reason for thinking that the principle is not applicable. It is true also that there was not in the case before us any emergency: the matter of the vessel was not confronted with a difficult choice between course of action all attended with peril; but I have, nevertheless, come to the conclusion, although the question is a difficult one, that the Crown has not in this case established such negligence as constituted *novus actus interveniens*.

As Lord Wright said in *Caswell* v. *Powell* (1):

> Negligence is the breach of that duty to take care which the law requires either in regard to another's person or his property, or where contributory negligence is concerned, of a man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances * * * It is not a matter of uniform standard. It may vary according to the circumstances from place to place, from man to man, from time to time. It may vary even in the case of the same man.

I attach importance to a consideration to which, with the greatest possible respect, as it appears to me, the learned trial judge did not give the weight I think it deserves. The learned judge found that the work, presenting, as Captain Williams says, the appearance of a new wharf, but with the sunken cribwork projecting from it without a sign of its presence, constituted a trap. The master of the *Ostrea* had not the slightest reason to suspect the presence of any obstruction, natural or artificial, as he passed within a few feet of the end of the wharf. He had every reason for complete confidence in the assumption that he had plenty of water and for acting on that assumption. When he and the mate and the engineer realized that the vessel had struck something, it did not, it seems clear, occur to them that they had run upon an obstruction solidly in place in the bed of the harbour; or that the ship had suffered such damage as to make it unsafe or risky to proceed to their destination. The impact seemed so light that the engineer, as he says, "thought she rubbed up against the breakwater."

The captain says:

> Q. Now as to this bump; was it a serious bump?
>
> A. No. We experience worse than that every day. I did not think it anything out of the way but enough to roll her a bit.

(1) (1939) 3 A.E.R. 722 at 737.

The engineer says:

Q. One of the witnesses said they got bumps like that every day?

A. I have hit against scows and other things when docking and the bump would be 75 per cent harder than that.

Q. So that this was not a hard bump?

A. No, sir, the ship seemed to run on something and listed to starboard.

Q. Could you tell that it struck forward?

A. Yes, from her listing and the fact that I felt no bump aft.

Q. Bumps of this kind happen daily?

A. But this was not exactly a bump. Maybe in the after end I would not hear the sound like they would, but I remember the vessel running up on something and her listing to starboard.

I cannot help thinking that, had they suspected the existence of the tangled mass of logs and rocks against which they had run,—had they realized the character of the obstruction with the risks involved in running against it,—the attention of the master and his officers would have been at once aroused to the practical possibility of substantial damage and that they would have proceeded more energetically in ascertaining the effects of the impact.

I do not think the authors of the original wrong can escape responsibility for the failure on the part of the officers of the vessel to appreciate instantly the serious nature of what had occurred and for any lack of energy in their investigation. I am inclined to think that the language of Lord Sumner in the *Paludina* (1) (referring to the facts in the *City of Lincoln* (2)) may not unfairly be adapted to the circumstances with which we are concerned: "The hand of the original wrongdoer was still heavy on" them, and their own management of the vessel "was not the sole human agency determining" the loss of the vessel.

I am disposed to think that the original wrongdoing which created the trap is chargeable, not only with leading the *Ostrea* into danger, but also with lulling her officers into a false confidence in the innocuousness of the blow they had received by concealing from them the character of the obstruction they had encountered. In these circumstances, although, as I have said, I have found the question a difficult one, I am with respect unable to agree that the Crown has shown "by clear evidence" that the loss

(1) [1927] A.C. 27. (2) (1889) 15 P.D. 15.

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Duff C.J.

of the ship "arose," to repeat Lord Haldane's words, "from negligence or great want of skill on the part of those on board."

The appeal should be dismissed and the cross-appeal allowed with costs throughout.

The judgment of Rinfret, Crocket and Kerwin JJ. was delivered by

CROCKET J.—During the years 1931, 1932 and 1933, the Federal Department of Public Works constructed a jetty as an addition to an old Government breakwater at Port Morien, a village on the north shore of Cow Bay, in Cape Breton, the added jetty running west from and at right angles to the old breakwater and forming with the original breakwater a small harbour protected from the sea on the east and south sides. The new structure consisted of a framework of cribbed logs fastened together by heavy bolts and ballasted with stones and rocks of various sizes from 10 to as much as 150 to 200 pounds. It was protected on either side by planking and tapered from a width of 26 ft. at the bottom to 16 ft. at the top. A length of 105 ft. of the jetty was completed in the year 1931 and a block or crib partially constructed for its extension by another 105 ft. during the year 1932. The framework of the last crib had been constructed on the shore to a height of 6 or 7 ft., including a ballast floor, in the latter part of 1931, when, the appropriation having been exhausted, the work was suspended. It had proceeded under the control of T. J. Locke, resident district engineer of the department of Public Works at Halifax, and the supervision of Duncan H. McDonald, his assistant district engineer, who had acted as inspecting engineer of the Department of Public Works in Cape Breton for a number of years. In May, 1932, a further appropriation having been granted, Henry T. Munro was notified by Locke of his appointment as foreman for the continuation of the work and the operations were resumed under his immediate control and the supervision of McDonald in July. The partially constructed crib after having been reinforced by the addition of more logs was towed to the end of the completed jetty, ballasted and sunk in its proper position. It was then raised to its proper height by further cribbing

and ballasting. In the month of September, while this work was in progress and before the ballasting had been completed, the top portion of the outer end of the crib for a distance of about 50 ft. was swept away by a violent storm and the wooden framework driven on a reef. The work on the extension of course ceased beyond the employment of two or three men to clear up the floating wreckage. Though McDonald went to Port Morien shortly afterwards and conferred with Munro on the situation, no further work was done on the extension until the late summer of 1933, the 1932 appropriation having been exhausted. In the meantime a report seems to have been made to the district engineer's office of a further examination of the situation made by McDonald in July, recommending that the jetty be squared off and sheeted at the point from which the upper framework had been torn away by the storm—approximately 155 ft. out from the old breakwater—and this crib framework utilized in the construction of a return L running about 50 ft. northerly towards the shore. A further appropriation of $2,000 had been placed at the disposal of the Resident Engineer's office for this work. A new foreman (John Martel) was appointed and carried the job on to final completion in October, 1933, under the direction and supervision of assistant engineer McDonald. No effort, however, was made to clear away the submerged portion of the damaged crib beyond the sawing off of a few projecting logs, which could be seen a few feet below the water line and which could be reached by a five-foot cross-cut saw at the point where the 50-foot section broke away. Martel said he did not go down to the bottom because there was ballast there covering the lower logs. No diver was employed by the department for the purpose of examining this submerged obstruction, but in December, 1934, after the loss of the steam tug *Ostrea,* hereinafter referred to, a diver named Hennessy examined it at the instigation no doubt of the suppliant company. According to his evidence as given on the trial as a witness for the suppliant, the submerged obstruction consisted of a mass of rock and round logs tangled into one another and extending perhaps 3 fathoms out from the head of the jetty, and rose at its centre to within 5½ feet of midwater level, as measured by his assist-

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Crocket J.

ing tender. The tender confirmed this evidence as to the depth of water above the obstruction at this point and produced a record showing that beyond the obstruction, 18 feet out from the jetty, the water depth was 11½ feet. No attempt was ever made to chart, buoy or mark this obstruction in any way.

In September, 1934, the suppliant's steam tug, the *Ostrea,* equipped for wrecking and salvage operations, was working on the wrecks of two steamers some few miles apart in Cow Bay and occasionally came into Port Morien, docking at the new Government wharf there to land some of the material salvaged, though it appeared she took most of it to Louisburg. She came in during the afternoon of September 21st and docked at the new Government wharf behind the new jetty, headed south. There were a large number of fishing boats anchored behind her, which necessitated some manoeuvreing in backing out from the dock early next morning and heading for the bay. The *Ostrea,* which was a boat of composite construction having a steel frame and wooden shell, was 70 or 80 ft. long with a beam of 18 or 20 ft. and a draft of 4 ft. 3 in. at the stem, gradually increasing to 7 ft. at the stern. According to the evidence of her master (Williams), who was at the wheel with his mate (King) beside him, the tug cleared the end of the new jetty by 5 or 6 ft., but in doing so experienced a little roll and a few bumps, which caused her to list over a bit. He had no knowledge of the existence of the submerged obstruction. The mate remarked that they had struck something and Williams sent him down to the chief engineer to see if there were any leaks or if anything was wrong below. King returned to the bridge and reported to the captain that the engineer had said No. Williams remained at the wheel until he passed a buoy marking the submerged remains of the outer end of the old breakwater, which he said was 30 yards away on the port side when, everything now being clear and the tug headed for the open bay, he gave the wheel to King and went to lie down in his berth. In about 25 minutes King told him he could hardly steer her. Williams jumped up immediately and saw that the boat was down by the bow. The engine was reversed and all

hands got into a life-boat and when they had pulled away about 100 yards the steamer went down about 3½ miles out from the jetty.

The *Ostrea* was insured with several marine underwriters and the suppliant thereafter filed a petition in the Exchequer Court on behalf of and for the benefit of these underwriters, who were subrogated to its rights in respect of the said losses, praying that the Crown be condemned to pay the sum of $22,016.50 and such further and other sums as the court might deem meet.

In its petition the suppliant alleged that the loss of the steamship with her equipment resulted from the negligence of officers or servants of the Crown while acting within the scope of their duties or employment upon a public work and that the said negligence consisted in not replacing the top part of the outer end of the jetty nor removing the said under portion and allowing the said under portion to remain and continue up to the time of the collision in a submerged, dangerous and unsafe condition, wholly uncharted, unbuoyed and unmarked and so as to constitute a menace to those lawfully engaged in the navigation of navigable waters. The petition further alleged that the value of the tug and her equipment at the time of their loss was $10,000 and the value of the salvage equipment $9,016.50 and that the suppliant sustained additional loss and damage of $3,000.

In its statement of defence the Crown denied that the jetty was built by officers or servants of the Crown, acting within the scope of their duties or employment or otherwise or at all, and that the said under portion was left in a dangerous condition as alleged in the petition. The defence also denied that the tug while rounding the jetty came into collision with the said obstruction and alleged contributory negligence upon the part of the officers and crew of the tug.

The petition came on for trial before Mr. Justice Angers at Halifax in June, 1937. His Lordship held that the case was governed by s. 19 (*c*) of the *Exchequer Court Act;* that the jetty was a public work within the meaning of that section; that the *Ostrea* struck the submerged under portion of its outer end and that the collision was attributable to the negligence of officers or servants of the Crown,

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Crocket J.

i.e., the district engineer and assistant district engineer, under whose supervision the construction of the jetty and its reparation after the top part of the outer end thereof had been partially washed away were effected, acting within the scope of their duties or employment upon a public work.

Dealing with the contention of the respondent that the Crown was not bound to keep in repair any public work and that it could not be held liable for injuries resulting from the unsafe condition thereof, the learned judge, while assenting to this submission and stating that s. 19 (*c*) seemed to exclude the case in which the injury was the result of non-repair or non-feasance, added that in some cases non-repair or non-feasance may constitute a hazard or, in other words, create what is called a trap and bring about a condition which renders an accident almost unavoidable. "This," he said, "is what happened in the present case."

His Lordship found, however, that after the accident the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to the vessel by the collision before proceeding to sea. In this connection he said:

> Had he found that the vessel was leaking, as I think he should have, if he had made a proper inspection of the hull immediately after the impact, he would not or at least should not, assuming he had acted prudently, have proceeded on his voyage but should have brought back his vessel to the wharf. He would thus have avoided the loss of his ship and of her equipment.

He therefore held that the damage for which the respondent was liable should be limited to the cost of the repair of the vessel. As unfortunately there was no evidence in the record enabling him to determine this cost, he suggested that if the parties could not agree on the amount they should have liberty to refer the matter to him and to adduce evidence for the purpose of establishing as exactly as possible what the repair of the vessel would have cost.

The formal judgment declared that the suppliant was not entitled to the entire relief sought by the petition but that he was entitled to recover the damages to the vessel directly attributable to the collision had such damages been ascertained immediately after the said collision and

that the amount thereof be established by reference to the court if the parties could not agree, and that the respondent pay to the suppliant its costs of the action.

The evidence of the material facts I have endeavoured to outline is undisputed and I think fully justifies the conclusion of the learned trial judge, not only that the *Ostrea* struck the submerged and invisible obstruction in turning around the end of the jetty, but that its collision therewith was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19 (*c*) of the Exchequer Court Act. It was not a case of mere non-repair or non-feasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

I am of opinion also that there was sufficient evidence to support the learned trial judge's finding that after the collision there was negligence on the part of the steamboat's officers in not discovering sooner than they did the extent of the damage caused to the vessel's hull in passing over the obstruction and that had they acted promptly and prudently in this regard, the vessel would not have continued its voyage for 3½ miles into the open bay.

There can be little doubt that the total loss of the vessel and its equipment would have been avoided had an attempt been made either to return her to the wharf or to beach her at some nearby point. For this reason, though not convinced of the correctness of the statement appearing in His Lordship's reasons that the damage should be limited to the cost of the repair of the vessel, I concur in the terms of the formal judgment in so far as it declares that the suppliant is not entitled to compensation as for a total loss as claimed, but is entitled to recover the damages directly attributable to the collision. I would not, however, restrict the condemnation to damages to the vessel alone and would delete from the order the words "had such damages been ascertained immediately after the said collision," and leave the assessment open generally to such damages as are directly attributable to the collision. It is not at all clear upon the existing evidence

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Crocket J.

that, had the extent of the damage to the steamer's hull been promptly discovered and the master brought her back to the dock or beached her at the nearest possible place, no further loss would have been sustained than the damages to the vessel itself, which were ascertainable immediately after her collision with the submerged obstruction. This phase of the case was not satisfactorily investigated on either side, though one of the witnesses, Waterhouse, supervisor of masters and mates for the Department of Transport at Halifax, did express it as his opinion that if the boat had been run to the nearest shore or returned to the dock she might fill up, but would not have sunk. Many other considerations might well enter into the assessment of the damages, which would have resulted from the collision, had the damaged steamer not proceeded on her voyage and an attempt been made either to manoeuvre her back to the dock or to beach her at the nearest possible place. For instance, assuming that the steamer had been safely brought back to the dock, it would seem to be almost certain that she could not have been prevented from filling up and, though not entirely disappearing, from settling on the bed of the water basin within the L. The consequent flooding of her engine and other machinery and the general depreciation of the steamer by such flooding and settling could scarcely be said not to be directly attributable to the collision, not to speak of the expense of raising and refloating her, or possible damage to the loose wrecking and salvage equipment, most of which, it seems, was kept in the alleged water-tight forward bulkhead. Or, assuming that the steamer had been beached on the nearest available shore, it could scarcely be that such a course would not have entailed considerable additional damage. In either event the owner would be entitled to recover the cost of restoring the vessel to as good a condition as she was in before the collision and if that were impossible to an allowance for such depreciation as may have occurred by reason of her having been completely flooded or further damaged by the attempt made to minimize the loss, and also for any loss proved to have resulted directly from the enforced suspension of its operations during the time required to make the necessary repairs. In this connection I may refer to Dr. Lushing-

ton's exposition of the rule applicable in a case where a ship is partially damaged. In "*H.M.S. Inflexible*," (1), "When a ship is partially damaged," he said,

> the principle is clear, *restitutio in integrum;* the application often difficult. First, then, as to consequential damages, an expression the precise meaning of which has not, to my knowledge, been defined by any authority, nor do I mean to attempt it. In the present case, regard being had to the particular circumstances, *restitutio in integrum* is the amount of loss sustained, and that amount consists of the expense of repair and a just compensation for the non-employment of the ship whilst under repair; and that just compensation must again consist of the expense of detention and amount of profit lost. Such, I apprehend, are the general principles which a judge at *Nisi Prius* would lay down for the direction of a jury in a case in which it was their duty to assess the damage.

Of course in a case such as this, where a steamship has been so damaged by running over a hidden obstruction and rendered so leaky that upon proceeding 3½ miles to sea she suddenly sank and became a total loss, and where the trial judge has found that the original damage was caused by the negligence of the respondent in the creation of the obstruction, but that the steamship's officers were guilty of negligence in proceeding to sea without ascertaining the extent of the damage to her hull, and could have avoided a total loss by returning to the dock, and therefore held that the suppliant was entitled only to the cost of the repairs, which might have been necessary had the steamer in fact returned to the dock, it is difficult to determine with any degree of certainty the condition of her hull immediately after the collision or what the cost of repairing that condition would be. The existence of such difficulty, however, does not relieve the respondent from liability to compensate the ship's owner for such damage as can fairly and reasonably be held to be really attributable to the ship's striking the submerged obstruction. It matters not whether the whole of such damage was ascertainable before or after the master's negligent failure to discover the extent of the injury to the ship's hull, so long as it was suffered as a direct and natural consequence of the collision. The effect of the latter negligence was simply to relieve the Crown of liability for the ship's foundering in the open sea and thus becom-

(1) (1857) 1 Swabey 200, at 204.

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Crocket J.

ing a total loss, which the respondent would otherwise have had to make good. The fact that the ship did founder in the open sea after so short a run from the site of the collision nevertheless shews the serious nature of the injury caused to her, and it seems to me should have a material bearing, not only on the question of the probable cost of repairing her if the master had made an attempt to get her back to the dock or to beach her after the collision and the lapse of a reasonable time in which he might have ascertained the extent of the damage done to her hull, but also upon the question of depreciation, the length of time which would probably be required for necessary repairs and her consequent enforced idleness, and other items of damage, which would probably have followed as the direct and natural consequence of the collision.

For the above reasons I would dismiss the appeal with costs, allow the cross-appeal to the extent of varying the declaration of the formal judgment of the learned trial judge limiting the assessment of damages in the manner stated, and, failing an agreement between the parties, remit the case to the Exchequer Court for their determination on the basis of the suppliant being entitled to all such damages as are directly and naturally attributable to the collision. The suppliant, I think, is in the circumstances entitled to costs on its cross-appeal as well as on the appeal.

DAVIS J.—In 1931, the Dominion Government undertook the construction of a jetty, projecting at right angles to the large Dominion Government breakwater at Port Morien in the province of Nova Scotia, for the better protection of numerous small fishing boats which were accustomed to find shelter in the safe anchorage of the bay at that point. There was no harbour at Port Morien except that which was afforded by the breakwater. This jetty or extension to the breakwater was in a location which exposed it to the full force of the Atlantic storms. The proposed jetty was to be about 210 feet long, with a width of 26 feet at the bottom and of 16 to 17 feet at the top, and 12 or 13 feet in height. The method of construction was cribwork made of logs and timber, with stones running in weight as high as 150 and 200 pounds

being used as ballast. Before the jetty was completed, about 50 feet of the upper portion of the outward end broke away during a storm on September 9th, 1932. This left the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. The inner portion of the jetty, about 50 feet in length, was not damaged; it withstood the storm because the ballasting of that portion had been completed.

Some two years later, on September 22nd, 1934, the tow-boat *Ostrea* became a total loss at sea; the suppliant claims as a result of having struck the submerged portion of the jetty that had been left undisturbed and without any buoy or other warning to indicate its presence there. The *Ostrea* was a boat used for salvage operations, some 70 or 80 feet in length and between 18 and 20 feet wide. Her draught was about 7 feet. She was of composite construction—a wooden covering with a steel frame.

In this action in the Exchequer Court, on a petition of right to recover for the loss of the ship and its equipment, no negligence was alleged against the Crown prior to the date of the storm and we are therefore not called upon to enquire into the method of construction of the jetty. Mr. Burchell, in his clear and forceful argument on behalf of the Crown, contended that there was no obligation upon the Crown to rebuild the damaged portion of the structure, or to remove the cribwork and ballast that remained submerged, or to place any buoy or other warning sign at the place. It may be that the Crown was under no such obligation, but it is unnecessary to express any opinion on that point. What actually happened was this: At the time of the storm in September, 1932, the appropriation of $3,000 for the work had become exhausted and the government engineers decided that in any event it was too late in the season to do any further work that year. On July 20th of the next year the district engineer of the Department of Public Works and his assistant visited the site and decided that the submerged portion was not suitable as a foundation for new cribwork, and abandoned it. They decided to saw off the logs that were sticking out at low water and these were cut down to the ballast. The end of the jetty which had not been washed away was squared off and spiled in order to support and

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Davis J.

strengthen it. The cribwork that had been washed ashore was used to make an L at what had become the end of the jetty. This work was done under the instructions of the district engineer of the department of Public Works. Two thousand dollars appears to have been appropriated in that year, 1933, to do the work that was then undertaken, and it was completed at the end of October, 1933. The jetty then "looked as if it were a new wharf that had just been built"; but immediately outside the apparent end of the jetty there remained the submerged cribwork of tangled logs and rocks, wholly invisible and unmarked.

No more work appears to have been done up to September 21st, 1934, when the towboat *Ostrea* arrived at Port Morien and was berthed inside the jetty. She had come to Port Morien as a base for salvage operations on the wreck of the steamer *Watford,* which had gone ashore on the coast a few miles distant from the harbour, during the same storm that had carried away the outer end of the jetty. In the early morning of September 22nd, 1934, the *Ostrea* left her berth in good condition to take up her salvage work in Morien Bay. While on her way out, and at a distance of 5 or 6 feet from the apparent outer end of the jetty, the suppliant contends she came into collision with the submerged outer portion of the jetty that had been abandoned and as a result subsequently sank and became a total loss. The trial judge was satisfied that the *Ostrea* struck the submerged rock or cribwork, and the evidence amply justifies that finding of fact. With the tide conditions at the time of the collision, the submerged cribwork at its highest point was covered with only 5½ feet of water. The collision caused the *Ostrea* to spring a leak, though that fact did not become at once apparent to those on board. She continued on her way to her salvage work but after proceeding for about twenty-five minutes, a distance of three and a half miles, it became apparent to those on board that she was filling with water. They could do nothing at that time to save her and were obliged to get into the life-boats to save themselves. A few minutes after they left her, the *Ostrea* with her furnishings and salvage equipment, sank. Subsequently the underwriters had their representative locate the wreck.

He took soundings and recommended to the underwriters that owing to the exceptional condition of the coast and the cost necessary to raise the ship, she be written off as a total loss. The underwriters paid the suppliant the sum of $20,016, made up as follows: $8,000 for the hull; $9,016 for the salvage equipment; and $3,000 for the disbursements. The suppliant then submitted a petition of right on behalf of and for the benefit of the group of underwriters who were subrogated to the rights of the suppliant in respect of the loss.

The case made against the Crown is that having undertaken and completed the restoration and change in the structure, leaving the impression upon those using the waters at the point that the end of the jetty was as it appeared above water, it was negligence on the part of the officers or servants of the Crown not to have either removed the submerged rocks and cribwork, or, placed a buoy or some warning of their existence and danger; in other words that it was not, as contended by the Crown, a case of nonfeasance but was in fact a case of misfeasance. That was the view of the evidence accepted by the learned trial judge and I think it was right. The Crown undertook the repair and reconstruction of the structure and did it in such a manner as to create a condition dangerous to those using the waters beside it. While in one sense the acts complained of might be regarded as an omission, in substance the result of the acts of those in charge of the work of restoration of the jetty constituted misfeasence.

The claim in question was put forward under sec. 19 (*c*) of the *Exchequer Court Act*, R.S.C., ch. 34, which is as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*a*) * * *
>
> (*b*) * * *
>
> (*c*) every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

That the submerged portion of the jetty was part of a public work is really not disputed. The appellant's factum admits that it is obvious " that the submerged portion of

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Davis J.

the cribwork would still be of some value as a breakwater to protect the inner harbour, which was the purpose for which the jetty or extension to the L of the breakwater was originally built." What is contended for by the Crown is that the Exchequer Court had no jurisdiction because there could be no duty on the Crown to remove the submerged pile of ballast; consequently no duty on any officers or servants of the Crown to remove it and a fortiori no negligence on the part of officers or servants of the Crown in not removing it. But I agree with the view taken by the learned trial judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

The learned trial judge declined to declare the suppliant entitled to relief to the extent of the total loss of the ship and its equipment. He limited the relief to (I now quote from the formal judgment)

> the damages to the vessel directly attributable to the collision with the obstruction in the vicinity of the pier as alleged, had such damages been escertained immediately after the said collision,

and directed that the amount of the damages so awarded should be established by a reference if the parties cannot agree. In his written reasons for judgment the learned trial judge on this branch of the case put his conclusion this way:

> I am of opinion, however, that, after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea. Had he found that the vessel was leaking, as I think he should have, if he had made a proper inspection of the hull immediately after the impact, he would not or at least should not, assuming he had acted prudently, have proceeded on his voyage but should have brought back his vessel to the wharf. He would thus have avoided the loss of his ship and of her equipment.

The learned judge then proceeds to refer to some of the evidence, and concludes:

> I have no doubt that the extent of the damage caused to the ship by the collision would have been detected if a proper inspection had been made immediately after the collision.

The limitation put by the trial judge upon the relief sought is such that it might only amount to a few dollars.

If the fact that the ship had sprung a leak in striking this submerged rock or cribwork had been immediately known to the master of the ship and he had at once beached the boat, if this were practicable, the cost of repairing the hull might well have been a small sum. The judgment limits recovery to "the damages to the vessel" directly attributable to the collision, "had such damages been ascertained immediately after the collision."

With the greatest respect I find myself unable on a review of the evidence to agree with the trial judge's conclusion on this branch of the case. Nothing is easier, in this sort of case, after all the facts and circumstances are known, than to suggest that if something else had been done than that which was done, the consequences might not have been what they were. But that is hindsight. The test is, what should a reasonable man under the circumstances have done? Did he exercise reasonable judgment on the facts as he knew them at the time? Now this little towboat, the *Ostrea*, equipped for and engaged in salvage work along the Atlantic coast, is not to be thought of in terms of a large passenger steamship running in a regular channel. If a ship of that sort strikes something in the course of its regular route, it immediately arouses anxiety of a grave concern, and the duty of the master is very plain. But this towboat, in the very nature of its operations, was, according to the evidence, constantly bumping up against different obstructions. It was nothing unusual. No one on board seems to have had the slightest fear that what had happened would cause the boat to spring a leak and sink. I quote from the evidence of the master:

> In crossing the end of that wharf the L was very close but we did not hit, but right past the end of that I struck something in the water; there was a little roll, but it was not bad, not much of a knock, but the mate asked me what I thought was there. The mate was on the bridge alongside of me. He said "We struck something," and I said "Yes." She listed over a bit, there were a few bumps, so I sent the mate down to the engine room to see if the engineer had heard it and to ascertain if any damage was done, if the ship was taking any water; I never thought any more about it.

And on cross-examination:

> Q. Now as to this bump; was it a serious bump?
>
> A. No. We experience worse than that every day. I did not think it anything out of the way but enough to roll her a bit.

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Davis J.

The mate testified that he felt a "bump," and I take the following from his cross-examination on this point:

Q. Did you make any investigation of your own in regard to this bump?

A. No, sir, I just went by the Captain's orders.

Q. Was this bump any different to bumps which you experience every day?

A. No, sir, not to me.

* * *

Q. This was not then an extraordinary hard bump or anything of that nature?

A. No.

Q. And there was nothing to indicate that it was something serious?

A. No.

Q. Or put you on your guard in any way?

A. No.

The engineer, when asked for his version of the accident, stated:

For a short time as we were going ahead the boat lurched over to starboard; I thought she rubbed up against the breakwater. She hit some obstruction anyway.

On cross-examination:

Q. Was it unusual to feel a bump of the type you felt that morning?

A. Yes, it was, while on that boat.

Q. One of the witnesses said you got bumps like that every day?

A. I have hit against scows and other things when docking and the bump would be 75 per cent harder than that.

Q. So that this was not a hard bump?

A. No, sir, the ship seemed to run on something and listed to starboard.

Q. Could you tell that it struck forward?

A. Yes, from her listing and the fact that I felt no bump aft.

Q. Bumps of this kind happen daily?

A. But this was not exactly a bump. Maybe in the after end I would not hear the sound like they would, but I remember the vessel running up on something and her listing to starboard.

It did not occur to the engineer, apparently, that any investigation should have been made by him at the time to see if the boat was taking water. The master of the ship certainly did not suspect that any appreciable injury was done to his boat, and in sending his mate down to the engine room and ascertaining from him that no damage had apparently been done, he did what, under all the circumstances, can be said to have been all that could be reasonably expected of him. There is no doubt, in the light of what we now know, that it would have been

prudent for the master to have caused a more careful examination to be made at the time, but whether his conduct was reasonable or not must be tested by what he knew or suspected at the time. Two experts were called for the Crown and testified as to what they thought the proper thing for the master of the ship to have done but Patterson, who is Superintendent of the Halifax Ship Yards, was a ship builder and as such would know and appreciate the serious effect that even a somewhat light bump might have on a boat of composite construction such as the *Ostrea,* and Captain Waterhouse, now Supervisor and Examiner of Masters and Mates for the Department of Transport for Eastern Canada, had been a master of large vessels and his experience had been limited to them. A small towboat like the *Ostrea,* by its very construction and use, is adapted for and subject to a good deal of "bumping" in its work of salvage along the coast.

The appellant is entitled to a diminution of damages only if it be proved that those in charge of the respondent's vessel were guilty of negligence (as opposed to mere error of judgment) amounting to a *novus actus interveniens* which caused the extra damage. *The Pensher* (1); *The Metagama* (2); *The Genua* (3). The question is whether the suppliant was guilty of such negligence after the collision as would make that negligence the direct cause of the final damage. There is no conclusive evidence that the *Ostrea* could have been saved from total destruction even if the leak in her had been discovered immediately after the collision, and it may be that she did not begin to leak until after she had proceeded a short distance on her way. The evidence is that a ship of the construction of the *Ostrea* would sink much more quickly than an ordinary boat. Capt. Waterhouse, who gave it as his opinion that if soundings had been taken immediately after the collision and the *Ostrea* found to have been leaking, she should have been run to the nearest shore water or returned to the wharf and put in a position where, if she did fill up, she would not sink, admitted on cross-examination that he had never been in Port Morien; whereas Munroe, a resident of Port Morien, stated that the coast line at Port Morien was rugged and rough all the way along.

(1) (1857) Swab. 211, at 213. (2) [1928] S.C. (H.L.) 21.
(3) (1936) 2 All E.R. 798.

1939

THE KING v. HOCHELAGA SHIPPING & TOWING CO. LTD.

Davis J.

Counsel for the appellant did not ask before us for the full amount claimed, $20,016, but for $19,666.50 (taking off $350 in view of the evidence as to the value of the provisions, stores, etc., lost).

I would dismiss the Crown's appeal with costs and would allow the cross-appeal to the extent of $19,666.50, with costs of the action and of the cross-appeal.

Appeal dismissed and cross-appeal allowed with costs.

Solicitor for the appellant: *C. J. Burchell.*

Solicitor for the respondent: *L. A. Lovett.*

1939

* May 23, 24.
* Dec. 9.

DUFFERIN PAVING AND CRUSHED STONE, LIMITED (DEFENDANT).... APPELLANT;

AND

FRANCES ANGER AND ANNIE W. DERBYSHIRE (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Limitation of actions—Construction of statutes—Action for damage caused to house by vibration through operation of cement-mixing trucks on highway—Damage sustained more than twelve months prior to commencement of action—Action barred by s. 53 of Highway Traffic Act, R.S.O., 1927, c. 251, as amended—"Damages occasioned by a motor vehicle."

Plaintiff sued defendant for damages for injury to plaintiff's dwelling house in the city of Toronto through vibration caused by operation of defendant's cement-mixing motor trucks in the street in front of the house. Permission had been granted (pursuant to authority under *The Highway Traffic Act*) by the City to defendant to operate said trucks on said street (otherwise the use of such trucks was prohibited by said Act). Practically all the damage was sustained beyond 12 months prior to the date when the action was brought (though operation of the trucks continued for a time within that 12 months period). Sec. 53 of *The Highway Traffic Act* (R.S.O., 1927, c. 251, as amended in 1930, c. 48, s. 11) provided (subject to provisions not material) that "no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained."

Held: The limitation in s. 53 applied, and plaintiff's action was barred.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

As to construction of the plain words in s. 53, there were cited (*per* the Chief Justice and Davis and Hudson JJ.) the rule stated in the *Sussex Peerage* case, 11 Cl. & F. 85, at 143 (accepted in *Cargo ex "Argos,"* L.R. 5 P.C. 134, at 153, and referred to in *Birmingham Corporation* v. *Barnes,* [1934] 1 K.B. 484, at 500), and (*per* Crocket J.) *Winnipeg Electric Ry. Co.* v. *Aitken,* 63 Can. S.C.R. 586, at 595, and *British Columbia Electric Ry. Co.* v. *Pribble,* [1926] A.C. 466, at 477, 478.

Semble (*per* the Chief Justice and Davis and Hudson JJ.): Where damage is the cause of action or part of the cause of action, a statute of limitation runs from the date of the damage and not of the act which caused the damage; if there be fresh damages within the statutory period, an action in respect of those damages will not be barred (*Crumbie* v. *Wallsend,* [1891] 1 Q.B. 503, following *Darley Main Colliery Co.* v. *Mitchell,* 11 App. Cas. 127). (In the present case the damages, if any, within the limitation period were negligible).

It being held that the action was barred, it was not necessary to determine whether or not, in view of the authorized permission to operate the trucks, the operation could be regarded in law as constituting an actionable nuisance. It was pointed out (*per* the Chief Justice and Davis and Hudson JJ.) that the authority to use the street was not obligatory but only permissive, and that even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons (*Manchester Corporation* v. *Farnworth,* [1930] A.C. 171, at 183. Also *Provender Millers (Winchester) Ltd.* v. *Southampton County Council,* 1939 W.N. 301, at 302, [1939] 3 All E.R. 882, affirmed, 1939 W.N. 367, [1939] 4 All E.R. 157, referred to).

APPEAL from the judgment of the Court of Appeal for Ontario dismissing (Riddell J.A. dissenting) the present appellant's appeal from the judgment of McTague J. (1) in favour of the plaintiffs against the present appellant (one of the defendants) for $500 damages for injury to a dwelling house through vibration caused by operation of appellant's cement-mixing motor trucks on the highway passing in front of the building. The material facts of the case are sufficiently stated in the reasons for judgment now reported. Special leave to appeal to this Court was granted by the Court of Appeal for Ontario. The appeal was allowed and the action dismissed with costs throughout.

D. L. McCarthy K.C. and *K. G. Morden* for the appellant.

J. W. Pickup K.C. for the respondents.

(1) [1938] O.R. 492; [1938] 4 D.L.R. 70.

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Davis J.

The judgment of the Chief Justice and Davis and Hudson JJ. was delivered by

DAVIS J.—This appeal comes to this Court by special leave granted by order of the Court of Appeal for Ontario.

The respondent Frances Anger, on July 18th, 1935, commenced the action against the appellant for damages to her residential property, 349 Beech avenue, in the City of Toronto. She alleged that in the years 1933 and 1934 the appellant was engaged in construction work in connection with the Water Purification Plant under construction for the Corporation of the City of Toronto in the eastern portion of the city and that for the purposes of its construction work the appellant

> operated and caused and procured to be operated upon the said Beech avenue in front of and in the immediate vicinity of the said premises of the plaintiff heavy machines for the mixing of concrete, said machines being mounted on heavy trucks and while in operation the said machines were carried upon the said trucks past the plaintiff's premises at a high rate of speed and in such a manner as to cause severe vibration of the buildings along the course of the said street, including the plaintiff's dwelling-house. As the result of the said acts of the defendants the said dwelling-house of the plaintiff was greatly damaged.

At the end of a long trial the learned trial judge, Mr. Justice McTague, in a considered judgment found as a fact "that the continued operation of these cement mixing trucks did cause physical injury to the plaintiff's property." The learned trial judge discounted, he says, to some extent the estimated cost of repairs advanced on behalf of the respondent but allowed damages in respect of actual physical injury at the sum of $500. This judgment was affirmed on appeal to the Court of Appeal, Riddell, J.A., dissenting. There are concurrent findings of fact because, while Riddell, J.A., accepted without adjudication the finding that the damage was done by the motor trucks to the respondent's house, Fisher, J.A., upon a careful review of the evidence, agreed expressly with the findings of fact of the trial judge, and Henderson, J.A., while not expressly stating his concurrence in the findings, refers to the evidence upon which the trial judge made his findings and affirms the judgment. However that may be, the main argument presented to us was that the appellant had been granted permission by the Corporation of the City of Toronto, pursuant to statutory authority, to operate the trucks on the particular street in ques-

tion and that while the operations may have been a nuisance in the broad sense of the term, they could not under the circumstances be regarded in law as constituting an actionable nuisance. This contention was accepted by Riddell, J.A. Against this view, the effect of the argument on behalf of the respondent was that while such permission had been granted by the municipal corporation, it was permissive merely and not imperative and that there was necessarily implied in the permit that the use of the highway so sanctioned was not to be in prejudice of the common law right of others. We were afforded a very complete argument by counsel on this branch of the case but in my view it becomes unnecessary to determine this question. It may with advantage, however, be pointed out that the authority to use the street was not obligatory but only permissive, and that even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons. *Manchester Corporation* v. *Farnworth* (1). Farwell, J., very recently said in *Provender Millers (Winchester) Ltd.* v. *Southampton County Council* (2) that the speech of Lord Macnaghten in *East Freemantle Corporation* v. *Annois* (3) must be read in the light of the particular facts of that case where the legislature had authorized the actual thing done, so that unless the work was improperly done the corporation could not be made liable for damages suffered by other persons.

The appellant pleaded in its statement of defence that any claim that the respondent may have had by reason of the operation of the trucks referred to in her statement of claim was barred by the provisions of sec. 53 of *The Highway Traffic Act,* being R.S.O., 1927, ch. 251 and amendments thereto. The relevant section as it stood in the Revised Statutes of 1927 was as follows:

53. (1) Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of six months from the time when the damages were sustained.

(1) [1930] A.C. 171, at 183.
(2) 1939 W.N. 301, at 302; [1939] 3 All E.R. 882 (affirmed in the Court of Appeal, 1939 W.N. 367; [1939] 4 All E.R. 157).
(3) [1902] A.C., 213, 217.

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Davis J.

Subsections (2) and (3) are not material. They deal with the case where death is caused and the action brought under *The Fatal Accidents Act* and the case where the person injured is an infant. In 1930, by 20 Geo. V, ch. 48, sec. 11, the period of limitation in sec. 53 was made twelve instead of six months. The subsection now stands in the same language as amended in 1930 in the Revised Statutes of 1937, ch. 288, sec. 60.

It is important then to repeat that the writ in this action was issued July 18th, 1935, and the statement of claim refers to the operations of the appellant in the years 1933 and 1934. If the statutory limitation of twelve months above mentioned applies to this case, then the damages, if any, sustained beyond the twelve months cannot be recovered. It was frankly admitted by Mr. Pickup that while there might be some damage within the twelve months period, the substantial damage was undoubtedly sustained outside that period of time. It is a fair view of the evidence that the damages, if any, within the twelve months period were negligible.

The learned trial judge in dealing with this aspect of the case said:

> If I have to give effect to the contention it would be serious as to the amount of the plaintiff's damages and perhaps as to the right to recover at all, because I am of opinion that the real damage was probably caused early in the year 1933 when the truck operation was heaviest and not nearly so reasonably carried out as it was after the 24th day of June of that year.

It therefore becomes vital to the respondent's case to determine whether or not her recovery is limited by the twelve months statutory period. The trial judge did not think so. He carefully considered the section of the statute and concluded that the right to damages here is a common law right which does not come within the purview of the statutory provision, and therefore in his opinion this defence had no application. In the Court of Appeal, Riddell, J.A., while not resting his judgment on that point, was of the opinion that the section plainly ousted claims for damages occasioned by a motor vehicle after the expiration of twelve months and he said that if the action were sustainable at all he would give effect to this section. Fisher, J.A., did not deal specifically with the point. Henderson, J.A., discussed the section at some

length and concluded that the statute concerned itself entirely with highway traffic and, having regard to the general purpose and scope of the statute, the limitation section must be deemed to refer to traffic accidents, and upon this reasoning it became clear to the learned judge, he says, that the respondent's action is not one contemplated by *The Highway Traffic Act* or within its scope or purview and that the limitation section cannot apply to it.

The interpretation and application of this special statutory limitation was carefully considered in at least two earlier cases in the Ontario Court of Appeal. In *Harris* v. *Yellow Cab* (1), Mulock, C.J.O., Hodgins and Smith, JJ.A., held (Magee, J.A., dissenting) that the damages to which the limitation applies, so far as the owner of the motor vehicle is concerned, are intended to be those provided for in the Act itself, due to its violation, and not those recoverable at common law or apart from the Act; and therefore an action brought by a passenger in a motor vehicle against the owner, to recover damages for injuries sustained by reason of the negligence of the driver in shutting the door of the vehicle upon the passenger's hand, was not barred, though brought more than six months (the then period of limitation) after the injury. Then in *Hughes* v. *Watkins & Co.* (2), the Court, composed of Mulock, C.J.O., Magee, Hodgins, Ferguson and Grant, JJ.A., held, affirming the judgment of Mr. Justice Riddell who had tried the case with a jury, that the plaintiff's action for damages for her injury (she had been struck while standing on the sidewalk of a city street and injured by the projecting part of a load on the defendants' motor truck negligently driven by their employee as found by the jury) was barred by the limitation section of *The Highway Traffic Act,* the action not having been brought until after the expiration of six months from the time when the damages were sustained. Whether the cause of action was to be regarded as arising under the statute or at common law, the section was held applicable. It was subsequent to this decision that the legislature amended (in 1930) the section by making the statutory period twelve months instead of six months. The judgment of Grant, J.A., in the *Hughes* v. *Watkins* case (2), contained

(1) (1926) 59 Ont. L.R. 8.

(2) (1928) 61 Ont. L.R. 587.

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Davis J.

obiter dicta, however, that if damages are occasioned by a motor vehicle upon a highway under circumstances which give a right of action under the provisions of the Act, even though the same circumstances give a right of action at common law (and whether based upon a breach of a contractual obligation or upon tort), the right of action is barred at the expiration of the special statutory period, but, if the circumstances are such as would give a right of action at common law but not under the statute, then the section has no application.

The argument presented on behalf of the respondent in this Court was that the action was a common law action of nuisance and that *The Highway Traffic Act* had no application to such an action; that the statute is dealing with regulation of traffic upon highways and that the cause of action here sued upon exists quite apart from the statute and is not within the scope of it. The respondent relied upon the *dicta* of Grant, J.A., in the *Hughes* v. *Watkins* case (1) and also on the decision in the *Harris* v. *Yellow Cab* case (2).

It is to be observed in the present case that *The Highway Traffic Act* not only deals with traffic accidents but stipulates the width and the length and the weight of vehicles and of the loads that may be moved upon wheels over or upon different classes of highways (old provisions that are now found as secs. 17 and 33 in R.S.O., 1937, ch. 288). It is plain that the use of the particular motor trucks in question in this action upon the highways was prohibited by the statute unless a special permit was issued, pursuant to sec. 34, which provides that the municipal corporation or other authority having jurisdiction over the highway may, upon application in writing, grant a permit for the moving of heavy vehicles, loads, objects or structures in excess of the limits prescribed by section 17 or 33. Permission was in fact granted by the City of Toronto to the appellant to operate their motor trucks on Beech avenue and that permission was given by the municipal corporation pursuant to the authority vested in it by sec. 34, and it is damage alleged to have been caused by those motor trucks that the respondent in this action seeks to recover. It is difficult for me, therefore,

(1) (1928) 61 Ont. L.R. 587. (2) (1926) 59 Ont. L.R. 8.

to accept the contention that the limitation section (now sec. 60) in the statute is not applicable to this action. It very plainly states that, subject to two provisoes which do not affect this action,

> no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

The rule of construction is plain:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

This is the rule declared by the Judges in advising the House of Lords in the *Sussex Peerage* case (1) which was accepted by the Judicial Committee of the Privy Council in *Cargo ex "Argos"* (2), and recently referred to by Slesser, L.J., in *Birmingham Corporation* v. *Barnes* (3).

The operation of the trucks continued on Beech avenue for a time within the one-year period. Where damage is the cause of action or part of the cause of action, a statute of limitation runs from the date of the damage and not of the act which caused the damage. If there be fresh damages within the statutory period, an action in respect of those damages will not be barred (*Crumbie* v. *Wallsend Local Board* (4), following the decision in the House of Lords in *Darley Main Colliery Co.* v. *Mitchell* (5)). But in the case now in appeal before us the finding of the trial judge, amply supported by the evidence, is that the substantial damages, assessed at $500, were in fact sustained prior to the one-year period. If there was any further damage within the year it was *de minimis*.

My conclusion, therefore, is that the action is barred by the statute and that the appeal must be allowed, the judgments below set aside and the action dismissed with costs throughout.

CROCKET J.—This action was brought to recover for damage alleged to have been caused to the plaintiffs' residential property on Beech avenue, Toronto, by the opera-

(1) (1844) 11 Cl. & F. 85, at 143.
(2) (1873) L.R. 5 P.C. 134, at 153.
(3) [1934] 1 K.B. 484, at 500.
(4) [1891] 1 Q.B. 503.
(5) (1886) 11 App. Cas. 127.

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Crocket J.

tion of heavy machines for the mixing of concrete in front of and in the immediate vicinity of the said property. The statement of claim alleged that the said machines were mounted on heavy trucks and while in operation were carried upon the said trucks past the plaintiffs' premises at a high rate of speed and in such a manner as to cause severe vibration of the buildings along the course of the said street, including the plaintiffs' dwelling house, and that, as a result, the said dwelling house was greatly damaged. It claimed that the acts of the defendants amounted to a nuisance and were an unlawful interference with the use and enjoyment of the property and resulted in permanent injury thereto.

The defendant appellant in its statement of defence alleged that when it operated its trucks on Beech avenue it was authorized to do so by permits issued pursuant to the provisions of ss. 2, 29 and 30 of the Ontario *Highway Traffic Act*, R.S.O., 1927, ch. 251, and amendments thereto, and did so in accordance with the limitations placed upon it by the said Act and the said permits and in a proper and careful manner, and denied that the operation of the trucks damaged the plaintiffs' premises or interfered with the reasonable enjoyment thereof. It also pleaded that the action was barred by the provisions of s. 53 of the said *Highway Traffic Act* and amendments thereto.

On the trial before McTague, J. (without a jury), His Lordship found in effect that the movement and operation of these trucks on Beech avenue was a nuisance, which had caused physical injury to the plaintiffs' property, for which the defendant appellant was liable, though he stated that there could be no question about the right of the Dual-Mix Co. (the defendant appellant's subsidiary) to operate the trucks upon the street and that the *Highway Traffic Act* and the municipal by-laws and regulations were lived up to. He held that the right to recover for this damage was a common law right outside the provisions of the *Highway Traffic Act* and that consequently the action was not barred by the provisions of the limitation section, which had no application to such a case, and accordingly ordered judgment to be entered for the plaintiffs against the defendant appellant for $500 and costs on the County

Court scale. This judgment was confirmed by the Appeal Court, Riddell, J.A., dissenting, and from the latter judgment special leave to appeal to this Court has been granted.

As I have come to the conclusion that the action must be dismissed on the ground that it was not brought within the time limit prescribed by s. 53 of the *Highway Traffic Act*, ch. 251, R.S.O., 1927, as amended by s. 11, ch. 48 of the Ontario Statutes of 1930, I shall confine myself solely to this point.

There can be no doubt, I think, that the concrete mixing trucks were motor vehicles within the meaning of s. 1 (*h*) of the *Highway Traffic Act*, nor that Beech avenue was a highway within the terms of that statute. The learned trial judge having clearly found that the damage to the plaintiffs' property, for which compensation was sought in this action, was caused by the operation of these cement mixing trucks upon the highway and that the provisions of the *Highway Traffic Act* and the municipal by-laws and regulations were lived up to in connection with their movement along that highway, I am at a loss to perceive how it can well be said that this action was not an action "for the recovery of damages occasioned by a motor vehicle," within the meaning of s. 53 of the *Highway Traffic Act* or that the plaintiffs' right to recover for such damages was a common law right entirely beyond the scope and purview of that statute. Had the trucks been driven at an excessive rate of speed or had there been any negligence of any description in connection with their movement or operation as they proceeded along the highway, to which the damage was properly attributable, no question could have been raised as to the action being barred, provided the damage claimed for was sustained more than twelve months prior to the commencement of the action.

The learned trial judge seems to have based his judgment as to the non-applicability of s. 53 upon the decision of the Ontario Court of Appeal in *Harris* v. *Yellow Cab, Ltd.* (1), and a dictum of Grant, J.A., in *Hughes* v. *Watkins* (2).

In the later case the plaintiff, while on foot on the kerb of a city sidewalk or street, was struck and injured by the

(1) (1926) 59 Ont. L.R. 8. (2) (1928) 61 Ont. L.R. 587.

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Crocket J.

projecting part of a load on the defendants' motor truck, negligently driven by their employee, as found by a jury. The Appellate Division held that the action, not having been brought until after the expiration of six months from the time when the damages were sustained, was barred by the limitation section. In his reasons for judgment, Ferguson, J.A., said:—

> It being established and admitted that the injury and damages which form the subject-matter of the plaintiffs' claim occurred and were occasioned by the negligent use of the defendants' motor vehicle in the course of its using a highway for motor travel or motor traffic, I am of opinion that the learned trial Judge [Riddell, J.A.] was right in his conclusion that s. 54 applied to bar the plaintiffs' claim, provided the "damages were sustained" more than six months [as the section then stood] prior to action brought.

This seems to have been the basis of the decision in that case that the action was barred.

It is claimed that it was "the *negligent* use of the defendants' motor vehicle in the course of its using a highway for motor travel or motor traffic," which brought that case within the purview of the section and of the statute, and that, no negligence having been alleged or found in connection with the use of the highway in the present instance, the decision in *Hughes* v. *Watkins* (1) is authority for the proposition that the section does not apply to bar the present plaintiffs' action. For my part I cannot accept this contention.

The section itself says nothing about the damages sued for being occasioned by the negligent operation of a motor vehicle upon a highway. It is directed wholly to the bringing of actions "for the recovery of damages occasioned by a motor vehicle"—a motor vehicle, which can only be lawfully operated on a highway under a permit granted in accordance with the provisions of the *Highway Traffic Act*. That statute contains special provisions regarding the weight, width, etc., of trucks and prescribes penalties for their violation. If any of those provisions had been violated by the defendant appellant's subsidiary in the operation of these trucks along the highway, their operation obviously would have been unlawful, and any damage really occasioned thereby attributable to the defendant appellant's negligence. In that case under the

(1) (1928) 61 Ont. L.R. 587.

doctrine laid down in *Hughes* v. *Watkins* (1) the limitation section would have applied and the plaintiffs would have been required to bring their action within the twelve months period prescribed thereby. It seems to me, with the highest respect, that we could not give effect to the distinction now relied upon in support of the judgment *a quo* without reading into the language of a perfectly clear, precise and unambiguous enactment, words which it does not contain, and, moreover, without holding that the section was enacted as a protection only for those who violated the provisions of the statute, and not for those who observed them.

In *Winnipeg Electric Railway Co.* v. *Aitken* (2), this Court considered a very similar question, viz.: whether an action to recover damages for personal injury, based on a claim for breach of contract of carriage, fell within the provisions of s. 116 of the *Manitoba Railway Act*. It was conceded that the plaintiff in that case had been injured as the result of one of the defendant company's tramcars colliding with another in which she was a passenger, through the negligent operation of the two cars, and the question involved was as to whether, notwithstanding the provisions of s. 116 of the *Manitoba Railway Act*, under which her action for negligence admittedly would have been barred, she was entitled to recover for the damages sustained against the defendant company for breach of the contract of carriage. This Court held, *per* Duff, Anglin and Mignault, JJ., Idington and Cassels, JJ., dissenting, that s. 116 of that Act applied and that the plaintiff could not recover either upon the ground of negligence or of breach of contract. S. 116 of the Manitoba Act provided that

> all suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained.

Anglin, J., held that the decisive question in the case was whether the plaintiff's injury was sustained by reason of the operation of the defendant's railway, regardless, as I take it, of whether the action was grounded on negligence or on a claim for damages for breach of contract. I reproduce from p. 595 the following paragraph from his judgment:

(1) (1928) 61 Ont. L.R. 587. (2) (1922) 63 Can. S.C.R. 586.

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Crocket J.

The primary rule of statutory construction is that, unless to do so would lead to absurdity, repugnancy or inconsistency with the rest of the statute the grammatical and ordinary sense of the words should prevail. The language of section 116 of the Manitoba Act is precise and unambiguous. No absurdity, repugnancy or inconsistency can arise from giving to it its natural and ordinary sense. On the other hand to hold that the case of a man in the street who is injured through negligence in running the cars falls within the purview of the section, but that the case of a passenger who sustains injury from the like cause does not, seems to me to involve inconsistency and repugnancy to common sense as well. Unless compelled by authority to hold otherwise, I should have no doubt that the plaintiff's injury was sustained "by reason of the operation of the defendant's railway" and that her action is therefore barred by the Manitoba statute above quoted.

His Lordship then proceeded to review all the authorities dealing with the construction of limitation sections. Subsequently in the case of *British Columbia Electric Railway Co.* v. *Pribble* (1), s. 60 of the appellant's private Act, which was precisely of the same import as that of s. 116 of the *Manitoba Railway Act*, except that the limitation was six instead of twelve months, came before the Privy Council for construction. The respondent plaintiff in that action was a passenger on the appellant's railway and was injured in alighting owing to the defective step of the car and had brought her action more than six months after the happening of the accident. The Judicial Committee held that the action was barred. Lord Sumner in delivering the judgment of the Board reviewed the Canadian authorities upon the construction of similar limitation sections and in doing so approved of the judgment of Anglin, J., in *Winnipeg Electric Railway Co.* v. *Aitken* (2) and of the judgments of his colleagues who concurred with him. In the course of his reasons Lord Sumner said at p. 477:

The section is expressed in general terms. If the action is one of the kind described, the section applies, for all such actions are within it.

and, after dealing with the argument, which had been presented in support of the inapplicability of s. 60, he added (3):

After the most careful consideration of the matter their Lordships are of opinion that the reasoning of *Sayer's* case (4) is wrong and that the reasoning in *Aitken's* case (5) gives true guidance to the construction of the present section.

(1) [1926] A.C. 466.
(2) (1922) 63 Can. S.C.R. 586.
(3) At p. 478.
(4) *Sayers* v. *British Columbia Electric Ry. Co.*, (1906) 12 B.C. Rep. 102.
(5) (1922) 63 Can. S.C.R. 586.

The above quotation from the reasons of Anglin, J., in the *Aitken* case (1) applies, in my judgment, with peculiar force to the case now before us, and I have no doubt that the respondents' action, not having been commenced within twelve months of the time when the damage claimed for was sustained, falls under the prohibition of s. 53, or, as it is now, s. 60 of c. 288 of the Revised Statutes of 1937.

For these reasons I think the appeal should be allowed and the plaintiffs' action dismissed with costs throughout.

KERWIN J.—Shortly after counsel for the respondents commenced his argument, the Court intimated that we did not require to hear him further on the question of fact as to whether the appellant's operations on the highway caused damage to the respondents' house to the extent of five hundred dollars, as we were satisfied that the trial judge's finding in that respect, concurred in as it was by the Court of Appeal, must stand. It is necessary to determine, however, whether any vibrations were set up by the operation of the cement mixers and auxiliary motors as distinct from the vibrations set up by the movement of the trucks themselves along the highway, and also whether any damage was caused thereby.

On behalf of the respondents, the point is thus put in their factum:—

13. It was also argued in the Court of Appeal that the cement mixing operations did not increase the vibrations set up beyond what the movement of the trucks themselves would cause and that the Trial Judge was under a misapprehension in relying upon that operation as causing unusual vibration. There is no evidence at all as to that either one way or the other. The Respondents relied upon the whole operation being an unusual one and the fact that the operation as a whole caused physical damage. It was not incumbent upon the Plaintiffs to show what elements in the Appellant's operations were the factors which produced the damages. If the fact that the operation of the cement mixer did not increase vibration has any bearing on the case it was for the Appellant to have proved the fact. It is submitted that the proper inference from the evidence as to causes of vibration (Case, p. 118, 1.1) and from the fact that an auxiliary motor was operating and a drum revolving with movement of cement inside is that such motion would set up vibrations.

The reference to page 118 of the Case is to the evidence of Dr. Harkness, a witness called on behalf of the respondents. Commencing at page 117, his examination-in-chief proceeds as follows:—

Q. Then, Dr. Harkness, in the passage of heavy vehicles—you have heard the evidence in this case, of course?

A. Yes.

(1) (1922) 63 Can. S.C.R. 586.

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Kerwin J.

Q. Such as trucks carrying cement mixers that we have heard so much about, what are the elements important in estimating the degree or extent of the vibration?

A. The condition of the roadway; the material on which the roadway rests; the weight of the vehicle; the resilience of the springs and tires of the vehicle, and the velocity.

Mr. McCarthy: Condition of roadway; substructure of the roadway; resilience of springs and tires?

Witness: Yes, and the weight of the vehicle and its velocity.

Mr. Robertson: Q. Other things being equal, what is the effect of the increase in velocity?

A. An increase in velocity would increase the impacts on the roadway at least in the ratio of the increase in velocity—if you double the velocity the impacts on the roadway would be at least double, and the vibration caused thereby would be double.

I can find nothing in the record to indicate that the point under consideration was put to any witness and my interpretation of the whole of the evidence is that no case was attempted to be made out that any vibrations that might have been set up by the cement mixers alone caused any damage. The trial judge seems to have found that the damages were caused by the combined operation of the trucks, the mixers, and auxiliary motors. He states:—

> The cement mixing trucks are very heavy and are equipped with an auxiliary motor which operates the mixer as the truck travels to its destination. * * * There is no question in my mind that the continued operation of these cement mixing trucks did cause physical injury to the plaintiffs' property. * * * Each truck of the Dual-Mixed Company is in a sense a manufactory. Unusual vibration is caused by virtue of the motor operating the mixer and by the operation of the mixer itself. It is a legitimate operation, of course, but it produces vibration to a degree which might well constitute a nuisance in these circumstances. * * * As between the two principles involved I think I should choose the one which fastens liability on the defendant who operated the cement-mixing trucks. * * * The cement-mixing trucks on the highway are in a sense in the same category as a manufactory established close to the plaintiffs' property.

While, no doubt, throughout the trial emphasis was placed upon the fact that the cement mixers operated while trucks were in motion upon the highway both when carrying cement and when empty, and while it may be a fair inference that the mixers and auxiliary motors did set up vibrations, I am unable to find any evidence to warrant a finding that these vibrations caused damage to the respondents' house. I therefore conclude that in this case the damages were caused by motor vehicles.

There remains for consideration the questions (1) whether the appellant was responsible in law for such

damages, and (2) whether such claim was barred by section 53 of *The Highway Traffic Act* of Ontario which at the relevant time was chapter 251 of the Revised Statutes of Ontario 1927, as amended by 20 George V, chapter 48, section 11. Contrary to the impression formed at the conclusion of the argument, I have concluded, though not without doubt, that any action that might have existed is barred by this section, and it is, therefore, unnecessary to express any opinion upon the first question.

We are not concerned with subsections 2 and 3 of section 53. Subsection 1, as amended, reads as follows:—

> Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

The amendment made in 1930 merely provided that the period of limitation should be twelve months instead of six months.

Taken by themselves the words used in this subsection are clear and unambiguous. In terms they are not limited to circumstances where damages are occasioned by a motor vehicle on a highway; they are not restricted to cases where damages are caused by a motor vehicle coming in contact with a person or thing; they do not state that the damages must have been occasioned by negligence in the operation of a motor vehicle or by reason of the violation of any of the provisions of the Act. It is contended on behalf of the respondents that the subsection must be construed in a narrower sense and that such a claim as the present, based as it is on an alleged nuisance at common law, is not within its purview.

Attention is called to the liability for loss or damage section and the onus section (now sections 47 and 48 of the current *Highway Traffic Act,* R.S.O. 1937, chapter 288) and it is argued that subsection 1 of section 53 should be construed as limited to damages occasioned by contact with a motor vehicle itself in its use of the highway for the purpose of traffic. It is also contended that to give the subsection a meaning broad enough to include the claim made in this action, which is not based on negligent operation of a motor vehicle, would mean that the truck driver, if sued by the respondents in this case for nuisance, would be required by the onus section to disprove negli-

1939

DUFFERIN PAVING & CRUSHED STONE LTD. v. ANGER.

Kerwin J.

gence or improper conduct on his part although such issue would have nothing to do with the action.

Upon consideration, I am unable to agree with these contentions. While the vehicles here in question were on the highway, it is to be noticed that not all sections of the Act refer to motor vehicles while upon a highway. Furthermore, cases may arise where damages are claimed as a result of nervous shock "occasioned by a motor vehicle," and while it is unnecessary to express any opinion as to the basis for such an action or as to how far it may extend, it is at least arguable that such actions fall and were meant to come within the terms of section 53. Finally, while it may be that in such an action as the present the onus section of the Act could have no application, since the negligence or improper conduct of the driver is not in issue, the action is nevertheless, in my opinion, one for damages "occasioned by a motor vehicle."

Considerable difference of opinion upon the question has existed in the Courts of Ontario, but upon the whole I am forced to the conclusion that there is nothing in the Act to warrant restricting the plain words of the subsection, "occasioned by a motor vehicle," so that they do not cover the damages sustained by the present respondents. As to whether the action was commenced after the expiration of twelve months from the time that all of the five hundred dollars damages were sustained, the trial judge stated that if he were to give effect to the section

> it would be serious as to the amount of the plaintiffs' damages and perhaps as to the right to recover at all, because I am of opinion that the real damage was probably caused early in the year 1933 when the truck operation was heaviest and not nearly so reasonably carried out as it was after the 24th day of June of that year.

In his factum, counsel for the respondents states:

> The action was not commenced within the time limited by that section,

and before us admitted that he could not state that any of the damages occurred within the statutory period.

The appeal should be allowed and the action dismissed, with costs throughout.

Appeal allowed wih costs.

Solicitors for the appellant: *Armstrong & Sinclair.*

Solicitors for the respondents: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

THE EXECUTORS OF THE ESTATE OF WALTER E. H. MASSEY (DECEASED) ..... APPELLANTS;

1939
*May 25
*Dec. 9

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Assessment of shareholder in respect of excess over par value received on redemption of shares by company—Question whether the "premium" was "paid out of" the company's "undistributed income on hand," within s. 17 (as it then stood) of Income War Tax Act, R.S.C. 1927, c. 97.

Sec. 17 of the *Income War Tax Act*, R.S.C. 1927, c. 97, as it stood at the material date, provided: "Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder."

A company (under due authorization) in 1929 created 5 per cent. cumulative convertible preference shares and increased its common shares, and, with the aid of proceeds of sale of these new shares, called in and redeemed its existing 7 per cent. cumulative preference shares of the par value of $100 each at $110 per share and accrued dividend. The "premium" (of $10 per share) paid on such redemption was charged by the company against its "surplus account." Appellants held shares thus redeemed and were assessed for income tax in respect of the "premium" received, on the ground that it was a "premium paid out of undistributed income on hand" within said s. 17. The assessment was sustained by Maclean J., [1939] Ex. C.R. 41. On appeal:

Held (Davis J. dissenting): The appeal should be dismissed.

Per the Chief Justice and Hudson J.: In view of the manner in which the company's surplus (as shown in its surplus account) was built up and what it represented (as appearing from directors' reports, balance sheets, and other evidence), it must be held that in fact it represented undistributed income actually existing, though in various forms as current assets. The company, having cash on hand (whether derived from sale of shares or a loan), might treat this cash as the embodiment of the surplus. It was clear in point of fact that the directors, with the assent of the shareholders, did intend to pay the premium out of surplus, and, *pro tanto*, to reduce the surplus; and by resorting to the fund of which they made use, they thereby treated that fund as part of the surplus of undistributed income, and, therefore, as "undistributed income on hand." Therefore the conditions of s. 17 were fulfilled. (Also, said premium, so called, was a premium within the contemplation of s. 17.)

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1939

EXECUTORS OF MASSEY ESTATE v. MINISTER OF NATIONAL REVENUE.

Rinfret and Kerwin JJ. agreed with the reasons for judgment of Maclean J. (cited *supra*) in holding that the premium in question was a premium paid out of the company's "undistributed income on hand" within the meaning of s. 17.

Per Davis J. (dissenting): From the facts (discussed) in regard to the source and constitution of the fund out of which the redemption payments were made, it cannot be said that the premium, so called, was "paid out of undistributed income on hand" within s. 17. *Quaere* whether the excess over par value, paid by the company in exercise of its right (given by supplementary letters patent) to redeem at a fixed price without consent of holders of the shares, was strictly "a premium."

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the present appellant's appeal from the decision of the Minister of National Revenue affirming the assessment of appellants for income tax for the taxation period of 1929 (under s. 17 of the *Income War Tax Act*, R.S.C. 1927, c. 97, as it stood at the material date) in respect of a "premium" of $10 per share paid to them upon the redemption by Massey-Harris Co., Ltd., of preference shares held by appellants in the stock of the company.

The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported (and are also discussed at length in the judgment appealed from (1)). The appeal to this Court was dismissed with costs, Davis J. dissenting.

C. H. A. Armstrong K.C for the appellant.

F. P. Varcoe K.C. and *A. A. McGrory* for the respondent.

The judgment of the Chief Justice and Hudson J. was delivered by

THE CHIEF JUSTICE.—This appeal raises a question of the construction and application of section 17 of the *Income War Tax Act* (ch. 97, R.S.C. 1927) which is as follows:

> 17. Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder.

The question to be determined is whether certain sums received in 1929 by the appellants from the Massey-Harris

(1) [1939] Ex. C.R. 41; [1939] 4 D.L.R. 225.

Co., Ltd., on the redemption of shares held by them in that Company are assessable to income tax as being within the scope of this definition of income.

The Massey-Harris Co., Ltd., is a manufacturing company created under the provisions of the Dominion *Companies Act*. By a document described as supplementary letters patent of the 17th of February, 1926, the Secretary of State, pursuant to statutory authority, approved a resolution of the Company of the 2nd of February converting 250,000 shares of the capital stock of the Company of the par value of $100 each into 125,000 cumulative preference shares of the par value of $100 and 125,000 common shares of the same value. By this document it was declared:

> The Company shall also have the right without the consent of the holders thereof, from time to time to redeem the whole or any number of the said cumulative preference shares at One hundred and ten (110%) per centum of their par value, together with any accumulated dividends thereon upon giving [the prescribed] notice * * *

The late Walter E. H. Massey at his death was the registered holder of 9,122 of these shares. By a document also described as supplementary letters patent, of March 19th, 1929, the Secretary of State, in exercise of authority vested in him by the *Companies Act*, confirmed a by-law of the company increasing the capital stock of the company from 125,000 7 per cent. cumulative preference shares of $100 each and 500,000 common shares without nominal or par value to 125,000 7 per cent. cumulative preference shares of $100 each (being the already authorized preference shares) and 150,000 5 per cent. cumulative convertible preference shares of $100 each and 1,000,000 common shares without nominal or par value, being an addition of 150,000 5 per cent cumulative convertible preference shares of $100 each and 500,000 common shares without nominal or par value of the company.

Upon the same date the company gave notice to the shareholders of the 7 per cent. cumulative preference shares of its intention to redeem these shares by paying the redemption price of $110 per share together with the accrued dividend. The shares held by the appellants as the executors of the late Walter E. H. Massey were redeemed on the 15th of May, 1929.

1939

EXECUTORS OF MASSEY ESTATE v. MINISTER OF NATIONAL REVENUE.

Duff C.J.

Accompanying the notice to the shareholders was a hypothetical balance sheet certified by the auditors as of the 30th of November, 1928, but modified by making allowances for:

(1) the redemption of the 7 per cent. cumulative preference shares and the issue of 120,899 redeemable 5 per cent. cumulative preferred shares,

(2) the issue of 241,798 additional common shares of no par value at $60 per share,

(3) the writing off of the entire bond discount and expenses shown as an asset on the actual balance sheet of the 30th of November, 1928, and "making reserve against any premium payable on redemption of the 7 per cent. preferred shares,"

(4) the repayment of bank advances out of the proceeds of new capital.

The actual surplus of the 30th of November, 1928, is given in this balance sheet as $6,982,098.02. The surplus left after the deductions mentioned in the third of the allowances enumerated above, amounting to $2,109,960.20, is shown to be $4,872,137.82. This balance sheet was certified by the auditors.

The premium of $10 attributable to 9,122 shares, amounting in the aggregate to $91,220, was duly paid to the appellants and was assessed as taxable income in their hands. I repeat, at the close of the fiscal year ending the 30th of November, 1928, the directors' report to the shareholders showed a surplus of $6,982,098.02. The surplus at the end of the year ending the 30th of November, 1929, was $5,786,337.67. In the year 1929 there was earned a profit of $2,800,813.35, but the deductions on account of bond discount and expenses, premium on 7 per cent. preference shares and dividends paid in the year 1929 had the effect of reducing the surplus to the figure mentioned. The amount paid for premiums on the 7 per cent. preference shares redeemed was $1,100,770. This is all shown in the directors' report to the shareholders for the year ending the 30th of November, 1929, and submitted to the shareholders at the annual meeting on February 21st, 1930.

It seems advisable to notice the manner in which (as it appears from the directors' reports to the shareholders and

the balance sheets) this surplus of nearly seven millions was built up and what it represented. The earliest directors' report and the earliest balance sheet before us are those for the year 1924. The report showed that the surplus at the 30th of November, 1923, that is the end of the fiscal year, was $750,152.73. The surplus at the 30th of November, 1924, ascertained by deducting from the surplus of the previous year a sum required for an adjustment in connection with subsidiary companies' stock and adding the net profit for 1924, is given as $818,709.60, and this sum appears in the balance sheet as a credit to profit and loss account. Net profit for the year is ascertained by deducting from the income for the year's operations interest on borrowings and appropriations for certain reserves. Reserves appear in each of the balance sheets for the years 1924 to 1929 inclusive and are for taxes, foreign exchange, etc., pensions, buildings and equipment, possible losses on collection, fire indemnity, contingent account as called for by charters and by-laws of companies and, as appears from the directors' reports, appropriations were made from time to time during these years for one or more of these accounts. In each year the surplus is ascertained by adding to the surplus of the preceding year the net profit for the year in question and deducting sums paid for dividends, if any, the net profit in each case being arrived at in the manner already mentioned.

Now, it appears from the hypothetical balance sheet sent to the shareholders with the notice of redemption that any premium payable on redemption of the 7 per cent. preferred shares would be paid out of, or would go in reduction of the surplus of $6,982,098.02 at the 30th of November, 1928; and, in the report of the directors for the year ending the 30th of November, 1929, submitted to the shareholders at the annual meeting on the 21st of February, 1930, the sum paid for such premiums, $1,100,770, is charged to and goes in reduction of such surplus.

We have, as I have said, no directors' reports or balance sheets, prior to 1924 but, from the evidence of Mr. Vardon, there is no doubt, I think, that the surplus at November 30th, 1924, was treated by the company as income and assessable to income tax; and subject to qualification as to a sum of $130,000 transferred to surplus account in 1925,

1939

EXECUTORS OF MASSEY ESTATE v. MINISTER OF NATIONAL REVENUE.

Duff C.J.

the surplus in each year is calculated, as I have said, by adding the net profit for the year to the surplus of the preceding year and deducting sums paid for dividends. The sum of $130,000 was transferred in 1924 direct from the contingent account, $380,000, to surplus, increasing the surplus by that amount and correspondingly diminishing the contingent account. The transfer was explained by the fact that this sum was held in the contingent account of subsidiary companies no longer required because of the surrender of their charters.

I have already observed that in all these years the net profit was as a rule ascertained by deducting from the income from the year's operations, interest on borrowings and appropriations for the reserves mentioned. There are, however, two credits to income, one in the year 1925, and the other in the year 1928, which, perhaps, call for some comment.

The first is a sum of $661,139.20 in 1925, representing "recovery of assets written off in the war years." The other is a profit on the sale of assets in the year 1928 amounting to $835,218.16. Both of these credits, as well as the nature of the receipts they represent, appear explicitly in the directors' reports submitted to the shareholders in the respective years mentioned.

Having regard to the way in which the income account is made up, as already explained, and especially to the appropriations for the reserves mentioned which appear to have been built up by such appropriations from income, it would appear to have been a perfectly natural and reasonable thing to credit both these sums to income account and, this having been done with the assent of the shareholders, it seems to me the net profit in each year, as it appears in the directors' reports, must be considered to fall within the category of income. Subject to a question as to the sum of $130,000 mentioned, the surplus at the 30th of November, 1928, which apparently stood at the same figure on the 15th of May when the Massey shares were redeemed, represented accumulated income. Whether this last-mentioned sum represented accumulated income or not we have no means of knowing.

Turning now to the application of section 17. The question to be determined is whether or not the premium

of $10 a share received by the appellants was paid out of undistributed income on hand. I think it ought to be observed that this is not necessarily the same question as the question to which the learned trial judge seems chiefly to have applied himself, whether it was paid out of undistributed profits available for the payment of dividends. The Dominion *Companies Act,* which governs the Massey-Harris Co., Ltd., provides (s. 98):

> No dividend shall be declared which will impair the capital of the company.

This section does not prevent the distribution of a capital profit provided the effect of doing so will not reduce the value of the assets below the sum total of the liabilities and the share capital. Broadly, it may be said that the company may distribute any of its assets among the shareholders so long as such is not the result of the distribution. The fact, therefore, that the surplus was drawn against for dividends is not at all conclusive; undistributed profits are not necessarily undistributed income within the meaning of section 17; but, I repeat, the proper conclusion from the evidence is that the surplus represented accumulated income with the exception of the sum mentioned of $130,000 which, as I have said, may or may not be within that category. Since the transfer of this sum took place in 1925, the total surplus was drawn upon to the extent of more than 30 per cent. and this sum must, therefore, be proportionately reduced; so reduced it may, I think, be disregarded.

There remains the question whether, within the meaning of section 17, the premiums on the shares redeemed were "paid out of" undistributed income "on hand" which the surplus represented at the time. That the intention of the directors was to charge the premiums against the surplus, that is to say, that they should go in reduction of the surplus, is plain; and it is also plain that the shareholders acquiesced in this manner of dealing with the surplus. The shareholders became aware of it at the meeting of February, 1930, and there is no suggestion that any shareholder ever took exception to it. The undistributed income, no doubt, existed in various forms in the current assets, as Mr. Vardon says, but it was there nevertheless and the fact that it was not in a form in which the

1939

EXECUTORS OF MASSEY ESTATE v. MINISTER OF NATIONAL REVENUE.

Duff C.J.

company could conveniently employ it for the purpose of making payments or convert it into cash does not appear to me to be conclusive upon the point we are considering. I can see no reason why the company, having cash on hand, might not treat this cash as the embodiment of the surplus. If that was done, I do not think it matters whether this cash was derived from the sale of shares or from a loan unless there is something in the law or the constitution of the company preventing such funds being so dealt with.

Of course, in the present case the direct and immediate source of the monies put to the credit of the Preference Dividend Account was the money subscribed for share capital and, if that were the whole story, nothing more could be said; but I think it is clear enough in point of fact that the directors, with the assent of the shareholders, did intend, as I have said, to pay the premium out of the surplus and, *pro tanto,* to reduce the surplus; and by resorting to the fund they made use of they thereby treated that fund as part of the surplus of undistributed income and, therefore, as " undistributed income on hand."

If I am right in my view that in fact the surplus represented undistributed income actually existing, though in various forms as current assets, then I think the conclusion is that the conditions of section 17 have been fulfilled.

I should add that, in my view, the premium so-called was a premium within the contemplation of section 17.

For these reasons I think the appeal must be dismissed with costs.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—This is an appeal by the executors of Walter E. H. Massey from a judgment of the Exchequer Court (1) confirming the assessment levied upon the appellants for income tax for the year 1929. The appellants were the owners of a number of preference shares of Massey-Harris Company, Limited, upon the redemption of which they received a premium, and the real point for determination is whether this premium was paid out of the company's " undistributed income on hand " within the meaning of

(1) [1939] Ex. C.R. 41; [1934] 4 D.L.R. 225.

section 17 of the *Income War Tax Act*. This section, as it stood at the time of the redemption of the shares in 1929, was in the following terms:—

> Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder.

Before this Court, however, counsel for the appellants took a point that had not been previously raised. He contended that, as section 17 is not a charging section and as there is no evidence that the premium received by the appellants was income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests within the meaning of subsection 2 of section 11 of the Act, the appellants could not be assessed for income tax. Apparently the solicitors for the appellants desired to obtain a decision on the point of substance, and, no doubt, having the assessment made against the appellant executors was considered a convenient method of securing an adjudication. The will of the late Walter E. H. Massey is not before us but it should be assumed that the premium did constitute income accumulating in trust as defined in subsection 2 of section 11 and it must be held that the point is not open to the appellants.

On the other hand, counsel for the appellants abandoned one claim he had advanced before the Exchequer Court, i.e., that as a portion of the surplus account of the company was earned prior to the coming into force of the *Income War Tax Act, 1917*, the premium, if held to be paid out of undistributed income on hand, should be deducted from that portion that had been earned prior to 1917. It is therefore unnecessary to deal with that question.

With reference to the main contention, that section 17 contemplates an actual payment out of accumulated cash income on hand, I agree with the reasons for judgment of the President of the Exchequer Court and have nothing to add.

I would dismiss the appeal with costs.

DAVIS J. (dissenting).—At the time of the redemption of the shares in question and the payment of what has been treated by both parties as "a premium" of 10 per

1939

EXECUTORS OF MASSEY ESTATE v. MINISTER OF NATIONAL REVENUE.

Davis J.

cent., the company admittedly had undistributed income but it was not in liquid form—it had gone into and had become part of the physical assets of the company. At the same time the company owed its bankers over six million dollars. Obviously, in any practical business sense the company was not in a position to redeem in cash large blocks of its capital stock at par plus 10 per cent. But the company desired to get rid of heavy dividend burdens on its outstanding preference shares by taking advantage of much lower prevailing interest rates, and worked out a plan whereby it would reduce its annual charge for dividends by $241,798 by calling in outstanding securities and issuing new securities at a lower rate of dividend.

The company, duly incorporated under the (Dominion) *Companies Act*, R.S.C. 1886, ch. 119, had the right, by virtue of supplementary Letters Patent,

> without the consent of the holders thereof, from time to time to redeem the whole or any number of the said [7%] cumulative preference shares at One hundred and ten (110%) per centum of their par value, together with any accumulated dividends thereon.

The company had the further right, by supplementary Letters Patent, to issue 5 per cent. cumulative convertible preference shares of the par value of $100 each as well as additional common shares without nominal or par value.

What actually was done was that the company created and issued a new series of securities (both preference and common shares) and from the proceeds of the sale of these securities realized nearly fifteen million dollars in cash out of which to pay, and did in fact pay, in cash the redemption price of the outstanding preference shares, including what has been called the premium thereon of 10 per cent.

The sole question in this appeal is whether or not the appellants are liable for income tax on the $10 per share received by them as part of the redemption moneys. The Minister of National Revenue contends that they are liable under section 17 of the *Income War Tax Act* as it stood when the said shares were redeemed. That section as it stood at the material date had been enacted by ch. 10 of the Statutes of 1926 in the following words:

> Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder.

This provision was carried into the Revised Statutes of Canada 1927, and remained in force until repealed in 1934 (by ch. 55, section 9, of the Statutes of 1934) and present section 17, which does not affect the issue in this appeal, was substituted in the following words:

> Where a corporation redeems its shares at a premium, the premium shall be deemed to be a dividend and to be income received by the shareholder.

The appellants contend they are not liable, in that the said moneys were not "paid out of" undistributed income of the company "on hand" within the meaning of section 17. Counsel for the Minister very frankly and accurately set out in their factum certain facts that were proved at the trial in the Exchequer Court. I set out below a complete paragraph that appears in the respondent's factum:

> On April 30th, 1929, that is fifteen days before the redemption of the 7 per cent preference shares the company was indebted to the Bank in the sum of $6,040,657.99. Between that date and May 16th, the company received cash as follows: in respect of common share subscriptions—$3,737,449.30; in respect of the sale of 5 per cent preference shares—$11,010,900; and in respect of ordinary operations—$398,693.04, making a total of $15,147,042.34. These receipts were utilized as follows: The sum of $971,510.59 was expended for current operations during the period, the sum of $5,000,000 was transferred to a special bank account called the Preference Dividend Account and it was out of this fund that the redemption payments were made, and finally the Bank loan above mentioned was paid off. The company after making these several disbursements, still had a credit balance of $3,124,873.66 on May 15th. This surplus, however, was rapidly depleted as funds were transferred to the preference dividend account to meet redemption cheques as presented. By May 17th, the company was once more indebted to the Bank and the redemption cheques paid on that day and the following days were paid out of loans or advances by the Bank. The Massey stock was paid for by cheques which were accepted for payment on May 15th.

Upon these admitted facts, how can the respondent contend that the $10 per share was "paid out of undistributed income on hand"?

The governing section (17) at the time of the transaction was not, as it is to-day, "Where a corporation redeems its shares at a premium, the premium shall be deemed to be a dividend and to be income received by the shareholder," nor did it declare that premiums "shall be deemed to be paid out of income" as section 21 (6), as enacted by the 1926 statute, had declared with respect to dividends actually declared by a personal corporation. The liability under the section as it stood at the time of

1939

EXECUTORS OF MASSEY ESTATE v. MINISTER OF NATIONAL REVENUE.

Davis J.

the transaction involved two matters of fact—(1) undistributed income "on hand," and, (2) a premium "paid out of" such income. The evidence plainly does not establish, in my opinion, the facts necessary to support the contention advanced by the Minister.

Although the income of a beneficiary from an estate is (apart from non-residents) not assessable at its source in the hands of the trustee but assessable against the beneficiary who receives the same, except in those cases where income is accumulating in trust for the benefit of unascertained persons or of persons with contingent interests (section 11), the appellants at no time disputed liability upon the ground that the 10 per cent. payment sought to be taxed was not accumulating in their hands but had been received by the beneficiaries, and it must therefore be taken for the purpose of this appeal that if the 10 per cent. payment in question came under old section 17, the trustees are liable to be assessed.

The question whether or not the $10 per share of the $111.75 per share paid by the company for the redemption of its shares was strictly "a premium" was not raised. It has been assumed throughout that it was and the appeal has been dealt with on that basis, but I should like to reserve the point for consideration should it ever come up in another case. There may well be a difference between the case where a company, having authority to do so, offers its shareholders an opportunity to turn back their shares to the company in payment of a bonus or premium, and the case such as this where the shares were sold to the public with certain defined rights, permitted by statutory authority, which included a right in the company, without the consent of the shareholders, from time to time to redeem the shares at a fixed price (i.e., 110 per cent. of their par value). A company may sell its preference shares, of a par value of $100 each, at $105 or $110 or for any amount in excess of the par value, and if it has authority to repurchase these shares at any time and obligates the holder to resell at any time at a fixed price, I doubt that the exercise of that right of repurchase is redeeming the shares "at a premium." The right here given to the company was not restricted, as it is under section 46 of the English Act of 1929 which provides that a company may, if so authorized by its articles, issue

1939

EXECUTORS OF MASSEY ESTATE v. MINISTER OF NATIONAL REVENUE.

Davis J.

preference shares which are, or at the option of the company are to be liable, to be redeemed provided that no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividends or out of the proceeds of a fresh issue of shares made for the purposes of the redemption.

I would allow the appeal and set aside the judgment appealed from and the decision of the Minister and the assessment, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *Armstrong & Sinclair.*

Solicitor for the respondent: *W. S. Fisher.*

1939

* March 1, 2, 3.
* Dec. 22.

ERNEST TROTTIER (DEFENDANT).....APPELLANT;

AND

DAME LIONEL RAJOTTE (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Domicile—Marriage in foreign country between persons previously living in Quebec—Matrimonial status—Action for damages by wife for personal injuries—Whether common or separated as to property—Conditions necessary to determine whether domicile of origin or of birth is changed and new domicile acquired.

The respondent, a married woman describing herself in her statement of claim as being separated as to property from her husband and having been duly authorized by him, brought an action for personal injuries against the appellant, the latter pleading *inter alia* that the respondent was *commune en biens* and that therefore any right of action belonged exclusively to her husband. There was no marriage contract between the consorts and by the law of Quebec they are presumed to have intended to subject themselves, as regards their rights of property, to the law of their matrimonial domicile, i.e., the domicile of the husband at the time of the marriage. And the principal question at issue in this case is whether such domicile was in Quebec where in the absence of a marriage contract community as to property is presumed or was at another place where in such a case separation as to property would be presumed. The husband, born at St. Germain, Quebec, in 1894, went to the United States in quest of work in 1923. In the fall of that year, his father, mother, brothers and sisters followed him, but they returned to Quebec in 1928, several months before the marriage. The respondent born at the same place in 1905, went in 1922 to Bristol, in the State

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

1939

TROTTIER v. RAJOTTE.

of Connecticut, also in quest of work and remained there except for a period of eleven months during which she lived with her family in Quebec. The marriage took place at Bristol in September, 1928, and two years later, the respondent and her husband returned to St. Germain, with the intention of building a home somewhere in Quebec. The husband also testified that he had taken out some papers connected with American citizenship; but these papers were not produced and the nature of the representations made for the purpose of obtaining them were not disclosed. The trial judge maintained the respondent's action, which judgment was affirmed by the appellate court.

Held that it was incumbent upon the respondent to establish the existence of a regime of non-community of property in the matrimonial domicile. The only evidence as to foreign law consisted of an admission that the regime of community of property did not prevail in the state of Connecticut. It was, therefore, incumbent upon the respondent to establish a domicile in Connecticut. The evidence did not establish by strict and conclusive proof a fixed settled intention on the part of the husband to make his permanent residence in the state of Connecticut or, in other words, a residence there, not merely for a particular purpose, not merely for the purpose of getting work there, but a permanent residence "general and indefinite in its future contemplation," and, therefore, from the facts and circumstances of the case, inference should be drawn that the husband had not acquired at the time of his marriage a domicile in the state of Connecticut. If so, the law of his former domicile, i.e., the law of Quebec, must determine the matrimonial status of the respondent, and according to that law the respondent is presumed to be *commune en biens*. Therefore the respondent cannot sue in her own name for recovery of damages for personal injuries and her action should be dismissed.

The principles by which the courts are governed when it is alleged that a domicile of origin, or a domicile of birth, has been changed and a new domicile has been acquired are, first, that a domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisition of a new domicile involves two factors,—the acquisition of residence in fact in a new place with the intention of permanently settling there: of remaining there "for the rest of his natural life," in the sense of making that place his principal residence indefinitely. In other words, a domicile of origin is not lost by the fact of the domiciled person having left the country in which he was so domiciled with the intention of never returning; but it is essential that he shall have acquired a new domicile, that is to say, that he shall in fact have taken up residence in some other country with the fixed, settled determination of making it his principal place of residence, not for some particular purpose, but indefinitely.

Quaere as to admissibility of direct evidence as to intention.—*Dictum* of Mignault J. in *Taylor* v. *Taylor* ([1930] S.C.R. 26) ref.

The strict rule as to concurrent findings of fact is not applicable to the circumstances of this case.

Judgment of the Court of King's Bench (Q.R. 64 K.B. 484) reversed.

1939

TROTTIER v. RAJOTTE.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Denis J. and maintaining the respondent's action for $3,000 damages.

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.

C. A. Séguin K.C. and *G. Ringuet K.C.* for the respondent.

The judgment of the Court (Mr. Justice Cannon taking no part in it) was delivered by

THE CHIEF JUSTICE—The respondent is a married woman and, by the law of the province of Quebec, the right of action for damages for personal injuries suffered by a married woman *commune en biens* belongs exclusively to her husband and she cannot sue for recovery of such damages in her own name, even with the authorization of her husband. An objection based upon this rule is raised by the defendant who appeals, and who alleges that the plaintiff comes within it, and, consequently, has no right of action against him.

The answer to these questions, admittedly, depends upon the matrimonial domicile for in this case there was no marriage contract and by the law of Quebec the consorts are presumed to have intended to subject themselves, as regards their rights of property, to the law of their matrimonial domicile. In the present case it is not disputed that the matrimonial domicile is the domicile of the husband at the time of the marriage.

It will be convenient, first, to state the undisputed, pertinent facts. The husband, Lionel Rajotte, was born at St. Germain de Grantham on the 22nd of July, 1894. In February, 1923, he went to the United States in quest of work. In the autumn of that year his father, mother, brothers and sisters followed him. They returned to St. Germain in May, 1928, several months before the marriage of Rajotte to the plaintiff. The plaintiff, whose name was also Rajotte, was also born at St. Germain de Grantham in March, 1905. In 1922 she went to Bristol,

(1) (1938) Q.R. 64 K.B. 484, reported as *X v. Rajotte.*

1939
TROTTIER
v.
RAJOTTE.
Duff C.J.

Connecticut, also in quest of work. She remained there except for a period of eleven months during which she lived with her family at St. Germain. She married her present husband at Bristol on the 4th of September, 1928. The members of her family went from St. Germain to Bristol and remained for a time but eventually returned to St. Germain where they were living at the time of the trial. Two years after the marriage, they returned to St. Germain. In the declaration her husband is described as "Lionel Rajotte de St. Germain de Grantham."

The respondent, by her pleading, alleges:

Qu'elle est l'épouse séparée de biens de Lionel Rajotte de St. Germain de Grantham, autorisée par ce dernier aux fins des présentes;

and, in support of this allegation that she is separate as to property, evidence was adduced intended to establish a matrimonial domicile in the state of Connecticut. The conclusions of the learned trial judge as to this point are stated in his judgment in the following two *considérants:*

Considérant que l'objection du défendeur, à l'action de la demanderesse, basée sur la prétention que cette dernière ne serait pas mariée sous le régime de la séparation de biens, doit être rejetée pour plusieurs raisons; tout d'abord, parce qu'il est prouvé que la demanderesse est réellement mariée sous le régime de la séparation de biens; ensuite, parce que l'état matrimonial de la demanderesse ne concerne pas le défendeur qui n'y a aucun intérêt; enfin, parce que si l'action n'appartenait pas à la femme, parce que mariée en communauté de biens, ce moyen aurait dû être plaidé par exception à la forme, alors qu'il n'est plaidé ni à la forme, ni au fonds la défense au mérite;

Considérant que le choix de l'état matrimonial des époux, irrévocable après le mariage, reste soumis à leur seule volonté avant le mariage, d'où il résulte que les tiers n'ont ni l'intérêt nécessaire ni le droit de discuter l'intention pré-nuptiale et les circonstances qui, dans la présente cause, ont fait que les époux ont été mariés sous le régime de la séparation de biens;

And the conclusion of the Court of King's Bench is expressed as follows:

Considérant qu'il ressort des faits et des circonstances rapportés, que le 4 septembre 1928, alors que la demanderesse et son époux se sont mariés à Bristol, dans le Connecticut, l'un des Etats-Unis d'Amérique, tous deux, et spécialement la mari, y avaient établi déjà leurs domiciles; que, n'ayant pas fait de contrat de mariage, ils se sont donc mariés sous le régime de la séparation de biens, suivant l'admission des parties concernant la loi du lieu; qu'en conséquence la demanderesse, assistée de son mari, a capacité d'ester en justice en la présente cause;

Before proceeding to examine the evidence, it is desirable, perhaps, first, to state some settled principles by

which the courts are governed when it is alleged that a domicile of origin, or a domicile of birth, has been changed and a new domicile has been acquired.

The subject came before this Court in the case of *Wadsworth* v. *McCord* (1) in the year 1886; and the rules and principles by which the courts must be guided in deciding such questions under the law of Quebec were very fully considered. There was an appeal to the Privy Council which was dismissed (2); and the judgment of the Board delivered by Sir Barnes Peacock implies that the rules for determination of international domicile do not differ from the generally recognized rules which are fully stated and illustrated in the judgment of Sir William Ritchie in this court. After quoting fully from the judgments of the Peers in *Bell* v. *Kennedy* (3), *Udny* v. *Udny* (4) and the *Lauderdale Peerage* case (5), the learned Chief Justice proceeds (p. 478):

> I cannot discover that these principles are peculiar to the law of England; they are of universal application as principles of private international law, and so far as the province of Quebec is concerned, there is nothing in the law of that province antagonistic to them.

The judgments of Henry J. and Gwynne J. proceed upon the same principle.

The principles which ought, I think, to be kept steadily in view and rigorously applied in this case are, first, that a domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisition of a new domicile involves two factors,—the acquisition of residence in fact in a new place and the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says, "for the rest of his natural life," in the sense of making that place his principal residence indefinitely.

It will be necessary, I think, to consider rather carefully the evidence as to the change of residence in fact, but before going into that, it will be useful, I think, to discuss more fully the point of intention.

(1) (1886) 12 S.C.R. 466.
(2) (1889) 14 App. Cas. 631, *sub nomine McMullen* v. *Wadsworth.*
(3) (1868) L.R. 1 Sc. App. 307.
(4) (1869) L.R. 1 Sc. App. 441.
(5) (1885) 10 App. Cas. 692.

1939

TROTTIER v. RAJOTTE.

Duff C.J.

As Lord Westbury says in *Udny* v. *Udny* (1) (page 457) the residence for the purpose

must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation.

Again, it was laid down in the *Lauderdale Peerage* case (2) (I am quoting from the head-note)

a change of domicile must be a residence *sine animo revertendi*. A temporary residence for the purposes of health, travel, or business does not change the domicile. Also (1) every presumption is to be made in favour of the original domicile; (2) no change can occur without an actual residence in a new place; and (3) no new domicile can be obtained without a clear intention of abandoning the old.

In this case two things must be established, first, a residence in Connecticut, not merely for a particular purpose, not merely for the purpose of getting work there, but a permanent residence "general and indefinite in its future contemplation."

In *Winans* v. *Attorney-General* (3), Lord Macnaghten quotes from Lord Westbury with approval to the effect that the *animus manendi* necessary to change the domicile of origin to a new domicile means a fixed and settled purpose and on the same page he quotes the language of Lord Cairns as follows:

To the same effect was the inquiry which Lord Cairns proposed for the consideration of the House in *Bell* v. *Kennedy* (4). It was this: Whether the person whose domicil was in question had "determined" to make, and had, in fact, made the alleged domicil of choice "his home with the intention of establishing himself and his family there, and ending his days in that country?"

And again, on page 292, Lord Macnaghten says:

My Lord, if the authorities I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved "with perfect clearness and satisfaction to yourselves" that Mr. Winans had at the time of his death formed a "fixed and settled purpose"—"a determination"—"a final and deliberate intention"—to abandon his American domicil and settle in England?

I think it is important also to emphasize this: the requirement of strict and conclusive proof is one which is naturally exacted owing to the very grave consequences entailed by a change of domicile. Lord Buckmaster says in *Ramsay* v. *Liverpool* (5):

The law upon the matter is settled. A domicile of origin can be changed and in its place a domicil of choice acquired, but the alteration

(1) (1869) L.R. 1 Sc. App. 441.
(2) (1885) 10 App. Cas. 692.
(3) [1904] A.C. 287, at 291.
(4) (1868) L.R. 1 Sc. App. 30.
(5) [1930] A.C. 588, at 590.

is a serious matter not to be lightly assumed, for it results in a complete change of law in relation to two of the most important facts of life, marriage and devolution of property. This is admirably expressed by Lord Curriehill in *Donaldson* v. *McClure* (1) in words unnecessary to repeat, which were expressly approved by Lord Halsbury in *Marchioness of Huntly* v. *Gaskell* (2).

And, to quote once more from Lord Macnaghten's judgment in *Winans* v. *Attorney-General* (3), he says: "And," says his Lordship (referring to Lord Westbury in *Bell* v. *Kennedy* (4))

"unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that a domicil of origin continues." So heavy is the burden cast upon those who seek to shew that the domicil of origin has been superseded by a domicil of choice! And rightly, I think. A change of domicil is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil.

Before proceeding to discuss the facts, it, perhaps, ought to be added that a domicile of origin is not lost by the fact of the domiciled person having left the country in which he was so domiciled with the intention of never returning. It is essential that he shall have acquired a new domicile, that is to say, that he shall in fact have taken up residence in some other country with the fixed, settled determination of making it his principal place of residence, not for some particular purpose, but indefinitely.

This factor is of great importance in the present case. The issue is not whether the husband had left Quebec with the intention of settling somewhere in the United States and not returning to Quebec, but whether he had taken up his residence in the State of Connecticut with a fixed, settled determination of making his permanent residence in that state.

The point is dealt with in the judgments in *Wahl* v. *Attorney-General* (5). The person whose domicile was in question there had been born in Germany and had a domicile of origin in Germany. He came to England and, after residing there for some years, applied for naturalization as a British subject under the *Aliens Act* of 1870. In his application he declared that he intended to con-

(1) (1857) 20 D. 307, at 321.
(2) [1906] A.C. 56, at 66.
(3) [1904] A.C. 287, at 291.
(4) (1868) L.R. 1 Sc. App. 321.
(5) (1932) 147 L.T. 382.

1939
TROTTIER
v.
RAJOTTE.
Duff C.J.

tinue to reside permanently within the United Kingdom of Great Britain and Ireland and that he had no intention of permanently leaving the United Kingdom. The argument addressed to the courts in favour of change of domicile naturally emphasized this declaration and, indeed, the declaration was considered by Lord Macmillan as sufficient to turn the scale in discharging the onus resting upon the Attorney-General. Lords Dunedin, Warrington, Atkin and Thankerton rejected the contention and the House of Lords held that the domicile of origin had not been thrown off.

Lord Dunedin's judgment seems to me to be very useful in its application to the present case and I quote it in full:

> I have had the advantage of reading the opinion which will be delivered by Lord Atkin, and as I agree *in omnibus* with it I do not think it necessary to deliver a full opinion. Were it not for the declaration I do not think that in the light of many cases decided as to domicile anyone would say that the determination *exuere patriam* was proved. Coming to the declaration I make three remarks. First, naturalisation does not carry with it as an inevitable consequence change of domicile. Second, in signing the declaration it is extremely unlikely that the question of domicile was before his mind. Third, the declaration itself is ambiguous, for residence in the United Kingdom as an intention does not discriminate between English and Scotch domicile, though these are essentially different. It seems to me to put too great a burden on the class of residence in England which has been proved, not only to establish the factum, but to turn the ambiguity of expression as to the animus into a certainty.
>
> I think the appeal should be allowed.

I may add that the judgment of Lord Atkin, in which Lord Dunedin concurs, illustrates admirably, I think, the searching analysis to which it is the practice of the courts to subject the facts adduced in support of an allegation that a domicile of origin has been changed and a new domicile acquired.

But my immediate purpose is to emphasize the third of Lord Dunedin's "three remarks." An intention to reside in the United Kingdom, although it may be a starting point as evidence, tells us nothing *per se* as to change of domicile. So with regard to the United States, an intention indefinite as to locality to live somewhere in the United States is in itself inconclusive where the question at issue is: Has A, the person whose domicile is in dispute, taken up residence in a given state with the intention of residing permanently in that State? Residing in

Philadelphia with the intention, not of making his permanent home in Philadelphia, but of making his home in Philadelphia, Baltimore or Washington, could not be effective to displace the domicile of origin.

Lord Dunedin's judgment suggests the advisability of entering a caveat against a possible misunderstanding. There are passages in the judgments of very eminent judges which seem to lay down this: that the intention necessary to constitute a change of domicile must amount to an intention directed to a change of civil status. I do not mean, of course, a change of political status (nationality), by which one ceases to be the subject of one country and becomes the subject of another, but a change of civil status by which it may be said, for want of a better expression, that one ceases to be the citizen of one country and becomes, to borrow the expression of Vice-Chancellor Wickens in the judgment to which I am now going to refer, "the citizen of another." That view is discussed by Vice-Chancellor Wickens in *Douglas* v. *Douglas* (1) in a judgment which in some respects, at all events, is approved by Lord Macnaghten in *Winans* v. *Attorney-General* (2); and that very learned judge feels himself forced to the conclusion that that is not the rule of English law, although he thinks such a rule would be a very convenient one.

On the other hand, there is a judgment of a very great judge, Lord Justice Turner in *Jopp* v. *Wood* (3) in which he employs language at least pointing in the other direction which is quoted by Ritchie C.J. in *Wadsworth* v. *McCord* (4). Then there is the well known judgment of Lord Halsbury in *Huntly* v. *Gaskell* (5), and the passage in that judgment at pages 66 and 67 in which he approves the judgment of Lord Curriehill in *Donaldson* v. *McClure* (6), whose judgment, as Lord Halsbury says, was approved and quoted by Lord President Inglis in the case of *Steel* v. *Steel* (7). Lord Curriehill's judgment, and the passage in Lord Halsbury's judgment to which I have referred, appear to have been accepted by Lord Buckmaster in *Ramsay* v. *Liverpool* (8). It is not, in my view, necessary

(1) (1871) L.R. 12 Eq. 617, at 643 *et seq.*
(2) [1904] A.C. 287.
(3) (1865) 4 De Gex, J. & S. 616, at 621.
(4) (1886) 12 S.C.R. 466, at 476.
(5) [1906] A.C. 56.
(6) (1857) 20 D. 307.
(7) (1888) 15 R. 896.
(8) [1930] A.C. 588, at 491.

1939

TROTTIER v. RAJOTTE.

Duff C.J.

for the purposes of this case to consider the effect of those passages. I refer to the topic only because Lord Dunedin's language, which I have quoted, suggests the possibility that his view was in accord with that of Lord President Inglis and Lord Curriehill.

You cannot of course have a change of domicile in the international sense unless you acquire a new domicile in a jurisdiction in which, having acquired it, you acquire a new civil status in the sense mentioned by Wickens, V.C. But it is unnecessary for the purpose of this appeal to express any opinion in the question whether the intention to acquire a new domicile as a factor in producing the legal result involves a specific intention to acquire a new civil status.

So far as this particular case is concerned, it must be remembered that the only change of domicile in question is that found by the Court of King's Bench, a change of domicile to Connecticut. *Prima facie,* the law of the foreign country would be the law of Quebec, that is to say, any party to an action alleging that a married woman was separate as to property would have to prove in proceedings in the Quebec courts either that there was a marriage contract, or that the law governing the several rights of the spouses in respect of their property is different from the law of Quebec; and the respondents rely upon an admission given at the trial that, by the law of Connecticut, a wife marrying without a marriage contract is separate as to property. The question with which we are strictly concerned then is: Had the husband acquired at the time of the marriage a domicile in Connecticut?

The facts in evidence are of the most meagre nature. The husband was born at St. Germain de Grantham in Quebec in 1894 and lived in that village with his parents until the year 1923 when he went to the United States. It is rather important to follow the evidence closely. The husband himself says that at the time he was married he had been in the United States since the 18th of February, 1923; that he was married in 1928; that during the period between 1923 and 1928 he had always lived in the United States; that he was a journeyman carpenter and worked on construction; that his parents were living in St. Germain and that after he went to the United States the family went there also.

D. Dans la même année, ils sont partis pour les Etats-Unis? R. Je les ai fait demander aux Etats-Unis, ils sont montés.

D. Pourquoi les avez-vous fait demander? R. Pour s'en venir rester aux Etats-Unis.

D. Parce que vous vouliez y rester? R. Oui.

D. Maintenant, est-ce que votre famille demeure encore aux Etats-Unis? R. Non.

D. Pendant combien de temps votre famille est-elle demeurée aux Etats-Unis? R. Cinq ans.

D. Au moment de votre mariage, est-ce que la famille était aux Etats-Unis? R. En Canada, depuis le mois de mai.

D. Après votre mariage combien de temps êtes-vous resté aux Etats-Unis vous-même? R. Je me suis marié dans le mois de septembre, je suis descendu au bout de deux ans, dans le mois de septembre, le 11 septembre.

D. Aviez-vous l'intention, au moment de votre mariage, de revenir au Canada ou aviez-vous l'intention de rester aux Etats-Unis? R. J'avais l'intention de rester aux Etats-Unis.

D. Etait-ce pour cela que vous aviez pris vos papiers américains? R. Certainement.

Two years after his marriage he and his wife returned to St. Germain; and he says, "Je suis revenu au Canada avec l'idée de bâtir à Drummondville".

Now, it will be observed that through the whole of this evidence there is nothing to show a residence in fact in the State of Connecticut. In cross-examination, it is true, there is this question and answer:

Q. Vous étiez menuisier, vous dites, à Bristol? A. Oui.

But there is nothing, I repeat, to show even a residence in fact in Bristol or in Connecticut. As to intention, apart from Rajotte's direct evidence as to intention, there are certainly no facts upon which an inference could reasonably be founded of an intention to settle permanently in Connecticut or anywhere in the United States. It is contended that he was domiciled in Bristol but, apart from the general statement quoted above, there is no evidence; and there are no concrete facts which would indicate the circumstances of his being there. Had he a house? Was he living in lodgings? Had he anything in the nature of permanent employment? His family, he says, were in the United States for some years, returning to Quebec before the marriage, but he does not tell us where. Nor is there anything about the circumstances or conditions of their life. I will come to his direct evidence as to intention in a moment.

As to evidence of the wife, she says that she had been living in Bristol about five years at the time of her mar-

1939

TROTTIER v. RAJOTTE.

Duff C.J.

riage and that her family came to the United States two years after she did; that she was seventeen or eighteen years old when she left Quebec for the United States; and that she went there to work. She says that her father was a farmer and that the family had gone to Bristol in search of work but still retained the ownership of the farm. Except as to direct evidence of intention, to which I shall come in a moment, there are not facts stated in her evidence from which it could properly be inferred that she had gone to Connecticut or, indeed, to the United States with the purpose of making her permanent home there.

Before coming to the direct evidence of intention, it is desirable, I think, to refer to some judicial observations. In *Wadsworth* v. *McCord* (1), Dorion, C.J., says this:

> As Merlin, vo. Domicile, says, there is nothing more difficult to decide than questions of domicile. This was said in France where the population is sedentary, but the difficulty here is greatly increased. Here is a man who left Ireland a grown up person. His domicile was in Ireland. The law is clear that the domicile of origin is the real domicile until another domicile has been acquired. Twenty or thirty years may intervene, but if the person has not acquired another domicile the domicile of origin continues to be his domicile. There was a case lately in Ontario (*Magurn* v. *Magurn* (2)) where a man had been twelve years away from his domicile, and it was held that his original domicile was still his domicile.

To the same effect is the observation of Lord Wensleydale in *Whicker* v. *Hume* (3):

> I perfectly agree with my noble and learned friend that, in these times of visiting abroad, transferring oneself even for years abroad, you must look very narrowly into the nature of the residence abroad before you deprive an Englishman living abroad of his English domicile.

Lord Macnaghten uses similar language in *Winans* v. *Attorney-General* (4):

> * * * you must look very narrowly into the nature of a residence suggested as a domicil of choice before you deprive a man of his native domicil.

It is well, I think, to keep this consideration in mind when asking ourselves the question whether there are any facts in this case apart from the direct evidence of intention from which it can be seriously argued that an infer-

(1) (1885) 2 M.L.R. 113, at 116.
(2) (1883) 30 R. 370; (1885) 11 A.R. 178.
(3) (1858) 7 H.L.C. 124, at 164.
(4) [1904] A.C. 289, at 294.

ence arises that either husband or wife had a fixed and settled purpose of remaining indefinitely in Bristol or Connecticut or even in the United States.

I come now to the direct evidence of intention. First of all, there is a question whether such evidence is admissible. The observation of Mr. Justice Mignault, speaking on behalf of the majority of this Court in *Taylor* v. *Taylor* (1) appears to me to be an *obiter dictum*. It is not, so far as I can see, a part of or a step in the *ratio decidendi;* consequently, it is open to challenge in this Court and, when challenged, it would be our duty to examine the point on the merits. Nevertheless, it is the deliberate opinion of Mr. Justice Mignault, concurred in by the late Chief Justice of this Court and by my brother Rinfret. I do not find it necessary to decide now whether it correctly states the law of Quebec. Remembering who the learned judges were who were responsible for it, I should feel called upon to weigh the question with great care before differing from them.

The English rule is, no doubt, different. The rule, I think, is correctly stated on page 204 of Halsbury's Laws of England (Hailsham Ed.), Vol. 6, in these words:

> Direct evidence of intention is often not available, but a person whose domicil is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness.

Assuming, but not deciding, that this is the law of Quebec, it is, of course, of the greatest importance to analyse direct testimony as to intention with care and to ascertain precisely what is the nature of the intention which the witness is ascribing to himself at the pertinent period.

The two witnesses in this case are the plaintiff and her husband. I have gone through the evidence of the husband with great care and there is no statement by him that he had a fixed settled intention to make his permanent residence either at Bristol or in the state of Connecticut. He mentioned the fact that he had taken out some papers connected with American citizenship. The papers are not produced and of the nature of the representations made for the purpose of obtaining them we are not informed.

(1) [1930] S.C.R. 26, at 30.

1939

TROTTIER v. RAJOTTE.

Duff C.J.

The fact that he made some such application is, in the circumstances of this case, not a weighty fact for the reason (if for no other) given by Lord Dunedin in the judgment quoted above, namely, that there are many jurisdictions in the United States where a separate domicile in the international sense could be acquired, and that such an act is necessarily too equivocal to determine the question whether the applicant intended to make his permanent home in a particular state.

Then, for the same reason that the declaration in *Wahl's* case (1), as to the intention to reside in the United Kingdom, was inconclusive upon the issue whether a domicile had been acquired in England, the direct evidence of Rajotte that he intended to remain the United States —and his evidence goes no further than this—can really be of no weight in determining whether or not he acquired a domicile in Connecticut or in any other state. These observations apply equally to the evidence of the respondent.

This is not a case in which, I think, the rule as to concurrent findings of fact ought to be applied, apart altogether from the question of the admissibility of direct testimony as to intention. It seems abundantly clear that the learned trial judge must have misdirected himself. He could hardly have appreciated the consideration that the domicile of origin could not be displaced until another domicile had been acquired; and that it was essential for the plaintiff to prove that her husband had a domicile in Connecticut, which was the state in which they were married, and the only state in respect of which there was an admission as to the matrimonial law. The majority of the Court of King's Bench appear also to have overlooked the fact that the direct evidence of intention, even if accepted at its face value, was inconclusive because the intention deposed to was not the only intention that could be relevant, namely, an intention to reside permanently in Connecticut.

Moreover, domicile of choice is a conclusion or inference which the law derives from certain facts (*per* Lord West-

(1) (1932) 147 L.T. 382.

bury, *Udny* v. *Udny* (1)), and I have not found a case in which the rule as to concurrent findings of fact has been applied to concurrent conclusions on the issue (usually one of mixed fact and law) that a particular domicile has been acquired or has been cast off. In *Wadsworth* v. *McCord* (2) this Court reversed the concurrent conclusions as to domicile of the Superior Court and the Court of Queen's Bench. In *Winans* v. *Attorney-General* (3), the House of Lords reversed the concurrent conclusions of Kennedy and Phillimore JJ. before whom the information was heard, and of the Court of Appeal. In *Wahl* v. *Attorney-General* (4), the House of Lords reversed the concurrent conclusions as to domicile of the King's Bench Division and of the Court of Appeal. In *Bell* v. *Kennedy* (5) the House of Lords reversed the concurrent findings of Lord Kinloch and the Second Division of the Court of Session. In all these cases the critical question concerned the proper inference to be drawn from the facts in evidence. The rule mentioned has, I think, no relevancy in this case.

As regards the suggestion made from the Court that the husband might now be added as a party respondent, we are satisfied that, since it follows from our judgment that the wife, the plaintiff of record, had no cause of action, the Court of King's Bench would not in such circumstances, under the practice prevailing in the province of Quebec, have substituted the husband as plaintiff.

It is not necessary to consider the question of prescription and we express no opinion on it.

The appeal should be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Hackett, Mulvena, Foster, Hackett & Hanna.*

Solicitor for the respondent: *Gaston Ringuet.*

(1) (1869) L.R. 1 Sc. App. 441.
(2) (1886) 12 S.C.R. 466.
(3) [1904] A.C. 289.
(4) [1932] 147 L.T. 382.
(5) (1868) 1 Sc. App. 307.

1939
*Feb. 7, 8, 9, 10, 13, 14, 15 16, 17, 20.
1940
*Jan. 19.

MASSIE & RENWICK LIMITED, (DEFENDANT) ..... APPELLANT;

AND

UNDERWRITERS' SURVEY BUREAU, LIMITED, AND OTHERS (PLAINTIFFS) .. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Action for infringement of copyright and conversion of infringing copies—Copyright in fire insurance plans and rating schedules—Ownership of copyright—Period of limitation established by Copyright Act not a bar to relief where infringement is accomplished by fraudulent act of defendant—Criminal conspiracy—Disclosure of authorship of the works—Unpublished works—Author not identified—Copyright Act, R.S.C., 1927, c. 32.

The action is one for infringement of copyright, and conversion of infringing copies in fire insurance plans and rating schedules. In 1883, the Canadian Fire Underwriters' Association, an unincorporated body, was formed by the association of a number of fire insurance companies carrying on business in Ontario and Quebec, all the members of that Association at the date of the action being added as plaintiffs to the Underwriters' Survey Bureau Limited, a Canadian corporation incorporated in 1917. Prior to 1901, the fire insurance business in Canada was carried on under the minimum tariff system of rating. In 1900, or shortly afterwards, the Association decided to adopt the system of "rating schedules" for all buildings in protected areas, with the exception of residential risks, which remained subject to the minimum tariff system. In this system, formulæ known as rating schedules, which are applied to individual buildings, must be arrived at and expressed with precision. These specific rates are recorded on cards or books, which are issued to members and members' agents only. From the beginning, the Rates Committees of the Association had charge of all matters connected with rates. According to the constitution of the Association of 1914, it was provided, *inter alia*, that all then existing members of the Association and companies thereafter becoming members were binding themselves, by signing a copy of constitution and by-laws, to observe same; and that the member, who may withdraw, was bound to release, or "forfeit," "any right or claim to any portion of the property or assets of the Association" and return to it all card ratings and specific tariffs received from the Association, rating schedules and manuals not being placed in the hands of the agents but remaining in the hands of the officers of the Association. The affairs of the Association are administered by officers elected annually by the members, and the expenses are met by an annual assessment upon all the members proportioned in each case to the premium income of the member for the year. At the end of 1917, or the beginning of 1918, the Plans Department of the Association was taken over by the appellant, the Underwriters' Survey Bureau Ltd., a company incorporated for that purpose whose shares were held in trust for the members of the Association and its directors were officers of the Association.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

The plan committee of the Association, constituted in 1917, was charged with the duty of transacting the common business in respect of plans and with conducting the business of the Bureau. Considerable sums of money derived from the contributions of the members of the Association to the common fund were spent in obtaining the necessary information for constituting the rating schedules and other material and in the actual production of the material itself, which material was intended for the exclusive use of the members of the Association. As to the plans, those produced by the plan committee prior to the incorporation of the Bureau and those made afterwards by the Association up to the 1st January, 1924, were delivered to the Bureau with the intention that they should be the property of the Bureau, i.e., the legal ownership should be vested in the Bureau. There were also two classes of plans other than that made by the Bureau after the 1st of January, 1924: first, plans, the copyright to which were registered in the name of Charles Edward Goad, who died in 1910; and, second, plans, the copyright to which was registered in the name of Charles E. Goad Company; and the respondents claim title to these plans under assignment by the Toronto General Trusts Corporation, executors and trustees of the will of Charles Edward Goad, through the members of the firm Charles E. Goad Company and under a further assignment in 1931 from the Charles E. Goad Company to the Bureau. A large number of the Goad plans were partially or completely revised and reprinted by the salaried employees of the Survey Bureau, some prior to the assignment of the Goad copyrights in 1931 and some subsequent to that. The respondents alleged that the appellant, not a member of the Canadian Fire Underwriters' Association, authorized others to make copies or reproductions of the plans and rating schedules and converted such to its own use. The appellant denied respondents' title to copyright to the plans produced by C. E. Goad and claimed by respondents to have been acquired by assignment from the C. E. Goad Company in 1931. The appellant further pleaded that the acts of the respondents in withholding from the appellant and others copies of the works in question constituted a combine and conspiracy within the meaning of the *Combines Investigation Act*, R.S.C., 1927, c. 36, and the Criminal Code, R.S.C., 1927, c. 36, s. 498; that the respondents acquiesced in the alleged infringement and conversion and are guilty of laches, and that the period of limitation applicable to such actions is a bar to relief.

Held that the appeal should be allowed in respect of the rating material brought into existence after the first of January, 1924, and in other respects dismissed (1).

The "rating material," designating what were known as rating schedules or manuals and rate books, minimum tariffs and specific ratings but excluding the plans, was the property of the members of the Association at the date when the *Copyright Act* of 1921 came into force on the 1st of January, 1924. These members were the owners, not only of the material itself, but of the common law, incorporeal, exclusive right of reproduction and became, by force of the statute (section 42 in the schedule), the owners of copyright in that material.

(1) *Reporter's note.*—Petition for special leave to appeal to the Privy Council dismissed with costs on March 15th, 1940.

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Material of that character was subject-matter for copyright and, not being published, the exclusive right of multiplying copies of it, or of publishing it, was a right which the common law, prior to the statute of 1921, gave primarily to the authors of it. As to such material produced after the statute came into force, the respondents have not adduced sufficient evidence to establish a title to copyright in it. The members of the Association are all incorporated companies and they or any one of them cannot be an author within the meaning of the *Copyright Act*. Any one or all of them, that is to say, all the members of the Association at any given time, could be the owner or joint owners of copyright, but they could acquire copyright only in one of two ways,—either by assignment by some person having a title to the copyright or by one of the ways mentioned in the proviso to section 12 of the Act. As to the ground that the present case comes within subsection (*b*), the respondents must, in order to succeed, show that the material in respect of which the question arises was made "in the course of his employment" by a person or persons "under a contract of service or apprenticeship" with the respondents or some of them. But from the evidence it must be inferred that this material was produced by employees in the course of their employment under a contract of service with the members of the Association for the time being. And there is no evidence as to the practice in relation to the contracts under which the employees of the Association were engaged or in relation to the terms of their engagement. It is not a mere abstract possibility, but a practical possibility, that for convenience some form of arrangement was resorted to by which there was no direct contractual bond between the members of the Association and the employees, or that in any case the work was done by persons who were independent contractors. As to plans: The plans copyrighted by Charles Edward Goad in his lifetime and those copyrighted by the Charles Edward Goad Company passed to the Underwriters Survey Bureau Ltd. by the deeds of transfer and assignment produced at the trial. As to nine plans made by the plan department of the Association in 1911 and 1917, copyright was vested by force of the *Copyright Act* of 1921, s. 42, in the members of the Association at the date when the Act came into force, i.e., on the first of January, 1924.—Copyright in the revisions of the Goad plans vested in the Bureau in virtue of the fact that these revisions were executed by the salaried employees of the Bureau in exercise of their functions as such. As to plans and revisions of plans made by the Bureau after the statute of 1921 came into force on the 1st of January, 1924, these having been made by the salaried employees of the Bureau, the title vested in the Bureau in virtue of section 12 (*b*)—As regards the copyright in the plans produced by the Bureau, including the revisions of the Goad plans, section 20 (3) (*b*) (ii) applies. *Prima facie* the legend "Made in Canada by the Underwriters' Survey Bureau Ltd." implies proprietorship and such legend is found on these plans: the *prima facie* case has not been met.

Held, also, as to companies which had ceased to be members of the Association and were not parties plaintiffs at the commencement of the action, their interest in the copyrights was a bare legal interest since, on ceasing to be members of the Association, they ceased to have any beneficial interest in such copyrights and the plaintiffs, as part owners, were entitled to protect their rights by suing for an

injunction and for damages. *Lauri* v. *Renad* ([1892] 3 Ch. 402); *Cescinski* v. *Routledge* ([1916] 2 K.B. 325) and *Dent* v. *Turpin* (2 J. & H. 139) ref.

Held, also, as to tangible chattels including infringing copies, companies on ceasing to be members ceased to have any joint or several right of possession in any of the common property and the plaintiffs were, therefore, entitled to maintain trover or detinue in respect of such chattels.

Held, also, as to the question of the Statute of Limitations, that that was ample evidence in support of the conclusion of the trial judge that there had been fraudulent concealment within the meaning of the rule; with the consequence that the limitation period began to run only on the discovery of the fraud, or at the time when, with reasonable diligence, it would have been discovered. Therefore, the period of limitation established by the *Copyright Act* is not a bar to the relief claimed by the respondents.

Held, further, on the question of criminal conspiracy: if the plaintiffs in an action for the infringement of copyright are obliged, for the purpose of establishing the existence of, and their title to, the copyright to rely upon an agreement and that agreement constitutes a criminal conspiracy, and their title rests upon such agreement and upon acts which are criminal acts by reason of their connection with such an agreement, then it would be difficult, on general principles to understand how such an action could succeed; but, in the present case, the conclusion of the trial judge, negativing the existence in fact of a criminal conspiracy is right.

Held, further, as to the appellant's contention that the authorship of the work cannot in the case either of the plans or of the rating materials be ascertained, that, according to the provisions of section 20 (3) of the *Copyright Act,* the statute does not contemplate disclosure of authorship as a necessary condition of success in an action for infringement; but the provisions of that section do not go as far as creating a presumption that the name of the Association on the rating material should be regarded as the name of the publisher. As already stated, all the members of the Association being bodies corporate, none of them could be an author within the contemplation of the statute; and it cannot be found as a fact that the name Canadian Fire Underwriters' Association in these manuals, rate-books and other rating material is a name which answers the description of the statute, namely, that "a name purporting to be that of the * * * proprietor of the work is printed thereon in the usual manner."

Held, also, that, in the case of unpublished works (where the proprietor is shewn to have acquired a common law right prior to the *Copyright Act* of 1921 by evidence establishing facts requiring an inference that the work was done for the plaintiff and that the intention of all parties concerned in the production of the work was that the common law right should vest in him) the statute plainly contemplates the protection of that right; and the only possible protection is the recognition of the substituted copyright given by the statute. It would be then merely a matter of evidence: the ownership of the common law right must rest upon established facts

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

and these facts can be proved by inference as well as by direct evidence.

Held, further, as to the duration of the copyright where that comes in question, that, if the owner of it cannot identify the author, the duration of it must be restricted to the period of fifty years from the date when the copyright or common law right, as the case may be, came into existence.

Judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 103) varied.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), maintaining with costs an action for infringement of copyright by the appellant against the respondents in respect of certain works known as fire insurance rating material and fire insurance plans.

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.

W. N. Tilley K.C., O. M. Biggar K.C. and *Christopher Robinson* for the appellant.

J. A. Mann K.C., W. D. Herridge K.C. and *A. M. Boulton* for the respondents.

The judgment of the court was delivered by

THE CHIEF JUSTICE: In 1883 the Canadian Fire Underwriters' Association was formed by the association of a number of fire insurance companies carrying on business in Ontario and Quebec.

Prior to 1901, the fire insurance business in Canada was carried on under the minimum tariff system of rating. Territory in which the companies were carrying on business was divided into districts. For each district a minimum tariff of rates was drawn up in which the premiums for various defined classes of risks were quoted. These were placed in the hands of the agents and of the member companies.

In 1900, or shortly afterwards, the Association decided to adopt the system of "rating schedules" for all buildings in protected areas with the exception of residential risks, which remained subject to the minimum tariff system. In this system, formulae known as rating schedules,

(1) [1938] Ex. C.R. 103.

which are applied to individual buildings, must be arrived at and expressed with precision. Speaking generally, in large cities, and many lesser communities, a specific rate is separately worked out for each building and is tabulated in anticipation of applications for insurance in respect of that building.

These specific rates are recorded on cards, in the case of a large city, and in books in the case of smaller municipalities. The rate cards and books are issued to members and members' agents only. The specific rates are kept up to date by new cards or slips pasted in the rate books.

From the beginning, the Rates Committees of the Association had charge of all matters connected with rates.

The operation of the system of rating schedules is explained by the witness Dixon:

Q. Just explain to the court how towns, cities and villages became specifically rated?

A. We will take, say a town A.—it does not matter whether we call it a village, town or city. They put in some fire protection—it may be fire pumps and mains and hydrants, and provide a certain amount of hose—a fire station, and some firemen. It may be a gravity or pumping system. They notify us that they have carried out these improvements and that they now have some protection.

The first thing we do is send down our water works inspector. He visits the place and checks over all the protection that is provided. He also checks over street widths and congestion, and construction conditions generally. He comes back to the office and writes a very elaborate report of that, so that we can tell exactly what that municipality has.

That report is sent to the municipality, by the way, and it has in it recommendations for further improvements and how to expand the system that they have.

His report comes, or it did, from the C.F.U.A. to the rates committee again, and they went over it very carefully and would decide that in view of the protection provided there we would effect a certain basic rate or key rate for the beginning of our schedule rating in that municipality. They would also say to the plans committee, "We desire to specifically rate town A. Kindly see to it that a plan of town A is made and working sheets sent to the C.F.U.A. as soon as possible."

We could not start in to make the inspection until that plan was made, because our whole schedule rating system depends upon our plans. We have in that specific tariff our block numbers, and our numbers in the specific tariff must absolutely correspond to the numbers that the agent and the company have; otherwise they would not know what rate to apply. So that either Goad or ourselves or the Underwriters' Survey Bureau, as the case may be—depending upon the time that the work was done—would send their surveyors to the municipality and build up a plan.

And while they were collating that to send out to the company members they would send us what we call a working sheet. That has just a cheaper binding on it, so that our inspectors can roll it under their arm and fold it up and take it to the municipality with them. And

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

they go into each one of those risks, in the municipality. They go down one street and up the next, and make a report of every risk of a mercantile nature in that place. That survey consists of all the details of construction, occupancy, exposure and private protection that the assured may have. He may have extinguishers, fire pumps and hose, and so on, for all of which he would be entitled to a credit off his rate.

They come back and they have a plan and spread it out in front of them, and they see on each one of these risks—each building is called a risk in the fire insurance business—they identify that survey with the marking on the plan. In other words, let us say it would be block 5, sheet 2, No. 62 Main Street, town A. And when a tariff goes out to the companies the agent writes in and says that

> my assured, Number so and so, 62 Main Street, block 5, sheet 2, of the town of A, desires so much insurance on his household furniture,

or his barber shop stock, or whatever it is he wants to insure; and the company simply goes to work and takes their tariff, and looks up block 5, 62 Main Street, and there it is. And they see it is a candy store, let us say, so they know the occupancy must have changed. Then they take it up with the agent. But if it is a barbershop when the inspection is made and is still a barbershop, they know the rate that is to apply. So that the plan and the rate identify one another.

His Lordship: But the rate is never put on the plan?

A. No, sir.

Q. That would be in the rate book?

A. Yes, sir.

Q. But there is a means of identifying all the particular properties on the plan?

A. Yes.

It will be convenient to use the term "rating material," which was employed on the argument, as designating what are known as rating schedules or manuals and rate books, minimum tariffs and specific ratings. Except in the case of minimum tariffs, plans are an essential part of the rating machinery but, for the purpose of convenient discussion, the term "rating material" will embrace the matters just mentioned and then only.

Before proceeding to consider the rights in controversy, it is convenient to explain the constitution of the Canadian Fire Underwriters' Association.

In the constitution of 1914 the names of the existing members of the Association are set out and it is prescribed, by one of its provisions, that all existing members of the Association and companies thereafter becoming members, shall sign a copy of the constitution and by-laws; and it is declared that by this signature a member binds itself to observe the constitution and by-laws.

The constitution also provides that a member may withdraw on giving notice to that effect but that such with-

drawal shall not take effect or release the member from his agreement to observe the constitution and the by-laws until the expiration of three months from the date of the notice.

Upon withdrawal, the withdrawing member releases, or "forfeits," as the word is, "any right or claim to any portion of the property or assets of the Association," and returns to the Association of all card ratings and specific tariffs received by it from the Association. Rating schedules and manuals are not placed in the hands of the agents. They remain in the hands of the officers of the Association. Plans, as we shall see, are dealt with as the property of the Underwriters' Survey Bureau, an incorporated company, which performs the functions of the plan department of the Association under the control and supervision of the Plan Committee.

The members of the Association meet annually, semi-annually and at special meetings called at the discretion of the president or the executive committee, or upon requisition by a specified proportion of members.

At annual meetings the members elect a president and two vice-presidents, one for each branch, Ontario and Quebec. They also name certain committees, including an executive committee, a plan committee and rates committees. The members of the executive committee are elected for two years and retire in rotation yearly.

This committee has a general authority to transact any business which the members of the Association can transact, excepting the amendment of the constitution and by-laws and the forfeiture of membership; and the constitution declares the intention that the committee shall dispose of all matters except those which the committee may consider it desirable to reserve for submission to the Association.

One of the secretaries is required to attend the meeting of the committee and keep the minutes which are printed and distributed to all the members of the Association.

The constitution formally declares that the members of the Association in general meeting are superior to all committees and constitute a final court of appeal.

The constitution also provides for the election by the members in general meeting of certain salaried officers,—

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

a permanent chairman of the executive committee and two secretaries, one of whom has an office in Montreal and the other in Toronto, where the business of the respective branches (Quebec and Ontario) is transacted. One of these secretaries is named as treasurer.

The secretaries are "in their respective jurisdictions" the chief executive officers of the Association, have the general supervision of its work and of all its employees and are directly responsible for the management of their respective offices.

The current expenses of the Association are met by an annual assessment upon all the members proportioned in each case to the premium income of the member for the year. Interim assessments are made quarterly based upon the income of the previous year, an adjustment being made when the amount payable by each member has been accurately ascertained. Each member, in addition, pays for the revision of any rating material and for the revision of tariffs made for it at the cost of the labour involved.

The assessment is made under the authority of the members of the Association in general meeting by the treasurer and is paid to the treasurer who submits to the annual meeting a printed statement of the previous year's expenditure and its apportionment audited by a chartered accountant appointed by the Association. There is a bank account at each of the branches, Montreal and Toronto, and all monies received are deposited in that account and it is the duty of each of the secretaries to defray the expenses of his branch. It is the duty of the secretary, who is the treasurer, to transfer to the account of the other branch sufficient funds to enable this to be done. All payments are made by cheque on one of these accounts, signed by the president, or a vice-president, and the treasurer or the other secretary, according to the account upon which the cheque is drawn.

At the end of 1917, or the beginning of 1918, the Plans Department of the Association was taken over by a company incorporated for that purpose under the Dominion *Companies Act,* the Underwriters' Survey Bureau, Ltd., the shares being held in trust for the members of the Association. The plan committee of the Association, which was constituted in December, 1917, under an amendment to the constitution, was charged with the duty of

transacting the common business in respect of plans and with conducting the business of the Underwriters' Survey Bureau, Ltd. We shall have to discuss in greater detail the business of the Bureau later.

I put aside the consideration of the plans for a moment and discuss the rating material so-called.

Considerable sums of money derived from the contributions of the members of the Association to the common fund were spent in obtaining the necessary information for constituting the rating schedules and the other material mentioned and in the actual production of the material itself. This material was intended for the exclusive use of the members of the Association. There can be no doubt, I think, that, subject to the provisions of the constitution, the property in it was (as was all the common property) vested in such members for the time being. I think there can be no doubt that material of that character was subject matter for copyright and, not being published, the exclusive right of multiplying copies of it, or of publishing it, was a right which the common law, prior to the statute of 1921, gave primarily to the authors of it. The principle laid down by Lord Brougham in *Jefferys* v. *Boosey* (1) applies.

The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation. I do not think section 22 of the statute of 1875, which relates only to printing and publishing, supersedes the common law right to prohibit other dealings with unpublished documents.

As regards the particular material with which we are concerned, that produced for the Association prior to the date when the *Copyright Act* of 1921 came into force, it was, as has been said, produced for the exclusive use of the members of the Association who considered it of funda-

(1) (1854) 4 H.L.C., 815 at 962.

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

mental importance that this right of exclusive user should be jealously guarded and, it must have been well understood that, not only the property in the material itself, but the ownership of the incorporeal right described by Lord Brougham should be vested exclusively in the members of the Association.

It is important to notice that at this moment we are considering only the common law right of the author, the author's employer and the author's assigns, to control the use of unpublished documents, the right so vividly described by Lord Brougham in the words just quoted.

It is the contention of the respondents that this right in respect of this rating material is vested, as to the legal property in it, in the members of the Association for the time being and it is said that, on the 1st of January, 1924, when the *Copyright Act* of 1921 came into force, the property, not only in the rating materials themselves as physical things was vested in the members of the Association at that moment, but also this incorporeal right in relation to these materials.

It is not necessary, I think, to go further back than the constitution of 1914 because, as we have seen, the members of the Association at that time contracted with one another in the terms of the constitution and by-laws, and the Association proceeded from that time on to work under that constitution and those by-laws as amended from time to time; the power to amend being vested by the constitution in the members of the Association in general meeting acting by a two-thirds majority.

Now, I think the only fair implication from the provisions of the constitution is that the legal title to the common property is vested in the members of the Association for the time being. The fluctuating body for which the name was a description in fact was not a entity known to the law and not capable of legal ownership of such property. There is no express provision for a board of trustees; and although the shares of the Survey Bureau are held by trustees for the Association, we have no information who these trustees are or how they are appointed.

The phrases used are " the property of the Association " and " the assets of the Association " and I think the reasonable meaning of these phrases is that which I have indicated.

The treasurer and the secretary who is not the treasurer, as well, perhaps, as the president and vice-president who are authorized to sign cheques with one of the secretaries have, no doubt, a special property in the funds of the Association and that may be so also with regard to the executive committee which possesses almost unlimited powers of administration. But the general property of the common assets is, I think, in the members for the time being, subject, of course, to the provisions of the contract under which they are associated together.

Primarily, the incorporeal right we are considering is the right of the author and, while I do not suppose a corporation could be an author in the sense of the rule, still these incorporated companies, who were the members of the Association during the period with which we are concerned, could acquire title to the incorporeal right by assignment from the author and I think also through the authorship of an agent or servant or of an independent contractor, employed to produce a work in respect of which, in ordinary circumstances, the author would be invested with the right.

It is clearly settled now, by the authority of *In re Dickens* (1) that the author, in transferring the property in his manuscript, does not thereby necessarily assign the incorporeal right.

But I think, having regard to the considerations just mentioned, it is a legitimate inference that it was well understood by everybody that this rating material was produced for the exclusive use of the members of the Association and, consequently, that in the members of the Association vested the sole and exclusive right of multiplying copies. The evidence does not disclose the practice of the Association in respect of the terms under which the persons, inspectors and others, were employed for the production of these materials. Under the constitution I have no doubt it was competent to the executive committee, if not to the secretaries, to authorize the employment of persons for such purposes under a contract which would be a contract of service between the members of the Association for the time being and an employee, or a contract of agency, or a contract under which the employee

(1) [1935] Ch. D. 267.

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

would be an independent contractor. Whether the executive committee could pledge the personal credit of the members of the Association is really immaterial. In practice such a question could hardly arise and, at all events, it is of no importance here.

These materials were produced and the cost of their production was paid for out of the common fund and whether the persons, who, if they had produced them for themselves, would have been the authors, were employees under a contract of service with the members for the time being, or agents under a contract of agency for the members for the time being, or engaged as independent contractors under a contract with the members for the time being, or whether the practice of the Association was to contract through one or more of its permanent officials, the treasurer for example, in such a manner as not to give rise to contractual relations with the members themselves, is really of no importance because, whatever was done, was done for the members and paid for with their money.

The materials themselves when produced and in the possession of their officers were in the possession of the members and any rights acquired by any permanent official as the result of work done under contracts with third persons, the fruits of such contracts, would be acquired for the members and would be the rights of the members. I think this results from an application of the reasoning of Maule J. in *Sweet* v. *Benning* (1) in his judgment at page 484 and *arguendo* at pp. 468 and 475, as well as from the reasoning of Lord Halsbury in *Lawrence* v. *Aflalo* (2) and the judgment of Bowen L.J. in *Lamb* v. *Evans* (3). The immediate question under consideration in these cases was the application of section 18 of the *Copyright Act* of 1842, but the reasoning seems to me to be applicable to the common law right.

Mr. McGillivray, in his book published in 1902, on the Law of Copyright, at pp. 73 and 74, expresses the opinion where the author was a servant or agent the property in the work, as well as the copyright in it, under the statute of 1842, would vest in the employer *ab initio* independently of section 18 of that statute; and, in the case of an independent contractor, independently of the statute also,

(1) (1855) 16 C.B. Rep. 459. (2) [1904] A.C. 17, at 20, 21.
(3) [1893] 1 Ch. 218, at 227, 229.

the copyright would not vest *ab initio* in the contractor but would pass to the employer upon the delivery of the work with the intention of conveying the right. I have no doubt that the delivery of completed materials by an independent contractor to an official of the Association for the Association as such or the completion of the work by a servant or agent and delivery into the custody of the proper official of the Association with the intention, express or implied from the circumstances, of transferring the common law incorporeal right, would have the effect of vesting this in the members. The official acquiring the incorporeal right could only hold it as agent and if there were a trust, he would be a bare trustee for the members of the Association for the time being. The entire beneficial property in the incorporeal right would, I think, in respect of such right, come within the schedule of section 42 under the statute of 1921.

This discussion will, probably, appear to be superfluous; but in my view it has a direct bearing upon a question that is one of the cardinal questions on the appeal to which we shall come to presently. Before leaving the subject, however, I think it is convenient at this point to make this observation. We have, as I have said, no evidence as to the actual practice pursued in respect of contracts with the persons employed by the Association for the preparation of these materials. Now, it is a fact that must be taken into account in endeavouring to consider these questions in a practical way that this Association was a body of fluctuating membership which could not, as such, be a party to a contract of service or any other contract. Between 1914 and 1924, from seventy to eighty companies were added to the membership of the Association. The membership was more than doubled. It was, no doubt, open under the constitution, as already observed, to the executive committee to authorize the officials of the Association to enter into contracts with third persons to which the members of the Association for the time being would be contracting parties. This principle would be attended by the inconvenient necessity of having in the case of employees an assent to a change of parties whenever a change in membership of the Association took place. I do not think we are entitled to speculate upon the subject

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

and I do not think on the evidence before us we can justly infer that this course was pursued in respect of contracts of employment, but, for the reasons just given, I think, as regards these incorporeal rights existing when the statute of 1921 came into force that is of no importance.

Such was the position when the statute of 1921 came into force on the 1st of January, 1924; the property in the rating material of the Association, as well as any incorporeal rights connected with it, were vested in the members of the Association at that time. It follows, by force of section 42 and the schedule thereto, that these members of the Association acquired copyright in this material under the statute.

After the Act came into force new rating material was produced by the Association and this material still remained unpublished. It was, I have no doubt, subject matter for copyright under the statute and one of the cardinal questions for determination is whether the plaintiffs, or some of them, acquired such copyright in this material in respect of the alleged infringement of which the action is brought.

The members of the Association are all incorporated companies and I am unable to convince myself that they or any one of them could be an author within the meaning of the *Copyright Act*. Any one or all of them, that is to say, all the members of the Association at any given time, could be the owner or joint owners of copyright, but they could acquire copyright, as far as I know, only in one of two ways,—either by assignment by some person having a title to the copyright or by one of the ways mentioned in the proviso to section 12 which is in these words:

12. Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein

Provided that

(*a*) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright; and

(*b*) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright; but where the work is an article or other contribution to a newspaper, magazine, or similar

periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

It is argued that the present case comes within subsection (*b*). The respondents must, in order to succeed upon that ground, show that the material in respect of which the question arises was made "in the course of his employment" by a person or persons "under a contract of service or apprenticeship" with the respondents or some of them.

I have already in effect expressed my opinion upon this question. It has given me a good deal of concern but I do not think from the evidence before us I can infer that this material was produced by employees in the course of their employment under a contract of service with the members of the Association for the time being. As already observed, there is no evidence as to the practice in relation to the contracts under which the employees of the Association were engaged or in relation to the terms of their engagement. It is not a mere abstract possibility, but a practical possibility, that for convenience some form of arrangement was resorted to by which there was no direct contractual bond between the members of the Association and the employees, or that in any case the work was done by persons who were independent contractors.

I turn now to the point chiefly relied upon by counsel for the respondents in support of their claim to copyright in this material. It is based on section 20 (3) (*The Copyright Act*, 1921, R.S.C. 1927, ch. 32, as amended by Stats. of Can. 1931, ch. 8) which is in these terms:

(3) In an action for infringement of copyright in any work in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case:—

(*a*) The work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and (*b*) The author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;

Provided that where any such question is at issue, and no grant of the copyright or of an interest in the copyright, either by assignment or licence, has been registered under this Act, then, in any such case:—

(i) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work;

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

(ii) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name, or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed, or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purpose of proceedings in respect of the infringement of copyright therein.

This subsection establishes, first, the presumption that copyright subsists in this material. As to clause *b* (1) that seems obviously inapplicable for the reason already indicated, namely, that all the members of the Association being bodies corporate, none of them could be an author within the contemplation of the statute.

I come now to 3 (*b*) (ii). I am unable to find as a fact that the conditions of this enactment are fulfilled. The action is brought by a number of incorporated companies, including the Underwriters' Survey Bureau, Ltd. The Canadian Fire Underwriters' Association is not a party to the action and could not be so under its group name. The Association is not a partnership. Its name is not a trade name. It designates sufficiently for practical business purposes a group of companies bound together by an agreement embodied in a constitution and by-laws, the identity of which changes from time to time. The name of the Association, if read as denoting the members of the group, would have one denotation at the time of the trial and, in fact, another at the date of the commencement of the action, another at the date when the material said to be the subject of copyright came into existence and the copyright also was constituted; another, perhaps, when the first alleged infringement occurred and, it may be, another and different one at the date of each successive infringement. In these circumstances I cannot find as a fact that the name Canadian Fire Underwriters' Association on these manuals, rate books and other rating material is a name which answers the description of the statute, namely, that

a name purporting to be that of the * * * proprietor of the work is printed thereon in the usual manner.

I now turn to the plans.

In October, 1917, the Underwriters' Survey Bureau, Ltd., was incorporated. The shares were held entirely in trust for the Association, that is to say, for the members for the time being of the Association. The directors were officers of the Association.

On the 4th of December, 1917, an amendment of the constitution was adopted by the Executive Committee and duly passed which provided as follows:

Plan Committee.—This Committee shall have charge of all work in connection with the making or obtaining of plans, and shall have the control and direction of the Underwriters' Survey Bureau, Limited, and shall make all arrangements for supplying plans and revisions to Members and others, and for the prices to be charged for them, subject to the following general regulations:—

The clause further provided that:

All copies of plans in Agents' hands shall remain the property of the Underwriters' Survey Bureau, Limited.

By the by-laws,

all plans and revisions delivered to a member should be by way of loan only and be and remain the property of the Underwriters' Survey Bureau, Limited;

and in the event of a member ceasing to be such, all such plans and revisions should be returned to the Underwriters' Survey Bureau, Ltd.

Copies were put in evidence of receipts required from agents and of the labels pasted upon the plans which show that a plan is to be used solely for the business of the members of the Association and that it is to be returned to the Bureau on request. The receipt is in the following form:

Underwriters' Survey Bureau, Limited
Toronto and Montreal

..... 19

I hereby acknowledge having this day received from the Underwriters' Survey Bureau, Limited, copy of Plan of.....

I bind myself to use same solely for the business of the Canadian Fire Underwriters' Association, Companies, and to return it to the Bureau on demand.

Signature.....

and the label reads as follows:

Insurance Plan of

.....

Underwriters' Survey Bureau, Limited
and is loaned to

..... on the following conditions: That the Plan is to be kept in good order, that it is to be used only in connection with business of Companies, Members of the Canadian Fire Underwriters' Association, and to be returned on request to the

Underwriters' Survey Bureau, Limited,
Toronto and Montreal.

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

Some nine plans in all had been made by officers of the Association, seven in 1917, between March and December, and two in the year 1911. The rest of them were all made by the Bureau.

Although the Bureau was not incorporated until October, 1917, an office was opened in its name on the 1st of April, 1917, and some time later it opened an office in Montreal for the transaction of Quebec business. In the minutes of the first annual meeting of July, 1918, it is stated that new plans and revisions had been made and distributed to the Companies in certain places

during the fourteen months from the 1st of April, 1917, to the 31st of May, 1918, that the Bureau has been in operation.

The plans produced by the plan committee of the Association prior to the incorporation of the Bureau seem to have been treated as the property of the Bureau and this would appear to be in conformity with the provisions of the constitution and by-laws above mentioned by which all copies of plans in agents' hands were to remain the property of the Underwriters' Survey Bureau, Limited, and the provisions of the by-laws that all plans and revisions issued to a member should be by way of loan only and be and remain the property of the Underwriters' Survey Bureau, Ltd.

It seems probable that all the plans made by the Association were delivered to the Bureau and delivered, moreover, with the intention that they should be the property of the Bureau, that is to say, the legal ownership should be vested in the Bureau. There can be no doubt, at all events, that after the incorporation of the Bureau, plans made by the employees of the Bureau became the property of the Bureau and, I think, the only inference is that the exclusive right of reproduction and publication vested in the Bureau also. The Bureau was under the control and direction of the plan committee and the business of the Bureau was conducted by that department, but the form of the resolution of the Bureau, by which the management of its affairs was placed in the hands of the plan committee shows that the committee was acting as the agent of the Bureau and that, in engaging and dismissing and controlling employees, in entering into contracts for supplies and work, in renting premises and other-

wise acting in the conduct of the business, the committee was to act on behalf of and in the name of the Bureau. That this was the practice appears from the evidence of Long and Brown.

As regards plans then produced by the Bureau down to and including the 31st of December, 1923, after its incorporation, the proper conclusion appears to be that the exclusive common law right of reproducing and publishing these plans was vested in the Bureau, an incorporated company. As regards the nine plans produced prior to the incorporation of the Bureau, if they were not the property of the Bureau they were the property of the members of the Association and the rights of the members of the Association as of the 31st of December, 1923, in respect of them would be the same as their rights in respect of the rating material. It follows that, by force of section 42 and the schedule thereto, of the statute of 1921, the Bureau or the members of the Association acquired copyright in all these plans.

It does not appear to me to be strictly necessary to decide whether the Bureau was the agent of the members of the Association or held these plans and the rights in relation to them in trust for the members of the Association, or was merely a corporate body under the control of the Association by virtue of the ownership of its shares and the composition of its governing body. But I think the proper conclusion is that the Bureau was the agent of the Association and governed by the constitution.

We are concerned also with two other classes of plans before we come to the plans made by the Bureau after the 1st of January, 1924: first, plans, the copyright in which was registered in the name of Charles Edward Goad, who died in 1910; and, second, plans, the copyright in which was registered in the name of the Charles E. Goad Company. The respondents claim title to these plans under assignment by the Toronto General Trusts Corporation, Executors and Trustees of the will of Charles Edward Goad, through the members of the firm Charles E. Goad Company, and under a further assignment of March 3rd, 1931, from the Charles E. Goad Company to the Underwriters' Survey Bureau, Ltd. I think the transfer from the Toronto General Trusts Corporation to the persons

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

who became members of the firm Charles E. Goad Company, which was a transfer of the business of Charles Edward Goad as a going concern, and a list of assets including (*inter alia*) good will and advances made to surveyors, by necessary implication had the effect of vesting in the transferees the title to the copyrights which had been acquired by Charles Edward Goad. The construction contended for on behalf of the appellants would really defeat the transaction as contemplated by all parties. The document may properly be construed with reference to the known circumstances in which it was made. In any case, a three-eighths interest in the plans was vested in the transferees under the will and passed to the Bureau by the transfer of 1931.

Certificates of registration have been produced for these plans which, under sections 36 (2) and 37 (6), constitute *prima facie* evidence that copyright subsists in the work and that the persons registered were the owners of such copyright. This *prima facie* case has not been met.

The property in all plans belonging to the Goads in possession of agents of the Association passed to the Underwriters' Survey Bureau, Ltd., for the consideration of $22,000 as the result of an agreement of the 21st of September, 1917. An agreement was made on December 27th, 1917, between the Charles E. Goad Company and the Survey Bureau that, for a certain price, when the Association or the Bureau

> desires to revise one of Goad's plans the plans or sheets needed are to be placed at the disposal of the Association or the Bureau and to be used as required in the preparation of the revision

and the right to revise copies in possession of the Association or member Companies, or their agents, was admitted.

A large number of the Goad plans were completely reprinted by the Survey Bureau; some prior to the assignment of the Goad copyrights in March, 1931, and some subsequent to that. There were also complete revisions by the Bureau of other plans of which, however, all the sheets were not necessarily reprinted.

I do not think it is doubtful that the intention of the members of the Association and of the Bureau and the plan committee was that the legal property in all the plans and revisions produced after the incorporation of the Bureau, and revisions of these plans acquired from the

Goads, should vest in the Bureau although no formal, explicit agreement to that effect is proved. The members of the Association conceived that the plan department of the Association was being incorporated. The business of the plan department was to be conducted by the plan committee but, as already observed, as agents for the incorporated Bureau. I see no reason why, as respects any of the revisions of Goad plans made prior to the 1st of January, 1924, for the Bureau, the exclusive right of reproduction should not be considered to be vested in the Bureau. And this, I think, would apply equally to complete reprints and to revisions effectuated by stickers where the sheet was not reprinted. These revisions were made for the exclusive use of the members of the Association and their agents and they had the authority of the Goad Company for making use of their original sheets for such purposes. Of the revisions, whether expressed in a complete reprint or by stickers, the salaried employees of the Bureau were the authors; and I can see no reason why, on the principles above explained, they had not the right to prevent anybody else publishing them or making copies of them, including the Goad Company.

On the 1st of January, 1924, then, the Bureau were the legal holders of the incorporeal, exclusive right of reproduction in all plans made by themselves as well as in the revisions of the Goad plans made by their salaried employees.

We arrive now at the important question which concerns the revisions of these plans after that date and the new plans made by the Bureau after that date.

First, as to the new plans. The method of plan making is explained by Mr. Long in his evidence very fully and, I think, it results from the evidence that all plans and revisions were made by the salaried employees of the Bureau, subject, of course, to instructions received from the plan committee (acting as agents and in the name of the Bureau) or emanating from a general meeting of the Association, or from the executive committee. These plans, of course, were only a part of the machinery for arriving at rates and were essential in the process of rate making. The plans constituted an essential part of the process, apparently, in every case except those cases in which the principle of "minimum" rates was applied.

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

They were intended, as everybody understood, for the sole and exclusive use of the members of the Association and their agents acting in the course of their duties as such agents. They were really confidential documents in the sense that the information contained in them was not to be disclosed to rival insurance companies, or employed in the business of such companies. The information given by a plan, besides the general setting of streets and general conditions such as information with regard to hydrants and water supply generally, public buildings and so on, and dimensions of areas and buildings, is conveyed by symbols the meaning of which is given in every case in a key plan.

The foundation of the plan is a field sheet made by the surveyor in the field, which is uncoloured. The office staff, comprising surveyors, draughtsmen, colourists, by the use of the surveyor's field notes complete the plan, inserting such additional symbols as do not appear in the surveyor's field sheet. But the whole process from beginning to end differs very little to-day from the method perfected by Mr. Long when he became in March, 1917, the Manager of the Association's plan department. There can be no doubt that the plan committee, subject to directions by a general meeting of the members, or the executive committee, had full authority, acting as agents for and in the name of the Bureau, to prescribe the manner in which this work was to be carried on. The persons concerned in the actual production of a plan could not in the ordinary course be fairly described as independent contractors and there is, I think, sufficient evidence to support the inference that they were persons performing services under contracts of service. And that is, I think, the proper inference. (*Massine* v. *de Basil* (1); *Ware* v. *Anglo-Italian Commercial Agency* (2); *Drabble* v. *Hycolite* (3)).

Then, as to the revisions of the Goad plans, the salaried servants of the Bureau were the authors of these revisions, and, as the work produced constituted in each case a new

(1) (1938) 82 Sol. Jo. 173.
(2) (1922) McGillivray Cop. Cas. 1917-1921, p. 346.
(3) (1928) 44 T.L.R. 264.

work, I do not know why they are not proper subjects for copyright, or why such copyright did not vest in the Bureau.

As regards the nine plans produced by the plan department of the Association before the incorporation of the Underwriters' Survey Bureau, Ltd., in October, 1917, copyright in these plans would appear to have vested in the members of the Association at the date when the Act of 1921 came into force. This point would appear to be governed by the considerations above mentioned as affecting the rating material produced by the Association before the Act came into force.

To sum up—

The rating material, using the words in the sense indicated above as excluding the plans, was the property of the members of the Association at the date when the statute of 1921 came into force on the 1st of January, 1924. These members were the owners, not only of the material itself, but of the common law, incorporeal, exclusive right of reproduction and became, by force of the statute (section 42 and the schedule), the owners of copyright in that material. As to such material produced after the statute came into force, the respondents have not adduced sufficient evidence to establish a title to copyright in it.

As regards plans.—The first group of plans with which we are concerned consists of plans copyrighted by Charles Edward Goad in his life time. These copyrights passed to the Underwriters' Survey Bureau, Limited, by the transfer, first, from the Trustees and Executors of Charles Edward Goad to the sons of Charles Edward Goad, who afterwards carried on his business as partners under the firm name of Charles E. Goad Company, by a transfer dated the 21st of September, 1911, and by a transfer from the partners in the Charles E. Goad Company to the Underwriters' Survey Bureau, Ltd., dated the 3rd of March, 1931;

Second, the plans copyrighted by the Charles E. Goad Company. These copyrights passed from the Charles E. Goad Company to the Underwriters' Survey Bureau, Ltd., by the last-mentioned assignment;

Third, the nine plans made by the plan department of the Canadian Fire Underwriters' Association in 1911 and

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

1917. With respect to these copyright was vested, by force of the Act of 1921, s. 42, in the members of the Association at the date when the Act came into force, the 1st of January, 1924.

Fourth, revisions of the Goad plans (plans of Charles Edward Goad and Charles E. Goad Company) effected by the Underwriters' Survey Bureau, Ltd. The copyright in the original plans passed under the agreements above mentioned to the Underwriters' Survey Bureau, Ltd., and the copyright in the revisions vested in the Bureau in virtue of the fact that these revisions were executed by the salaried employees of the Bureau in exercise of their functions as such;

Fifth, as to plans and revisions of plans made by the Underwriters' Survey Bureau, Ltd., after the statute of 1921 came into force on the 1st of January, 1924. These plans having been made by the salaried employees of the Bureau the title vested in the Bureau in virtue of section 12 (*b*);

Sixth, as regards the copyright in the plans produced by the Underwriters' Survey Bureau, Ltd., including the revisions of the Goad plans, although the question is doubtful, I have come to the conclusion that section 20 (3) (*b*) (ii) applies. *Prima facie* the legend "Made in Canada by the Underwriters' Survey Bureau, Ltd.," I am disposed to think, implies proprietorship and this legend is found on these plans. The *prima facie* case has not been met.

In this view of the case, the point that attracted considerable attention on the argument as to the rights of part owners can be briefly disposed of. The point has no application to the plans except the nine plans made by the Association before the incorporation of the Bureau. As regards the copyright in these plans, and in the rating material, owned by the members of the Association on the 1st of January, 1924, the copyright vested in these members when the Act came into force.

If any companies which were members on that date were not plaintiffs in the action because they are no longer members, there is no evidence to show that such companies are still in existence. Their right, in respect of the copyrights, if any, would be a bare legal right because, by

the terms of the constitution, they released all their rights and claims in the common property on ceasing to be members.

As to the personal chattels, the rating material itself and the plans, they abandoned possession of them on ceasing to be members and from this abandonment of possession, and the terms of the constitution which embodied their contract with the continuing members, it resulted, I think, that they never acquired either possession or right to possession in any of the personal chattels that became part of the common property of the members of the Association after their withdrawal.

As to the copyrights, the agreement embodied in the constitution was executed by them before the copyrights came into existence and I assume, therefore, that even after withdrawal they retained a bare legal title to some interest in the copyrights but I do not think that applies to personal chattels, even such personal chattels as the infringing copies. A company ceasing to be a member could, I think, thereafter have no joint or several right to possession in any of the common property and, therefore, would not be a proper party to an action in trover or detinue in respect of such property. Further, I cannot accept the proposition that one joint owner, or owner in common, of personal chattels is not entitled to maintain trover or detinue against a mere wrongdoer.

It is not, of course, disputed that the plaintiffs are entitled to protect their rights by suing for an injunction and for damages. (*Lauri* v. *Renad* (1); *Cescinsky* v. *Routledge* (2). As to their rights in respect of the infringing copies, attention may be called to *Dent* v. *Turpin* (3) in which it was held that one of several companies of a name used as a trade mark may, on infringement, sue alone for an injunction or delivery up of articles bearing the pirated trade mark, or for an account of the profits made by the infringers, and for payment of such part of the profits as the plaintiff may be entitled to.

There is a further point as regards the nine plans produced by the Association. All these plans were under the control of the plan committee. The reasonable inference

(1) [1892] 3 Ch. 402. (2) [1916] 2 K.B. 325.
(3) (1861) 2 J. & H. 139.

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

from the facts appears to be that the plan committee treated them as in the same category as plans produced by the Bureau,—the property of the Bureau to be lent to the agents of members and to be returned on the retirement of a member. They bear the legend above mentioned. I am disposed to think it to be a legitimate inference that these plans, with the consent of the plan committee representing the members of the Association, became the property of the Underwriters' Survey Bureau, Ltd., together with the incorporeal right of reproduction, and that when the Act of 1921 came into force the Bureau was invested with the copyright in these plans.

There remains the question of the Statute of Limitations. The point which has concerned me most as to this feature of the appeal is whether, in view of the fact that the rights the respondents seek to enforce are the creature of the statute, you can go beyond the statute for the purpose of ascertaining the statutory limitation.

I have come to the conclusion, however, that the principle applied in *Bulli Coal Mining Co.* v. *Osborne* (1) cannot be limited to underground trespasses, that it covers this case and that there was ample evidence in support of the conclusion of the learned trial judge that there had been fraudulent concealment within the meaning of the rule; with the consequence that the limitation period began to run only on the discovery of the fraud, or at the time when, with reasonable diligence, it would have been discovered.

I think the conclusion of the learned trial judge negativing the existence in fact of a criminal conspiracy is right and I think it unnecessary to discuss the subject further except to say this: If the plaintiffs in an action for the infringement of copyright are obliged, for the purpose of establishing the existence of, and their title to, the copyright to rely upon an agreement, and that agreement constitutes a criminal conspiracy, and their title rests upon such agreement and upon acts which are criminal acts by reason of their connection with such an agreement, then I have on general principles great difficulty in understanding how such an action could succeed.

(1) [1899] A.C. 351.

In what I have said, I have not adverted to some points raised by Mr. Tilley and Mr. Biggar which should be noticed. The first is the contention that the authorship of the work cannot in the case either of the plans or of the rating materials be ascertained. It is clear from section 20 (3) of the Act that the statute does not contemplate disclosure of authorship as a necessary condition of success in an action for infringement.

Then in the case of unpublished works (where the proprietor is shewn to have acquired a common law right prior to the statute of 1921 by evidence establishing facts requiring an inference that the work was done for the plaintiff and that the intention of all parties concerned in the production of the work was that the common law right should vest in him) the statute plainly contemplates the protection of that right; and the only possible protection is the recognition of the substituted copyright given by the statute. It appears to me to be merely a matter of evidence: the ownership of the common law right must rest upon established facts and these facts can be proved by inference as well as by direct evidence.

As to the duration of the copyright when that comes in question, if the owner of it cannot identify the author, the duration of it must be restricted to the period of fifty years from the date when the copyright or common law right, as the case may be, came into existence.

As to the point of *res judicata,* I can perceive no reason for disagreeing with the decision of the Court of Appeal in *Ash* v. *Hutchison* (1) which, it is quite freely conceded, is conclusive if rightly decided.

There is a further point, in respect of the presumption under section 20 (3). Mr. Mann argued that the name of the Association on the rating material should be regarded as the name of the publisher. I am afraid the considerations already explained are conclusive against him on this point. Publishers in the copyright sense they could not be because the respondents' case in effect involves the proposition that the material was in that sense unpublished. In any other sense the word would seem to imply proprietorship.

In the result, the appeal is allowed in respect of the rating material brought into existence after the 1st of

(1) [1936] 1 Ch. 489.

1940

MASSIE & RENWICK, LIMITED v. UNDERWRITERS' SURVEY BUREAU LTD. ET AL.

Duff C.J.

January, 1924, and in other respects dismissed. The appellants should have two-fifths of the costs of the appeal. The respondents should have the general costs of the action and the appellants the costs exclusively attributable to the issue on which they have succeeded.

Appeal allowed in part and in other respects dismissed, appellant to have two-fifths of costs of appeal.

Solicitors for the appellant: *Cassels, Brock & Kelley.*

Solicitors for the respondents: *Mann, Lafleur & Brown.*

1939

* May 29.
* Dec. 9.

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

QUEBEC CENTRAL RAILWAY COMPANY (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Railway subsidies—Construction of a branch line—Time for completion "to be essential and of the essence of the agreement"—Claims for subsidies for portion of line constructed at the date fixed for completion—Claim for services (transportation for mails over portion of line receiving subsidies) pursuant to statute—The Railway Subsidies Act, 2 Geo. V, c. 48, ss. 8 and 11.

The respondent was incorporated by an Act of the legislature of Quebec with powers to construct a railway in that province. Some time prior to 1912, the respondent had begun the construction of a branch line from a point on its main line of railway for a distance of about 175 miles. By the *Railway Subsidies Act,* (1912) 2 Geo. V, c. 48, the Governor in Council was authorized to grant a subsidy to the respondent for an extension of this branch line "not exceeding 50 miles" in length, a distance of 40·34 miles in length having at that time been already constructed. In addition, the respondent and the Minister of Railways for Canada entered into two supplemental agreements in writing which provided for the construction of the railway extension, for payment of this subsidy in the manner and time therein set forth and in accordance with section 11 of the Act, for the completion of the whole extension by August 1, 1916, declaring time "to be essential and of the essence of the agreement" and providing that "in default of completion thereof within such time the company shall forfeit absolutely all right and title, claims and demands, to any and every part of the subsidy or subsidies payable under this agreement whether for instalments thereof at the

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

time of such default earned and payable by reason of the completion of a portion of the line, or otherwise howsoever." The respondent received $43,161.06 as payment on account of subsidy for the completion of ten miles of the road in the spring of 1915; and on August 1, 1916, 24·17 miles only of the line, in all, had been built, no further mileage ever having been constructed. The respondent, by its petition of right, claimed payment of the subsidy upon the line of railway so far completed, less the amount received on account; and it also claimed payment for services rendered in accordance with section 8 of the Act which provides that every company operating a railway, or portion of a railway, subsidized under the Act "shall each year furnish to the Government of Canada transportation for * * * mail * * * over the portion of the lines in respect of which it has received such subsidy and, whenever required shall furnish mail cars properly equipped for such mail service" and that in or towards payment for such charges the Government of Canada "shall be credited by the company with a sum equal to three per cent per annum on the amount of the subsidy received by the company under the Act." The Exchequer Court of Canada *held* that the respondent was not entitled to recover any subsidy whatever; and it also *held* that with regard to the payment for services rendered in accordance with section 8 of the Act, the continuous extensions of the respondent's branch line, upon which subsidies have been paid, must be treated as a single line of railway and as if constructed under one subsidy contract; and it *held* further that the annual credits of interest upon subsidy as provided for in the Act were not cumulative.

Held, affirming the judgment of the Exchequer Court of Canada in this respect, that all rights in respect of subsidies accrued or accruing were subject to a radical condition that, unless the work was completed on the prescribed date, they would be forfeited if they had not already been liquidated in money, and therefore the respondent is not entitled to recover the amount of subsidies claimed by its petition of right.

Per The Chief Justice:—The view upon which the Governor in Council acted apparently was that the statutory authority to pay came to an end on the prescribed date if the work had not then been completed; clause 5 of the subsidy contract which declares the effect of failure to complete the whole line by the first of August, 1916, was intended to give effect to that view of the statute. That condition was not overridden by the supplemental agreement: when the *Subsidy Act* is considered as a whole the conclusion must be that clause 5 had not the effect of defeating the intention of the statute. The enactment touching the date of completion cannot be regarded as directory merely and the Governor in Council did not exceed the discretion necessarily vested in him respecting the subsidiary terms of the contract in exacting conditions intended to secure the due and timely completion of the lines subsidized.

Held, also, varying the judgment of the Exchequer Court of Canada, that, for the purpose of construing section 8 of the Act, each section of the line was a separate "railway or portion of railway subsidized under the Act"; and, therefore, the credit of three per cent per annum on the amount of the subsidy received could only

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

be applied towards the payment of charges for services rendered upon the section of railway in respect of which the subsidy was granted and paid.

Held further, affirming the judgment of the Exchequer Court of Canada, that the annual credits of interest upon subsidy as provided for in the Act were not cumulative.

Judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 82) varied.

APPEAL and CROSS-APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the respondent was not entitled to recover subsidies from the Crown, but granting payment for services as to carriage of mails in accordance with provisions of the *Railway Subsidies Act*, 2 Geo. V, c. 48.

Aimé Geoffrion K.C. and *F. P. Varcoe K.C.* for the appellant.

W. N. Tilley K.C. and *D. I. McNeill* for the respondent.

THE CHIEF JUSTICE—The decision of this appeal is governed principally by section 11 of the *Subsidy Act* of 1912 (2 Geo. V, ch. 48) and of the supplementary contract of the 18th of January, 1915. The language of the statutory provision and of the contract is, of course, of cardinal importance and I reproduce them textually:

11. Whenever a contract has been duly entered into with a company for the construction of any line of railway hereby subsidized, the Minister of Railways and Canals, at the request of the Company, and upon the report of the chief engineer of the Department of Railways and Canals and his certificate that he has made careful examination of the surveys, plans and profile of the whole line so contracted for, and has duly considered the physical characteristics of the country to be traversed and the means of transport available for construction, naming the reasonable and probable cost of such construction, may, with the authorization of the Governor in Council, enter into a supplementary agreement, fixing definitely the maximum amount of the subsidy to be paid, based upon the said certificate of the chief engineer and providing that the company shall be paid, as the minimum, the ordinary subsidy of $3,200 per mile, together with sixty per cent of the difference between the amount so fixed and the said $3,200 per mile, if any; and the balance, forty per cent, shall be paid only on completion of the whole work subsidized, and in so far as the actual cost, as finally determined by the Governor in Council upon the recommendation of the Minister of Railways and Canals, and upon the report and certificate of the said chief engineer, entitles the company thereto: Provided always—

(*a*) that the estimated cost, as certified, is not less on the average than $18,000 per mile for the whole mileage subsidized;

(1) [1938] Ex. C.R. 82.

(*b*) that no payment shall be made except upon a certificate of the chief engineer that the work done is up to the standard specified in the company's contract;

(*c*) that in no case shall the subsidy exceed the sum of $6,400 per mile.

* * *

Supplemental agreement made this eighteenth day of January, one thousand nine hundred and fifteen.

Between His Majesty the King, represented herein by the Minister of Railways and Canals of Canada (referred to herein as the "Minister") acting under the authority of an Order in Council dated the fifth day of January, A.D. 1915, of the first part, and Quebec Central Railway Company, hereinafter called the "Company," of the Second Part.

Whereas under and by virtue of *The Railway Subsidies Act,* 1912, chapter 48, a subsidy contract was duly entered into between His Majesty the King and the Quebec Central Railway Company for the construction of a line of railway mentioned and set forth in paragraph 27 of the second section of the said Act, namely:—

"27. To the Quebec Central Railway Company, for the following lines of railway:

(*a*) * * *

(*b*) For an extension of its line of railway from a point (31·34 miles from St. George) in the parish of St. Sabine, county of Bellechasse, to a point in the township of Dionne, county of L'Islet; not exceeding 50 miles; not exceeding in all 51·34 miles.

as by reference to the said subsidy contract which is dated the seventeenth day of June, one thousand nine hundred and fourteen, and filed in the Department of Railways and Canals under the number 20825, will more fully appear.

And whereas by section 11 of the said Act it was enacted as follows:

(Here follows section 11 already quoted).

And whereas the Company having duly entered into the said subsidy contract, has requested that, in pursuance of the provisions of the said Act, 1912, chapter 48, it be permitted to enter into such supplementary contract or agreement fixing the maximum and the minimum amount of the subsidy payable under the said subsidy contract.

And whereas the Chief Engineer of the Government Railways has duly furnished his certificate as required of him by the said Act in that behalf, making the sum of $26,200 as the probable and reasonable cost of the construction per mile of the line of railway mentioned.

It is therefore covenanted and agreed by and between His Majesty the King (represented as aforesaid, and under and by virtue of an Order in Council dated the fifth day of January, 1915, and pursuant to the said Act of 1912, chapter 48), for Himself and His Successors and the Company for itself and its successors and assigns, as follows, namely:—

1. That the maximum amount of subsidy to which the Company shall be entitled under the said subsidy contract is hereby fixed at $6,400 for the said 50 miles.

2. That the minimum amount of subsidy to which the Company shall be entitled under the said subsidy contract shall be $3,200 per mile for the said 50 miles, together with sixty per cent of the difference between $6,400 per mile so fixed and the said $3,200 per mile.

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

Duff C.J.

3. That the balance, forty per cent, shall be paid only on completion of the whole work for the said 50 miles, and in so far as the actual cost, as finally determined by the Governor in Council, entitled the Company thereto.

Provided always:

(*a*) That no payment shall be made to the Company under these presents and the Company shall not be entitled to any payment hereunder except in compliance with the provisions of the statutes in each case made and provided and upon the certificate of the Chief Engineer that the work done is up to the standard specified in the Company's contract no. 20825.

(*b*) That these presents shall be read with and taken to form part of the said subsidy contract no. 20825, and the line of railway therein mentioned shall be constructed, completed and operated by the Company and the subsidies authorized shall be paid by His Majesty subject to and in accordance with all the provisoes, covenants, agreements and conditions in such subsidy contract contained, except in so far as the said provisoes, covenants, agreements and conditions may be inconsistent with or varied by these presents.

In witness whereof, &c.

The first point to be noticed is that, by force of section 11 and of the contract executed under that section, the provisions of sections 2, 4 and 5 are in this case in great part superseded. It is evident that under section 11 it is on the footing of the report and certificate of the Chief Engineer

as to the physical characteristics of the country to be traversed and the means of transport available for construction and the reasonable and probable cost of construction,

sanctioned and acted upon by the Governor in Council, that the Company acquires the contractual right to the minimum subsidy of $3,200 a mile and 60% of the difference between that sum and the maximum fixed by the same authority on the basis of the Chief Engineer's certificate as to reasonable and probable cost. The provision of section 4 with regard to "actual, necessary and reasonable cost" does not come into operation in connection with this minimum subsidy.

Then, as to section 5, that section provides that the subsidies shall be payable out of the Consolidated Revenue Fund of Canada. There is nothing in section 11 or in the supplementary agreement which affects this provision. But the section proceeds to enact that the subsidies may be paid in three different ways which are enumerated in paragraphs (*a*), (*b*) and (*c*), at the option of the Governor in Council on the report of the Minister of Railways

and Canals, subject, however, to the important condition "unless otherwise expressly provided in this Act"; a condition which, obviously, has in view section 11 and a supplementary agreement under that section.

Now, when we look at these paragraphs we find that the first method of payment which the Governor in Council is authorized to adopt at his option is payment only upon completion of the work subsidized. That provision is incompatible with the nature of the contract authorized by section 11 under which the Company on the execution of the supplementary agreement "shall be paid" a minimum subsidy which (as section 11 and the contract obviously contemplate) is to be paid before the completion of the work subsidized.

Then, when we come to (*b*), the method of payment there designated which the Governor in Council may adopt at his option is:

> By instalments, on the completion of each ten-mile section of the railway, in the proportion which the cost of such completed section bears to that of the whole work undertaken.

Here it seems clear that the method of payment may well result in payment of the whole of the subsidy allocated in respect of the particular ten-mile section in question when that section is completed, a method, again, inconsistent with the provisions of section 11 which contemplates the deferment of the payment of 40% of the excess of the maximum subsidy over $3,200 a mile until the final completion of the railway, and generally the scale and conditions of payment are not consistent with the terms of s. 11.

Once more, subsection (*c*) imposes a condition which does not appear to be contemplated by section 11.

In truth, section 4 and these paragraphs of section 5 are enactments which would appear to contemplate a subsidy wholly calculated and conditioned as defined by section 2 and not one governed by the terms of section 11. By section 2, a subsidy is authorized (in respect of the "undermentioned railways") of $3,200 a mile for each mile of railway for railways not exceeding an average of more than $15,000 per mile to construct, that is to say, for the mileage subsidized; and a further subsidy towards construction of the same lines of railway which shall cost

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

Duff C.J.

more than $15,000 a mile on the average for the mileage subsidized; and that further subsidy is to amount to 50% on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, so that, however, the subsidy shall not exceed "in the whole $6,400 per mile."

It will be seen at once that this section contemplates a method differing radically from that contemplated by section 11 under which a minimum subsidy is fixed by the Governor in Council on the basis of the report and certificate of the Chief Engineer as to the nature of the country to be traversed and the facilities that will be available and the reasonable and probable cost of construction of the railway subsidized. The maximum and minimum subsidies are fixed in advance and the minimum subsidy is to be payable prior to the completion of the whole of the line.

The line with which we are concerned is defined in subsection 27 (*b*) of section 2 of the statute of 1912 which is in the following words:

> 27. To the Quebec Central Railway Company, for the following lines of railway:—
>
> (*a*) * * *
>
> (*b*) for an extension of its line of railway from a point (31·34 miles from St. George) in the parish of St. Sabine, county of Bellechasse, to a point in the township of Dionne, county of L'Islet; not exceeding 50 miles; not exceeding in all 51·34 miles.

By section 6 of the statute it is provided that the construction of the lines subsidized shall be commenced by the 1st of August, 1912, and completed within a reasonable length of time, not to exceed four years from the 1st of August, to be fixed by the Governor in Council

> and shall also be constructed according to descriptions, conditions and specifications approved by the Governor in Council on the report of the Minister of Railways and Canals, and specified in each case in a contract between the company and the said Minister, which contract the Minister, with the approval of the Governor in Council, is hereby empowered to make.

Under this section a contract was duly entered into between the respondents and the appellant on the 17th day of April, 1914, in respect of the work described in subsection 27 (*b*) pursuant to an Order in Council of the same date. By the Order in Council the time for completion was fixed at the 1st of August, 1916. The first

ten miles of the work in question were completed by the spring of 1915 and the sum of $43,161.06 was paid to the Company under the subsidy agreement on or about the 17th of May, 1915. A further 13·8 miles of the extension were completed some time prior to June, 1916; and before the 1st of August, 1916, additional construction had increased it to 24·17 miles.

The Crown relies upon the terms of this contract of 1914, which contains three rather important clauses, 5, 8 and 9. These clauses are as follows:

5. That the Company shall commence * * * the construction of the said line of railway within two years from the first day of August, 1912, and * * * shall complete the same on or before the ninth day of March, one thousand nine hundred and sixteen (1916) * * * time being declared to be material and of the essence of this agreement; and in default of completion thereof within such time the Company shall forfeit absolutely all right and title, claims and demands, to any and every part of the subsidy or subsidies payable under this agreement, whether for instalments thereof at the time of such default earned and payable by reason of the completion of a portion of the line, or otherwise howsoever.

8. That the Company shall in all respects comply with and abide by, and the said line of railway shall be subject to, all the provisions of the *Subsidy Act,* and of any other Acts of Parliament applicable thereto, as fully and to the same extent as if such provisions were set out at length herein.

9. That upon the performance and observance by the Company, to the satisfaction of the Governor in Council, of the foregoing clauses of this agreement, His Majesty will, in accordance with and subject to the provisions of sections two, four and five of the *Sudsidy Act,* pay to the Company so much of the subsidy or subsidies, hereinbefore set forth or referred to, as the Governor in Council having regard to the cost of the work performed shall consider the Company to be entitled to, in pursuance of the said Act.

* * *

As to the first of these clauses, it is contended on behalf of the respondents that it is inoperative because the date, the 9th of March, is not the date fixed by the Governor in Council for the completion of the subsidized work. I am unable to accept this contention because I think for the purpose of construing the contract we must look at the Order in Council (which, as above mentioned, fixed the date of completion as August 1st, 1916) and correct the obvious slip in the fifth paragraph; especially in view of the fact that after the execution of the contract all parties acted on the date formally fixed by the Governor in Council as the governing date.

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

Duff C.J.

It is also contended that the Governor in Council is not entitled to exact from the Company the terms and conditions of clause 5 because such terms and conditions are not contemplated by the statute. After the most careful consideration, I am unable to agree with this contention to which I shall refer later.

On behalf of the Crown it is contended, and the learned trial judge has proceeded upon this view, that notwithstanding the supplemental agreement, clause 5 of the agreement of 1914 remains in full force and that it is a complete answer to the Company's claim. Before examining the question, it will be convenient to notice the proceedings in relation to the payment of $43,000 odd for the section of ten miles completed in 1914. First of all, the following paragraph of the Order in Council authorizing the supplemental agreement should be read:

> That application has been made by the Company for admission to a supplementary subsidy agreement, in pursuance of the said Act, section 11.
>
> That under date the 22nd December, 1914, the Chief Engineer of the Department of Railways and Canals has furnished a certificate, as called for by the said section, showing the estimated reasonable and probable cost of such construction to be $1,312,430 or $26,200 per mile, for the total distance, 50 miles, of the said railway. He points out that the average cost in excess of $15,000 per mile is $11,200 which is more than sufficient to produce full "Further Subsidy" of $3,200 per mile in addition to the ordinary subsidy, making a total of $6,400 per mile, and that the maximum amount of subsidy payable, namely, the ordinary subsidy together with 60% of the "further subsidy," is $5,120 per mile, the balance, 50% of the "further subsidy" to be payable as the final cost may be actually determined.
>
> The Minister recommends that authority be given for entry into a Supplementary Subsidy Agreement with the Company, accordingly.

The terminology of the Chief Engineer's certificate is rather confused, but both section 11 of the *Subsidy Act* and the operative parts of the supplemental agreement make it clear that what is here described as the "maximum amount of subsidy payable" is the minimum subsidy.

Some days after the execution of the agreement of the 18th of January, the Company applied for the minimum subsidy in respect of the ten miles completed amounting, as mentioned in the Order in Council, to $5,120 a mile, an aggregate of $51,200. The inspecting engineer in reply gave particulars of a calculation based partly on paragraph (*b*) of section 5 of the *Subsidy Act* and partly on

the supplemental agreement, with the conclusion that the amount of subsidy earned was $43,161.60. On the 24th of February, Mr. Bowden, the Chief Engineer, gave a certificate stating that the work already done "is up to the standard specified in the Company's contract" (a certificate it should be noticed which conforms to the condition prescribed by section 3 (*a*) of the supplemental agreement) and, further, that "the progress made justifies the payment of" $43,161.60. On the 30th of March the Company wrote to the Chief Engineer pointing out that they were entitled to the payment of the minimum subsidy under the supplemental agreement; but the Governor in Council did not proceed beyond the recommendation of the Chief Engineer and by Order in Council of the 4th of May, 1914, authorized the payment of the sum mentioned.

In my view, the claim of the Company was at that time a just and well founded claim. The Company had constructed a part of the subsidized line. There was a certificate by the Chief Engineer that the work done was up to the standard specified in the subsidy contract of 1914 as required by section 3 (*a*) of the supplemental agreement.

The supplemental agreement had the effect, as I have observed, of superseding paragraph (*b*) of section 5 of the *Subsidy Act* in so far as concerns the minimum subsidy. Section 11 of that statute enacts explicitly that the "supplementary agreement" is to provide "that the Company shall be paid as the minimum" the minimum subsidy and, as I have observed, it is evident that no part of the minimum subsidy is to be deferred until the actual cost of the line has been ascertained at completion. The supplemental agreement itself (clause 2) declares that

> the minimum subsidy to which the said Company shall be entitled * * * shall be $3,200 per mile * * * together with 60% of

what had been ascertained as $3,200 per mile. The minimum subsidy under the statute and the contract (as appears from the certificate of the engineer, notwithstanding the confused terminology) for the ten miles completed in November, 1914, amounted to $51,200. If proceedings had been taken at that time to recover the difference

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY

Duff C.J.

between that sum and the sum paid, $43,000 odd, there could have been, I think, no answer to the Company's claim.

As regards the balance of the Company's claim, there are several distinctions: First, as to the Company's claim for the minimum subsidy in respect of the ten-mile section completed in 1914 (or the amount of it), clause 5 of the subsidy agreement of 1914 could have had no application. Second, the Crown admitted the Company was entitled to the proper proportion of the subsidy for the ten-mile section, the only dispute being as to the quantum. Third, the Company had a certificate of the Chief Engineer under clause 3 (*a*) of the supplemental agreement. As regards the balance of the claim, on the other hand, clause 5 is operative unless displaced by the supplemental agreement and no cause of action had arisen prior to the 1st of August, 1916, because the Engineer's certificate that the work (subsequent to 1914) is up to the standard of the subsidy agreement was not obtained until after that date. And finally, the dispute is not merely as to the amount but as to the right of the Company to any part of the statutory subsidy which the Crown alleges has lapsed.

I now turn to the critical question raised by the appeal: whether clause 5 of the subsidy agreement of 1914 remained operative in respect of the minimum subsidy after the execution of the supplemental agreement. It was not argued that the Company is entitled to relief against the clause as a penalty or forfeiture. In the view expressed above of the effect of section 11 and the supplemental agreement in respect of the "minimum subsidy" that might, perhaps, have been contended on the authority of *Steedman* v. *Drinkle* (1); but the circumstances which in that case gave the plaintiff a title to equitable relief have no parallel here (see the judgment of Farwell J. in *Mussen* v. *Van Diemen's Land Realty Co.* (2)) and I have not considered whether the Exchequer Court has power to grant such relief. However that may be, no such question arises.

Since we are only concerned with the minimum subsidy it is, perhaps, convenient to consider first the question of the effect of the supplemental agreement in relation

(1) [1916] 1 A.C. 275. (2) [1938] Ch. 253 at 266.

to its application to the minimum subsidy for the ten miles completed in November, 1914, in respect of which, as I have already said, the Company had a valid claim in 1915. If the clause applies to and excludes that claim, obviously, the Company must fail on the residue of its claim in respect of which, by reason of the absence of a certificate under clause 3 (*a*) of the supplemental agreement, no cause of action had been constituted on the 1st of August, 1916.

Clause 5 declares the effect of failure to complete the whole line by the 1st of August, 1916, is to extinguish any right to any part of a subsidy payable under the agreement whether for instalments thereof at the time of such default earned and payable by reason of the completion of a portion of the line or otherwise. "Instalments . . . earned and payable" include, I think, sums to which there is a valid claim enforceable by petition of right. The clause, therefore, embraces in its scope the Company's claim in respect of the ten miles mentioned.

The question to be examined is whether the application of the clause is excluded, first, by section 11 and, second, by section 3 (*b*) of the supplemental agreement.

I shall first consider the effect of the supplemental agreement. The precise point is whether clause 5 is "inconsistent with or varied by" the stipulations of the supplemental agreement. The latter document recites section 11 which enacts, as we have seen, that the agreement under it is to provide "that the Company shall be paid" the minimum subsidy without qualification; nevertheless, it is made plain in the supplemental agreement that its foundation is the subsidy contract of April, 1914. The subsidy contract is recited and the recital proceeds

> the Company has requested that, in pursuance of the provisions of the said Act, 1912, chapter 48, it be permitted to enter into such supplementary contract or agreement fixing the maximum and the minimum amount of the subsidy payable under the said subsidy contract.

By clause 1 of the agreement it is stipulated that

> the maximum amount of subsidy to which the Company shall be entitled under the subsidy shall be $6,400 per mile.

By clause 2 it is agreed that

> the minimum amount of subsidy to which the Company shall be entitled under the subsidy contract

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

Duff C.J.

shall be $3,200 per mile and 60% of the excess of the maximum subsidy over that figure. By clause 3 (*b*) it is provided that

> * * * these presents shall be read with and taken to form part of the subsidy contract * * * and the subsidies authorized shall be paid subject to and in accordance with all the provisoes, covenants, agreements and conditions in such subsidy contract contained except in so far as (they) may be inconsistent with or varied by these presents.

The intention, as we have seen, of section 11 and the supplemental agreement is to fix the amount of the minimum subsidy payable before completion of the whole work, the right to which is in no way left to the discretion of the Crown and the provisions of clause 9 of the subsidy contract cannot, therefore, stand together with clause 2 of the later agreement. Clause 8 of the subsidy contract must be read in light of the fact that section 11 of the statute has become operative and, consequently, that the options given by section 5, subject to the condition "unless otherwise expressly provided in this Act," are largely nullified.

But clause 5 stands in a different category. It says nothing as to the conditions under which the subsidies may be earned during the progress of the work prior to the date fixed for completion. It does say that if the Company have earned and are entitled to be paid the minimum subsidy, that right will be extinguished if they are not paid before August 1st, 1916. In effect it declares that any rights acquired or in process of being constituted before and at that date come to an end if the line is not then completed.

The effect is that all rights in respect of subsidies accrued or accruing are subject to a radical condition that, unless the work is completed on the prescribed date, they shall be forfeited if they have not already been liquidated in money.

The view on which the Governor in Council acted apparently was that the statutory authority to pay came to an end on the prescribed date if the work had not then been completed; clause 5 of the subsidy contract is, I think, intended to give effect to this view of the statute.

After much hesitation I have come to the conclusion that this condition is not overridden by the supplemental agreement. When the *Subsidy Act* is considered as a

whole, I do not think clause 5 has the effect of defeating the intention of the statute. The enactment touching the date of completion cannot, I think, be regarded as directory merely and I think the Governor in Council does not exceed the discretion necessarily vested in him respecting the subsidiary terms of the contract authorized by section 6 in exacting conditions intended to secure the due and timely completion of the lines subsidized.

As to section 11, I do not think that section properly understood in its relation to the other enactments of the *Subsidy Act* precludes the Governor in Council from insisting upon such a condition even as applied to the minimum subsidy.

The learned trial judge seems to think that the documentary evidence discloses an intention on the part of the Company to agree that section 5 (*b*) remained in full operation after the execution of the supplemental agreement. I cannot agree with this. The Company insisted in January and February, 1915, upon their right to the full minimum subsidy as defined by that agreement and section 11. It was the Government which insisted on acting under section 5 against the demand of the Company and in contravention of the terms of the supplemental agreement.

The remaining questions arise under section 8 which is in the following words:

> 8. Every company receiving a subsidy under this Act, its successors and assigns, and any person or company controlling or operating the railway or portion of railway subsidized under this Act, shall each year furnish to the Government of Canada transportation for men, supplies, materials and mails over the portion of the lines in respect of which it has received such subsidy, and, whenever required, shall furnish mail cars properly equipped for such mail service; and such transportation and service shall be performed at such rates as are agreed upon between the Minister of the department of the Government for which such service is being performed and the company performing it, and, in case of disagreement, then at such rates as are approved by the Board of Railway Commissioners for Canada; and in or towards payment for such charges the Government of Canada shall be credited by the company with a sum equal to three per cent per annum on the amount of the subsidy received by the Company under this Act.

As to the first point raised, it seems to me to be clear that the credit of three per cent per annum on the amount of the subsidy received can only be applied towards the payment of charges for services rendered upon the section

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

Duff C.J.

of railway in respect of which the subsidy is granted and paid. I think, for the purpose of construing section 8, each of "the undermentioned lines of railway" enumerated by section 2 is a separate "railway or portion of railway subsidized under the Act."

As to the question whether the credits are cumulative, I find the point a difficult one but I think it is a reasonable construction of the statute to read "such charges" as referring back to "such transportation and service" which, again, refers back to the obligation by which the Company "shall each year furnish to the Government * * * transportation, etc." This seems to point to the conclusion that the enactment has in view a service performed in each one of a series of years and the charges for an annual service against which the three per cent credit is to be set off.

The last point, again, is not free from difficulty. As I have explained, by clause 5 of the subsidy contract the completion of the whole line is regarded as the consideration for every part of the subsidy; having regard, however, to the manner in which the ten-mile section was treated by the Chief Engineer and the Governor in Council, I am disposed to think that it may be taken, for the purposes of section 8, as a segregated unit.

The appeal should be dismissed and on the cross-appeal the judgment of the Exchequer Court varied in accordance with the views above expressed. The respondent Company should have the costs of the appeal and the cross-appeal.

The judgment of Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—I agree with the judgment of the President of the Exchequer Court and, generally speaking, his reasons therefor, in all respects save one. Section 8 of *The Railway Subsidies Act,* 2 Geo. V, chapter 48, provides:—

> 8. Every company receiving a subsidy under this Act, its successors and assigns, and any person or company controlling or operating the railway or portion of railway subsidized under this Act, shall each year furnish to the Government of Canada transportation for men, supplies, materials and mails over the portion of the lines in respect of which it has received such subsidy, and whenever required, shall furnish mail cars properly equipped for such mail service; and such transportation and

service shall be performed at such rates as are agreed upon between the Minister of the department of the Government for which such service is being performed and the company performing it, and, in case of disagreement, then at such rates as are approved by the Board of Railway Commissioners for Canada; and in or towards payment for such charges the Government of Canada shall be credited by the Company with a sum equal to three per cent per annum on the amount of the subsidy received by the company under this Act.

A similar provision is found in the other Subsidies Acts. The suppliant furnished to the Crown adequate transportation for mails at the rates in effect from time to time over the various sections of railway in connection with which subsidies have been paid. The contention of the Crown is that in computing the credit provided for by the last part of section 8 and similar sections, all the subsidized extensions of the suppliant's branch line are to be treated as a single line. The judgment appealed from gives effect to this contention but I am unable to agree that the proper construction of the statutory provisions leads to that conclusion.

Section 8 and each of the corresponding provisions appears in separate Acts relating to separate and distinct sections of the line, and each section of the line is dealt with in a separate contract. Each section of the line is a separate "portion of the lines in respect of which it has received such subsidy." I am not convinced that such a construction involves a cumbersome method of accounting, as the learned President seemed to suggest, but even if that were so, it would, in my opinion, be no valid reason for construing the statutory provisions in the manner adopted by the judgment *a quo*. Perhaps I should add that although on this one point I find myself in disagreement with that judgment, I am still satisfied that the annual credits are not cumulative.

In the result, therefore, the judgment should be varied by striking out paragraph 4 and substituting the following therefor:—

This Court doth further order and adjudge that in calculating the amount to be paid the suppliant each year for the carriage of mails over each extension of railway referred to in paragraphs 2, 3, 4 and 9 of the Petition of Right, each extension is to be taken separately for the purposes of such calculation, and His Majesty is entitled only to apply in or towards payment of the amount owing, an amount equal to one year's interest at three per cent. on the subsidy paid in respect of each such extension.

1939

THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

Kerwin J.

His Majesty fails on the appeal and it should be dismissed with costs. The cross-appeal succeeds to some extent but not with reference to the claim for subsidy. As it was His Majesty who first appealed, the railway company should be awarded its full costs of the cross-appeal. In this way it would be compensated to some extent for not securing any costs in the Exchequer Court.

CROCKET J.—I agree with the conclusion of the learned President of the Exchequer Court that under the express terms of the subsidy contract for the construction of the 50-mile extension of the respondent's line of railway from Ste. Sabine to a point in the Township of Dionne, in the County of L'Islet, it must be held that in default of completion of the whole work contracted for by the date fixed therefor, the railway company forfeited any claim or demand for any unpaid instalments of subsidy then earned in respect of the completion of any portion of the proposed extension. Time having been expressly declared to be material and of the essence of the contract, that is the unfortunate result. Though it may seem hard, in view of the fact that the respondent had actually completed 24·17 miles of the proposed extension up to the standard specified in the subsidy contract, as certified by the Government engineers, for which upon the basis of those certificates the suppliant would have been entitled to receive as the minimum subsidy $5,120 per mile or $123,750.40 on completion of the whole work, and on the construction of the first 10-mile section of which the Crown had actually paid $43,161.06 on account, that the Crown should, in the circumstances in which the work had to be abandoned, refuse to pay any part of the agreed subsidy on the last 14·17-mile section or of the 40% balance retained by it in respect of the construction of the first 10-mile section, and insist upon the application of the rigid rules of law to such a case, there seems to be no other alternative, so far as courts of law are concerned, than to give effect to the defence which the Crown has now put forward.

As to the effect of s. 8 of the *Subsidy Act* in relation to the right of the Crown to "apply in or towards payment for" the respondent's charges against it for the carriage of mails over the subsidized extensions a sum equal to

3% per annum on the amount of the subsidy received by the company, I think also that the learned President was right in holding that the credit of 3% upon subsidies received is only to be applied annually against the sum payable annually for the mail services, which the railway "shall each year furnish," and that the annual credit of interest upon subsidy was not intended to be cumulative as contended by the Crown. I concur, however, in the view of my Lord the Chief Justice and my brother Kerwin that in computing the credit provided for by that section the several sections upon which subsidies had been paid must be treated separately and not as one single line, as held by the learned trial judge, and I agree that paragraph 4 of the formal judgment should be varied accordingly and the appeal dismissed with costs. I think, for the reasons stated by my brother Kerwin, that the respondent also should have its full costs on the cross-appeal.

Appeal dismissed, cross-appeal allowed in part, cost of appeal and cross-appeal to respondent.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Ewart, Scott, Kelley, Scott & Howard.*

SALMO INVESTMENTS LIMITED (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1939
* June 5.
* Dec. 22.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Jurisdiction of Exchequer Court—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c) (as it stood in 1934)—"Public work"—Claim against Dominion Government for damage by fire through alleged negligence of persons employed on project organized and executed by Dominion Government, for construction, etc., on provincial highway, under The Relief Act, 1933 (Dom., 23-24 Geo. V, c. 18) and agreement (under authority of that Act) between Dominion and Province—Whether persons guilty of alleged negligence were "officers or servants of the Crown acting within the scope of their duties or employment" upon a "public work" within said s. 19 (c).

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1939

SALMO INVESTMENTS LTD. v. THE KING.

The Government of Canada, under authority of *The Relief Act, 1933* (Dom., 23-24 Geo. V, c. 18), entered into an agreement, dated August 21, 1933, with the Government of the Province of British Columbia, by which the Dominion agreed to assume responsibility for the care of all "physically fit homeless men" and for that purpose to organize and execute relief projects. In consequence of an agreement and request by the Province under said agreement of August 21, 1933, the Dominion instituted the project now in question, which consisted, by arrangement with the Province, of carrying out certain improvements, such as grading, widening and straightening, to a certain provincially-owned highway. The arrangements provided that the Provincial authorities would indicate the nature of the work to be done, such as the line of any re-routing, the extent of widening, etc., but the actual work would be carried out by the men on the strength of the project. All personnel connected with the project were so connected either as labourers or in an administrative or supervisory capacity under the authority of and conditions set out in certain Dominion Orders in Council, which provided, *inter alia,* for recruiting and organizing labour, and for transportation, accommodation, subsistence, care, equipment and allowance for the men employed, and included a provision empowering the Minister of National Defence, through the officers of his department, "to select and employ" "administrative and supervisory personnel." Appellant claimed against the Dominion Government for damage to appellant's property by fire, which damage, it was assumed for the purpose of certain questions of law raised, was sustained from a fire which originated from slash burning operations carried on by the project, the slash burning being done under provincial fire permit issued to the member of the project personnel then in charge of the work and the fire escaping through the negligence of such personnel in failing effectively to observe the directions as to patrol laid down by the permit.

Held: The persons employed on the project were "officers or servants of the Crown acting within the scope of their duties or employment" upon a "public work," within the meaning of s. 19 (*c*) of the *Exchequer Court Act,* R.S.C., 1927, c. 34, as it stood at the relevant time (1934). (Judgment of Maclean J., [1939] Ex. C.R. 228, holding that the project was not a "public work" within the meaning of said s. 19 (*c*), reversed).

The phrase "public work" ("chantier public" in the French version) as used in said s. 19 (*c*) discussed, with references to statutory definitions of the phrase, the history of the section, and *The King* v. *Dubois,* [1935] S.C.R. 378, and other cases.

For a work to be a "public work" within said s. 19 (*c*), it is not necessary that the work or its site be property of the Crown in the right of Canada. It is sufficient to bring the work now in question within the designation if (in the words of the definition in the *Expropriation Act,* to which reference should be had in ascertaining the classes of things contemplated by "public work" in said s. 19 (*c*)) it was a work for the "construction, repairing, extending, enlarging or improving" of which public moneys had been "voted and appropriated by Parliament," and if at the same time such public moneys were not appropriated "as a subsidy only." Sec. 9 of *The Relief Act, 1933* (enacting that "any obligation or

liability incurred or created under the authority of this Act * * * may be paid and discharged out of the Consolidated Revenue Fund") is a sufficient voting and appropriation within the sense of this condition, and the moneys voted to defray the cost of the work in question were not "appropriated as a subsidy only."

It was a fair inference from the agreement, the Orders in Council and the agreed statement of facts that the particular area upon which the employees of the Defence Department were engaged was sufficiently defined by the arrangement between the representatives of the Dominion Government and the representatives of the Provincial Government to bring it within the conditions of the decision in *The King* v. *Dubois, supra.*

APPEAL by the suppliant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the suppliant's petition of right in which it claimed $24,692.85 for damage to its property by fire caused, it was alleged, by negligence of officers and servants of the Crown (in the Right of the Dominion of Canada) employed on a certain relief project, consisting of highway construction in improving and enlarging the provincially-owned Nelson-Spokane highway between Salmo, British Columbia, and the United States boundary, organized and executed under the authority of *The Relief Act, 1933* (Dom., 23-24 Geo. V, c. 18) and an agreement (made under the authority of that Act) between the Government of the Dominion of Canada and the Government of the Province of British Columbia.

Under an order made in the Exchequer Court, points of law raised by the pleadings were argued before Maclean J. For the purpose of the argument a statement of facts was agreed to on behalf of the parties. After hearing argument on said points of law, Maclean J. (1) held that the project in question was not a "public work" within the meaning of s. 19 (*c*) of the *Exchequer Court Act,* R.S.C., 1927, c. 34, as it stood at the relevant time (1934), and dismissed the petition of right for want of jurisdiction.

The material facts of the case and the questions of law are sufficiently stated in the reasons for judgment now reported. The appeal to this Court was allowed and the judgment of the Exchequer Court set aside; it was directed that judgment be given declaring that the parts of the Nelson and Spokane highway affected by the improvements known as project No. 65 constituted a public work

(1) [1939] Ex. C.R. 228; [1939] 4 D.L.R. 215.

1939

SALMO INVESTMENTS LTD. v. THE KING.

within the meaning of s. 19 (*c*) of the *Exchequer Court Act* as it stood before the amendment of 1938, and that the "personnel" engaged "in the slash burning operations" carried on by project No. 65 as stated in par. 5 of the agreed statement of facts were, when so engaged, "officers or servants of the Crown * * * acting within the scope of their duties or employment upon a public work" within the meaning of the said s. 19 (*c*); appellant to have its costs throughout.

E. F. Newcombe K.C. for the appellant.

F. P. Varcoe K.C. for the respondent.

The judgment of the Chief Justice and Davis, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE—In order to understand the questions arising on this appeal it is necessary that the following facts should be stated:

A statute, known as *The Relief Act, 1933,* was enacted in that year by the Parliament of Canada and it provided, *inter alia,* that the Governor in Council may

> 2. (*a*) Upon such terms and conditions as may be agreed upon,—enter into agreements with any of the provinces respecting relief measures therein;

and made provision also for

> special relief, works and undertakings in the National Parks of Canada and elsewhere.

By section 9, it was enacted that

> any obligation or liability incurred or created under the authority of this Act * * * may be paid and discharged out of the Consolidated Revenue Fund * * *

On the 21st of August, 1933, the Government of Canada, represented by the Minister of Labour, entered into an agreement with the Government of the Province of British Columbia, reciting the enactment of section 2 (*a*) just quoted as well as section 9 and stipulating *inter alia:*

> 2. The Dominion will assume responsibility for the care of all "physically fit homeless men," and will for that purpose organize and execute relief projects consisting of works for the general advantage of Canada which otherwise would not have been undertaken at this time. The conditions under which these relief projects will be carried out are the following:

(1) Shelter, clothing and food will be provided in kind and an allowance not exceeding twenty cents per diem for each day worked will be issued in cash.

(2) Eight hours per day will be worked; Sundays and Statutory Holidays will be observed, and Saturday afternoons may be used for recreation.

(3) Persons leaving voluntarily except for the purpose of accepting other employment offered or for the reason that they no longer require relief and those discharged for cause will thereafter be ineligible for reinstatement.

(4) Free transportation will be given from place of engagement and return thereto on discharge except for misconduct.

(5) No military discipline or training will be instituted; the status of the personnel will remain civilian in all respects.

* * *

4. The Dominion may initiate such works for the general advantage of Canada as may be decided upon by the Dominion, and the Province may propose other works of a similar character for the purpose of providing occupation for physically fit homeless men.

In the agreed statement of facts it is said:

2. The Province of British Columbia upon the recommendation of the Chief Engineer of the Department of Public Works of that province agreed and requested that the Dominion should initiate work upon the Nelson-Ymir-Salmo-Nelway Road and in consequence of such agreement and request the Dominion instituted a project known as No. 65, the project mentioned in paragraphs 6 *et seq.* of the Petition of Right.

3. The project in question consisted, by arrangement with the Province of British Columbia, of carrying out certain improvements, such as grading, widening and straightening, to the provincially-owned Nelson-Spokane highway; the arrangements provide that the provincial authorities would indicate the nature of the work to be done such as the line which any re-routing of the road would take, the extent to which the same would be widened, etc., but the actual work would be carried out by the men on the strength of the project.

4. All personnel connected with project 65 were so connected either as labourers or in an administrative or supervisory capacity under the authority of and conditions set out in Orders in Council P.C. 2248 of 8th October, 1932, P.C. 2543 of 19th November, 1932, and P.C. 422 of 20th March, 1933, which Orders in Council respectively provide, *inter alia,* as follows:—

(P.C. 2248). "3. The Minister of National Defence to recruit and organize the requisite labour from those in receipt of relief from federal, provincial or municipal sources and to provide for transportation, accommodation, subsistence and care thereof. Each individual so employed to be issued with an allowance for each day of employment at a rate not exceeding twenty cents, this allowance to be issuable under such conditions as are from time to time determined by the said Minister.

4. The Department of National Defence to make available from its surplus stock of clothing, equipment and tools such items as are required and available."

1939

SALMO INVESTMENTS LTD. v. THE KING.

Duff C.J.

(P.C. 2543). "The Ministers further recommend that in this and the other works already authorized by the aforesaid Orders in Council of the 8th October, 1932 (P.C. 2248) there be paid by way of relief allowances in cash and kind to such administrative and supervisory personnel as in the opinion of the Minister of National Defence are required in connection with the said works the following:

Foremen	$60 00	per month with board and lodging.
Gang Bosses or sub-foremen	40 00	
Cooks	50 00	
Storemen	30 00	
Clerks or Timekeepers	20 00	

and that the Minister of National Defence, through the officers of his Department, be empowered to select and employ the personnel in question pursuant to such conditions as he shall prescribe."

to which were added, by P.C. 422, clauses with professional qualifications—

". . . presently unemployed and in need of relief . . . . . with the allowance as set out . . . . .:—

Engineer	$100 00	per month with board and lodging.
Assistant Engineer	80 00	
Medical Officer	70 00	
Assistant Medical Officer	60 00	
Accountant	50 00	

The conditions set out in these Orders in Council; these conditions generally were kept effective from time to time by various Orders in Council up to and including P.C. 1506 of 14th July, 1934.

5. For the purpose of this argument and such purpose alone it is to be assumed that the damage claimed was sustained from a fire which originated from slash burning operations carried on by project No. 65, the slash burning being done under provincial fire permit issued to the member of the project personnel then in charge of the work and the fire escaping through the negligence of such personnel in failing effectively to observe the directions as to patrol laid down by the permit.

It ought to be observed before proceeding further that this highway (the Nelson-Spokane Highway) with which project No. 65 was concerned, had not been declared by the Parliament of Canada to be a work for the general advantage of Canada, but both Governments proceeded upon the footing that it was such a work within the intendment of the agreement between them; and it seems quite clear that the phrase "works for the general advantage of Canada" in the agreement does not solely contemplate works which have been declared to be for the general advantage of Canada, by the Parliament of Canada, for the purpose of giving the Dominion Parliament legislative control over them under sections 91 and 92 of the *British North America Act.*

Two questions arise; first, whether the persons "employed" (to adopt the term used by the Order in Council) on project No. 65, were "officers or servants of the Crown acting within the scope of their duties or employment" as such within the meaning of section 19 (*c*) of the *Exchequer Court Act* (R.S.C., 1927, cap. 34) as it stood prior to the amendment of 1938.

As to the first question, although the ultimate purpose of the statute, the Orders in Council and the agreement and of the whole plan was the relief of distress, it seems to me that the fair inference from the facts is that the relationship between the personnel and the Government was one of contract and that the contract was one of employment. The men employed there were there by common consent of the Crown and themselves and the benefits they received must, I think, from the legal point of view, be regarded as remuneration for their labour.

As regards the administrative and supervisory personnel, the Order in Council of the 19th of November, 1932, provides that the Minister of National Defence, through the officers of his Department, is empowered to select and employ such personnel pursuant to such conditions as he shall prescribe. It would be difficult to contend that these persons so selected and employed or the men under them were independent contractors. I think they fall within the classes of persons for whose negligence the Crown is made responsible by the enactment in question.

As to the second question, the meaning of the phrase "public work" was very fully considered in *The King* v. *Dubois* (1) and *The King* v. *Moscovitz* (2). Judgments were delivered in those cases which were the judgments of the majority of this Court. It was pointed out in the judgment in the *Dubois* case (1) that the French version of the statute could not be entirely ignored and that the two versions, English and French, must be read together for determining the scope and application of the subsection, and attention was called to a significant change in the phraseology of the French version which was introduced into the *Exchequer Court Act* by the revision of 1927. It is, perhaps, convenient to quote paragraphs (*b*) and (*c*) of section 19 as they appear in the Revised

(1) [1935] S.C.R. 378. (2) [1935] S.C.R. 404.

1939

SALMO INVESTMENTS LTD. v. THE KING.

Duff C.J.

Statutes and as they stood when the events occurred out of which the present claim arises, that is to say, prior to the amendment of 1938. They are as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work;

and, in the French version:

19. La cour de l'Echiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

(*b*) Toute réclamation contre la Couronne pour dommages à des propriétés causés par l'exécution de travaux publics;

(*c*) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public;

In order to appreciate the nature of the change that took place in 1927, it is necessary to look at subsection (*c*) as enacted by the statute of 1917. It is in these words (in English):

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

and (in French):

(*c*) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi sur tout ouvrage public.

In 1927, it is seen, "chantier public" was substituted for "ouvrage public." In the judgments mentioned, it was laid down (and this was an essential element in the ratio of the decision in each case) that the phrases "public work" and "chantier public" connote physical things of defined area and ascertained locality and do not include public services, although, for the reasons there given, it is not essential (to bring any given case within the scope of subsection (*c*)) that the act of negligence should have

been committed during the presence on a public work of the negligent officer or servant. We said, at page 402:

> The phrase "pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public" is plainly inconsistent with any construction of the phrase "public work" which has the effect of extending its meaning in such a way as to include public services. The rule for the construction of the parent enactment (50-51 Vict., c. 16, s. 16 (*c*)), laid down in *Paul* v. *The King* (1), that the phrase "public work" includes physical things of defined area and ascertained locality and does not include public services, is plainly sanctioned and adopted by these words as the rule applicable to the construction of section 19 in the Revised Statutes of 1927.
>
> "Chantier," in this connection, implies defined area and locality and is incapable of application in such a way as to include public services, as such.

The observations at page 403 may also be referred to.

It was also laid down in the judgment in *The King* v. *Dubois* (2) that in ascertaining the classes of things contemplated by the term "public work" reference should be had to the definition of public work in the *Expropriation Act*. I do not feel any difficulty in holding that the provincially-owned highway, the Nelson-Spokane highway, with which project No. 65 was concerned, satisfies the description of "work" and "chantier" as employed in R.S.C., 1927, cap. 34, s. 19 (*c*). The real question is whether it constitutes a "public work" or a "chantier public" within the contemplation of that enactment.

It is not necessary, to bring the work within that category, that the work itself or the site of it should be the property of the Crown in the right of Canada. In *Mason's* case (3), which was considered and affirmed in *Dubois'* case (4), the work in question was an excavation in the bed of the sea of defined area and locality and the question of the ownership of the bed of the harbour was not considered. It was regarded as immaterial. And I think it is sufficient to bring the work with which we are now concerned within the designations "public work" and "chantier public" if, to quote the words of the *Expropriation Act* (R.S.C., 1927, cap. 64), it was a "work for the construction, repairing, extending, enlarging or improving of which public moneys" had been "voted and

(1) (1906) 38 Can. S.C.R. 126. (2) [1935] S.C.R. 378.
(3) *The King* v. *Mason*, [1933] S.C.R. 332.
(4) [1935] S.C.R. 378.

1939

SALMO INVESTMENTS LTD. v. THE KING.

Duff C.J.

appropriated by Parliament," and if at the same time such "public moneys" were not appropriated "as a subsidy only."

Now, it appears to me that section 9 of *The Relief Act, 1933,* is a sufficient voting and appropriation within the sense of this condition and I think this appropriation is not a "subsidy merely." Where you have a work with which the Dominion Government has nothing to do except to pay a subsidy and, of course, to take the necessary steps to see that the conditions of the subsidy are fulfilled,—where the connection of the Dominion with the work is thus limited, then you are within these words of exclusion.

Here the Dominion Government undertook by its officers and servants to construct or improve the work as the case might be; and the moneys voted to defray the cost were not, I think, "appropriated as a subsidy only" as these words of the *Expropriation Act* ought to be understood. I think it is a fair inference from the agreement, the Orders in Council and the statement of facts that the particular area upon which the employees of the Defence Department were engaged was sufficiently defined by the arrangement between the representatives of the Dominion Government and the representatives of the provincial government to bring it within the conditions of the decision in *The King* v. *Dubois* (1).

The appeal should be allowed with costs throughout.

CROCKET J.—This is another appeal from the Exchequer Court involving the much discussed problem of the liability of the Crown for injury to property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work under the relevant section of the *Exchequer Court Act,* as it read after the amendment of 1917, by which the words "on any public work" were removed from their position in the original section and, with the substitution of the preposition "upon" for "on," placed at the end of the section after the words "while acting within the scope of his duties or employment." The section remained as thus amended until Parliament in 1938

(1) [1935] S.C.R. 378.

finally, and, if I may say so, very sensibly, removed the troublesome words "upon any public work" entirely from the section, and thereby established the doctrine of *respondeat superior* as regards the Crown, and rendered it liable for the negligence of its servants in the course of their employment, in the same way as any other master would be liable for the negligence of his or its servants.

Although the petition of right, upon which the present problem arises, is dated January 31st, 1938, the damage to the suppliant's property claimed for occurred in July, 1934, so that we are again confronted, as the learned President of the Exchequer Court was confronted, with the same old problem as to what the words "upon any public work" really mean, and whether the suppliant's specific claim falls within the intendment of the section, as it stood in 1934.

The appeal comes before us from a judgment of the learned President of the Court, dismissing the petition of right for want of jurisdiction, as the result of a hearing before him of the point of law raised by the pleadings under Rule 149, that the case did not fall within the purview of the section already referred to, upon which the original exclusive jurisdiction of the Exchequer Court to hear and determine it depended.

The argument before His Lordship seems to have been based upon an agreed statement of facts, made, of course, solely for the purpose of the argument, and a series of 14 Orders in Council, purporting to have been passed under the provisions of the Dominion *Relief Act, 1933,* and which were produced before him with the agreed statement of facts. His Lordship set out in his judgment all the relevant facts. From this it appears that the damage claimed for was caused by the destruction by fire of a large area of standing timber owned by the suppliant in the District of Kootenay, B.C., as the result of slack burning along the Nelson-Spokane provincial highway in the execution of relief Project No. 65 for the improvement and enlargement of the highway, which the Dominion Government had, in an agreement with the Government of British Columbia, agreed to organize and execute as a relief project under the supervision of the Department of National Defence.

1939

SALMO INVESTMENTS LTD. v. THE KING.

Crocket J.

Paragraph 4 of the principal agreement provided that the Dominion might initiate such works for the general advantage of Canada as might be decided upon by the Dominion, and that the Province might propose other works of a similar character for the purpose of providing occupation for physically fit, homeless men. The agreement also provided that the Province should provide all necessary rights of way or property, whether owned by the Province or private individuals, which might be required for the proper execution of such projects. Also, that the Province would make available for the use of the Dominion without charge during the period of the agreement all relief camps established by the Province, camp equipment, tools, stores and supplies thereat or held in reserve therefor, such machinery as might be necessary and available for the proper execution of such projects and the apparatus for such machinery, and the assistance of such members of the permanent engineering staff of the Province as could be made available from time to time as required. It was also arranged that the provincial authorities would indicate the nature of the work to be done, such as the line which any re-routing of the highway would take, the extent to which the same should be widened, but that the actual work would be carried out by the men on the strength of the project. The requisite labour was to be recruited from those in receipt of relief from federal, provincial or municipal sources under terms and conditions set out in the Orders in Council. The administrative and supervisory personnel was to be selected by the Minister of National Defence through the officers of his Department, pursuant to such conditions as he should prescribe. The Dominion Government was to provide transportation, accommodation, subsistence and care for all men employed on the work, including an allowance for each day of employment at a rate not exceeding 20 cents,—this necessarily, of course, out of an appropriation voted by Parliament for unemployment.

Upon these admitted and undisputed facts the learned President held that the project in question was not a public work within the meaning of that enactment. "The highway," His Lordship said (1),

(1) [1939] Ex. C.R. at 234.

was owned by the Province, the Project was proposed by the Province and was carried out by the Dominion at the request, and with the agreement, of the Province. In essence it was financial assistance rendered the Province in carrying out necessary relief measures. That it took the form of highway improvement, and was carried out by and under the direction of the Dominion, does not alter the substance of the arrangement, and its real purpose. It may have been in the national interest that the Dominion should support and supplement the relief measures of the Province but that would not, I think, make the Project a "public work" in the sense of the statute. It was really a Provincial work.

His Lordship in his reasons for judgment seems to have based his conclusion upon the judgment of this Court in *The King* v. *Dubois* (1). It is true, as he points out, that in the reasons for that judgment, this Court distinctly laid it down, as a result of the transfer to the Exchequer Court of the jurisdiction conferred upon the Official Arbitrators by the *Official Arbitrators Act* of 1870 and the decisions of the Exchequer Court and of this Court upon the meaning of the term "public work," that the expression must be read and construed by reference to its definition, as given in the interpretation sections of the *Official Arbitrators Act*, ch. 40, R.S.C. (1886), and the *Expropriation Act*, ch. 39, R.S.C. (1886), and that the amendment of 1917 above referred to effected no change in its meaning. That case also reaffirmed the principle that "public work" denotes, not a mere service or undertaking, but some physical thing having a fixed situs and a defined area. It did not, however, lay it down or suggest that the amendment, made by Parliament in 1917, did not effect any change in the application of the entire section. To my mind the transposition of the words "upon any public work" did effect a very material change in its application. Previously it had been held by the Exchequer Court and by this Court in *Chamberlin* v. *The King* (2) and *Piggott* v. *The King* (3) that the words "on a public work" in the section, immediately following as they did the words "person or property," were descriptive of locality and that to make the Crown liable for injury to property under that section, such property must be situated on the work when injured. As Mignault, J., in his reasons in *Wolfe* v. *The King* (4) said, the amendment having been made in the year follow-

(1) [1935] S.C.R. 378.
(2) (1909) 42 Can. S.C.R. 350.
(3) (1916) 53 Can. S.C.R. 626.
(4) (1921) 63 Can. S.C.R. 141, at 152.

1939

SALMO INVESTMENTS LTD. v. THE KING.

Crocket J.

ing the decision in the *Piggott* case (1), it is not unreasonable to suppose that the intention was to bring such a claim within the ambit of the amended clause, and in *The King* v. *Schrobounst* (2), it was unanimously held by Anglin, C.J.C., and Duff, Mignault and Rinfret, JJ., and McGee, J. (*ad hoc*), that as the section then stood (since the amendment of 1917), it was no longer necessary, in order to create liability, that the person or property injured should be upon the public work at the time; that the words "upon any public work" qualify the employment, not the physical presence of the negligent officer or servant thereon; and that the driver of a motor truck (employed by a Government Department) carrying Government employees to a public work was so employed.

The learned Chief Justice in delivering the judgment of the Court in the *Dubois* case (3) discussed both the *Wolfe* (4) and the *Schrobounst* (2) judgments as well as that of this Court in *The King* v. *Mason* (5), and said nothing that to my mind detracts from the soundness or authority of any of them. Indeed, I think it clearly appears from what he said that, although the meaning of "public work" itself remained unaffected by the amendment of 1917, that amendment had materially enlarged the scope of the section by making, not the site of the public work itself, or the presence or position upon it of the person or property injured, but the employment of the officer or servant of the Crown in relation to it, the test of liability, so that if death or injury to the person or to property results from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, the Crown may be held to be liable, if such duties and employment are found to have been "upon any public work," that is to say, as I take it, directly connected with its construction, repairing, improvement, etc.

I think Mr. Newcombe has correctly summed up the conditions necessary to constitute a "public work," as laid down in the *Dubois* case (6), viz.: it must be a physical thing, not a mere service or undertaking; it must have a

(1) (1916) 53 Can. S.C.R. 626.
(2) [1925] S.C.R. 458.
(3) [1935] S.C.R. 378.
(4) (1921) 63 Can. S.C.R. 141.
(5) [1933] S.C.R. 332.
(6) [1935] S.C.R. 378.

fixed situs and a defined area; and it must come within the definition of "public work" as contained in the *Official Arbitrators Act* and the *Expropriation Act* of 1886.

This definition is as follows:

> The expression "public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharves, piers and works for improving the navigation of any water—lighthouses and beacons—the slides, dams, piers, booms and other works for facilitating the transmission of timber—the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, fortifications and other works of defence, and all other property which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public money is voted and appropriated by Parliament, and every work required for any such purpose; but not any work for which money is appropriated as a subsidy only.

This language, in my opinion, does not require that the physical thing, whatever it may be, should belong to the Dominion, though the first half of the paragraph ending with the words "and all other property which now belong to Canada" undoubtedly applies only to Dominion property. The definition, however, does not end there, but immediately goes on with the words

> and also the works and properties acquired, constructed, *extended, enlarged, repaired or improved at the expense of Canada, or for the* acquisition, *construction, repairing, extending, enlarging, or improving of which any public money is voted and appropriated by Parliament,* and every work required for any such purpose.

The last half of the paragraph seems to me plainly to comprehend works and properties other than those which the Dominion owns or may acquire, and to make, not the ownership of the work or property, but the expenditure of public money provided by Parliament the real criterion for determining whether a work is or is not "a public work." As pointed out in the reasons of the learned Chief Justice in the *Dubois* case (1), s. 1 of the *Official Arbitrators Act* of 1870, by which the Official Arbitrators were originally invested with jurisdiction in matters of this kind, provided that where there was a supposed claim against the Crown

> arising out of any death, or any injury to person or property on any railway, canal, or public work *under the control and management of the Government of Canada,*

(1) [1935] S.C.R. 378.

1939

SALMO INVESTMENTS LTD. v. THE KING.

Crocket J.

the claim might by the head of the Department concerned therewith be referred to the Official Arbitrators, who should have power to hear and make an award upon such claim. So that, under the provisions of the *Official Arbitrators Act* of 1870, from which s. 19 (*c*) of the *Exchequer Court Act* originated, it would appear that it was the control and management by the Government of Canada, rather than the ownership of the work or property, which determined the jurisdiction of the Official Arbitrators as well as the liability of the Crown.

I thought at first there might be some question as to whether the last clause of the definition reproduced from the *Official Arbitrators Act,* R.S.C. (1886), does not exclude the project now under consideration, but I have concluded that it has no other effect than to except from the operation of the words immediately preceding any work for which money is appropriated by Parliament "as a subsidy only" and that this clause has no application to a case of this kind, where the Government, purporting to act under the authority of an Act of Parliament respecting relief measures generally throughout the entire country, has, through one of its Departments, agreed to execute a particular work and to assume the whole responsibility therefor.

The crucial question, in my opinion, is, not whether the highway, which the Dominion undertook to enlarge, repair and improve, and, in case of the Province proposing any diversions thereof, to construct, was a highway which was owned by the Dominion or by the Province, but whether the project, which the Dominion undertook, not only to initiate, but to organize and execute in a defined area, was or was not a "public work" within the meaning of the above definition. I have reached the conclusion after anxious consideration that it was, as it was executed at the expense of Canada, so far as the expenditure of public money is concerned, and under the sole control and management of a Department of the Federal Government.

For these reasons I would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Newcombe & Company.*

Solicitor for the respondent: *W. S. Edwards.*

J. K. SMIT & SONS, INC. (PLAINTIFF)...APPELLANT; 1939

AND

RICHARD S. McCLINTOCK (DEFENDANT) ..... } RESPONDENT.

* May 22, 23
* Dec. 22.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Alleged infringement—Substance of the invention—Specification—Claims.

Appellant sued for a declaration that its machine for casting diamond core bits and its sale or use in Canada does not constitute an infringement of respondent's patent, which related to a method and mold for setting diamonds and was, according to the specification, "especially designed for setting diamond-cutters in tools and devices."

Respondent in his specification claimed that his method prevented the "floating" of the diamonds which, being lighter than the molten metal poured into the mold to form the tool, were apt to become dislodged (to "float"); that he prevented this by placing them in a pattern-holder, then placing it in the mold, and then utilizing air suction to retain the diamonds in their seats during the arranging of them and during the pouring of the molten metal into the mold. Appellant used a process of centrifugal casting, in which the problem of preventing the diamonds "floating" was not encountered, and which process in itself did not, nor did the machine used therein, infringe respondent's patent; but, prior to the casting operation, appellant temporarily anchored the diamonds in place to a die plate by a thin film of adhesive which, when the die plate (with the diamonds thus previously anchored to it) had been transferred to the mold, would, at the outset of the casting operation, immediately disappear under the heat of the molten metal; and, in applying this adhesive, appellant used a machine and process of suction, to assist in arranging the diamonds and to retain them in place during the spraying of the adhesive.

Held (reversing judgment of Maclean J., [1939] Ex. C.R. 121): Appellant should have the declaration as prayed.

It is not the province of the court to guess what is or what is not the essence of respondent's invention; that must be determined on examination of his language; and on construction of his specification, the primary thing at which he was aiming was to solve the problem of "floating" and he mastered that by using suction to retain the diamonds in place during the pouring of the molten metal into the mold; that was clearly indicated as an essential, if not the essential, part of the invention; and though he also used suction to keep the diamonds in place during their arranging, that was only after the diamond holder had been placed in the mold; and it cannot be said that the substance of respondent's invention was taken by appellant's process (which does not employ suction at all after the diamond holder has been placed in the mold or after the formation of the tool has begun by the introduction of the molten metal into the mold). *R.C.A. Photophone Ld.* v. *Gaumont British Picture Corpn. Ld. et al.*, 53

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1939

J. K. SMIT & SONS, INC. v. MCCLINTOCK.

R.P.C. 167, at 197, cited. Further, respondent at the time he applied for his patent could not have got a patent for the process which appellant employs in sticking the diamonds on a die plate by the adhesive and for that purpose making use of suction while arranging the diamonds and while applying the adhesive; in the state of the art, the employment of such process would have constituted no patentable advance. Such process of appellant could not be said to be the "equivalent" or operation in another form of respondent's process of pouring the metal and employing suction during it. Also, on consideration of those claims in respondent's specification alleged to be infringed, there was no description therein of a monopoly which clearly and plainly included a prohibition against anything the appellant does. (As to function and effect of claims in a specification, *Electric & Musical Industries Ld. et al.* v. *Lissen Ld. et al.*, 56 R.P.C. 23, at 39, cited).

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing its action which asked for a declaration that its machine for casting diamond core bits and its sale or use in Canada does not constitute an infringement of the defendant's letters patent no. 368,042, relating to a method and mold for setting diamonds. The judgment in the Exchequer Court declared that as between the parties to the action, claims 1 and 4 of the defendant's patent are infringed by the use or sale in Canada of the plaintiff's machine.

By the judgment now reported, the appeal to this Court was allowed; appellant to have judgment with the declaration as prayed, with costs throughout.

R. S. Smart K.C. and *M. B. Gordon* for the appellant.

E. G. Gowling and *J. C. Osborne* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This is an appeal from the judgment of the President of the Exchequer Court of the 25th of February, 1939 (1), in which it was held that a machine for the casting of diamond core bits described in exhibit 1 attached to the statement of claim, as sold or used in Canada, constituted an infringement of claims 1 and 4 of a Canadian patent of the respondent dated August 10th, 1937; and the action of the appellants was dismissed in which they claimed a declaration under the provisions of section 60 (2) that their machine or its sale or use in Canada would not constitute such infringement.

(1) [1939] Ex. C.R. 121; [1939] 2 D.L.R. 145.

1939

J. K. SMIT & SONS, INC. v. MCCLINTOCK.

Duff C.J.

The appellants began the construction of their machine early in the spring of 1937 before the issue of the respondent's patent and their design was to construct a machine in which diamond bits could be cast centrifugally. This is done by rotating the mold about a vertical axis at high speed so that the molten metal is disposed radially in the mold.

The respondent in his specification says:

> My present invention relates to an improved method and mold for setting diamonds which while applicable for use in a variety of industries, is especially designed for setting diamond-cutters in tools and devices, as for instance in rotary drill-bits for earth boring.

He proceeds to say that

> Heretofore the common practice for setting diamonds, as cutters in industrial tools, has centered around the comparatively difficult, tedious, and therefore extremely expensive method of first drilling depressions in the face of the tool and then setting the diamonds in the depressions and forming facets from the surrounding material by means of punches and mauls.

This method, he declares, is

> expensive and inefficient and necessitates the use of comparatively large and more expensive stones.

Then he refers to the method which proceeds by

> temporarily holding the diamonds in proper position in a mold, and then, through the application of heat and pressure upon a powdered metal confined within the limits of the mold, a cutting tool is produced.

This, he says, has the "obvious disadvantage * * * that the diamonds are not held firmly" in their place in the tool with the natural consequence that there is a high percentage of loss of diamonds. He adds that attempts have been made at "casting diamonds in a slug," but he says that, the specific gravity of diamonds being considerably less than that of the molten metal of which the bit is to be composed, extreme difficulty has been encountered in holding the diamonds in their proper places "during the process of pouring the molten metal." The dislodgement of the diamonds is known as "floating" and hitherto, he says, this has presented a problem which has defied solution. He then explains the process by which he carries out his invention in these words:

> I employ a pattern-holder for the diamonds in which they are initially seated, and after the pattern-holder has been located in the mold, I utilize a vacuum chamber in the mold and air-suction to retain the diamonds in their respective seats in the holder during the process of arranging the diamonds in the best chosen pattern and during the pouring

1939

J. K. SMIT & SONS, INC. v. MCCLINTOCK.

Duff C.J.

of the molten metal for the formation of the tool. In this manner the diamonds are retained in their proper positions against dislodgement during arranging period and against "floating" and they are set with accuracy and firmly retained against loss during subsequent use.

It will be noticed that the invention is specially designed for "setting diamond-cutters in tools and devices" and that the method resorted to is casting the diamonds in a slug which, hitherto, has proved inefficacious by reason of the dislodgement of the diamonds during the process of pouring the molten metal into the mold because the diamonds are lighter than the molten metal; and that this is overcome by placing the diamonds in a pattern-holder which is then placed in the mold and by then utilizing air suction to retain the diamonds in their seats during the process of arranging them, and during the formation of the tool by pouring the molten metal into the mold.

I turn now to the appellants' machine and process which are described in exhibit 1 of the statement of claim.

The process of centrifugal casting was well known in other fields. In that process, as employed by the appellants, the mold is rotated about a vertical axis at high speed, between four and five hundred revolutions a minute, and the molten metal, subjected to centrifugal force, is disposed radially. The die plate in which the diamonds are placed at the end of the mold has, of course, a vertical extension and as the metal during the casting operation is thrown with great force in a horizontal direction against the end of the mold, the problem of floating of the diamonds does not arise. But, it is necessary temporarily to anchor the stones in place to this die plate prior to the casting operation. This is done by the appellants by employing a thin film of adhesive which temporarily holds the diamonds on the perforated die plate while it is being transferred to the mold but which immediately disappears under the heat of the molten metal at the outset of the casting operation.

It is not suggested that in this casting operation the centrifugal machine itself or the centrifugal process constitutes any infringement of the respondent's patent.

The appellants, in applying the adhesive to the die plate for retaining the diamonds temporarily in place until the

casting operation proper begins, make use of a machine and a process the essential features of which are the employment of suction for the purpose of assisting in arranging the diamonds in a perforated die plate and for retaining them in place during the process of spraying the adhesive over the die plate and the diamonds and while it solidifies. This last step of the process is virtually instantaneous. The adhesive once set anchors the diamonds in the die plate but, as has already been said, it immediately disappears under the heat of the molten metal at the outset of the casting operation.

The learned President has held that in this process the appellants have taken the substance of the respondent's invention. He comes to this conclusion without reference to the claims in the respondent's patent, which he does not discuss, and without reference also to a contention much pressed during Mr. Gowling's able argument to which I shall come later.

Now, there is no suggestion, as I have said, that the respondent is entitled in any way to complain of the appellants' process of centrifugal casting, or of the machine that he utilizes in that process. By it, as already mentioned, the molten metal is thrown under the impulse of centrifugal force horizontally into the mold and against the die plate placed at the periphery of the circle through which the mold revolves in the process. The die plate, which holds the diamonds, having a vertical extension, it is necessary that the diamonds should be stuck in their places in order to preserve the pattern in which they have been arranged while the die plate is being placed in position at the outer end of the mold, and, as we have seen, the adhesive is used for that purpose, it is used as a convenient way of preventing the diamonds being shaken or dropping out of the holes in which they have been placed.

It is plain, therefore, that the difficulty which the patentee emphasizes,—the problem which he says had been encountered in all attempts to cast diamonds in a slug and which had baffled solution before his invention, the problem, namely, of preventing the diamonds "floating" because of their low specific gravity as compared with that of the molten metal, is a problem which never arises. It is not encountered in the process of the appellants.

1939

J. K. SMIT & SONS, INC. v. MCCLINTOCK.

Duff C.J.

Therefore suction by air is not used to hold the diamonds in place during the process of casting; there is no vacuum chamber and none of the apparatus of suction in the appellants' casting machine. The diamonds are held in place by the adhesive until the molten metal begins to be thrown against the end of the mold when it instantly disappears under the influence of heat and thereafter the pressure of the stream of molten metal and the centrifugal force hold the diamonds in place.

Let us observe again what it is that the patentee says about his invention. It is an invention for setting diamond cutters in tools and devices and for this purpose he uses a vacuum chamber in his mold and air suction to retain the diamonds in their respective seats in the holder during the process of arranging the diamonds and during the pouring of the metal for the formation of the tool; and the result declared is that in this manner the diamonds are retained against dislodgement during the arranging period and against "floating."

It does not appear to me that the patentee's own account of the essence of his invention is really at all doubtful. The primary thing at which he was aiming, according to his own story, was to solve the problem of "floating" and he mastered that problem by the use of suction to retain the diamonds in their seats during the process of pouring the molten metal. He resorts to suction, it is true, as a convenient means of keeping the diamonds in place during the process of arranging, but that is only after the diamond holder has been placed in the mold and, convenient and useful as that part of the process may be, it does not appear to me that the patentee regards it as so absolutely essential as the use of air suction during the pouring of the metal for the purpose of preventing floating.

On the face of it, therefore, it seems to me to be very difficult indeed to say that the substance of this invention has been taken by a process which does not employ suction at all after the diamond holder has been placed in the mold, or after the formation of the tool has begun by the introduction of the molten metal into the mold.

There are some observations of Lord Justice Romer, as he then was, in *R.C.A. Photophone Ld.* v. *Gaumont-British*

1939

J. K. SMIT & SONS, INC. v. MCCLINTOCK.

Duff C.J.

Picture Corpn. Ld. et al. (1), which I think ought to be quoted:

What is the principle? I do not know that it has ever been more clearly enunciated than it was by Lord Parker in *Marconi* v. *British Radio Telegraph Company* (2). "Where * * * the combination or process besides being new produces new and useful results, everyone who produces the same results by using the essential features of the combination is an infringer even though he has in fact altered the combination or process by omitting some unessential part or step and substituting another part or step which is equivalent to the part or step he has omitted." The word in this passage to which I should like to call particular attention is the word "unessential." It is only in respect of unessential parts of an invention to which the principle of mechanical equivalent can be applied. The principle is, indeed, no more than a particular application of the more general principle that a person who takes what in the familiar, though oddly mixed metaphor is called the pith and marrow of the invention is an infringer. If he takes the pith and marrow of the invention he commits an infringement even though he omits an unessential part. So, too, he commits an infringement if, instead of omitting an unessential part, he substitutes for that part a mechanical equivalent. But it is not the province of the Court to guess what is or what is not the essence of the invention; that is a matter to be determined on an examination of the language used by the patentee in formulating his claims. In the case of *Submarine Signal Co.* v. *Henry Hughes & Son, Ld.* (3), I thought that the patentee had clearly indicated that an electric oscillator was an essential feature of the invention described in his eleventh claim. I consequently held that the defendant, who had not used an electric oscillator, but something that might properly be described as a mechanical equivalent of it, had not infringed. Further reflection has not caused me to change the view that I then expressed. The patentee in that case had made the electric oscillator part of the pith and marrow of his invention and the principle of mechanical equivalent was inapplicable.

Obviously, the invention, as described by the inventor himself, involves the use of air suction to hold the diamonds in place while the molten metal is being introduced into the mold. There can be no doubt, in my mind, that as the inventor puts it, that is an essential part of his process. That part of his process is clearly not taken by the appellants. Adapting the language of Lord Romer, it is not the province of the court to guess what is and is not of the essence of the invention of the respondent. The patentee has clearly indicated that the use of air suction at that stage of the process is an essential, if not the essential, part of the invention described in the specification.

(1) (1935) 53 R.P.C. 167, at 197. (2) (1911) 28 R.P.C. 181, at 217.
(3) (1931) 49 R.P.C. 149.

1939

J. K. SMIT & SONS, INC. v. MCCLINTOCK.

Duff C.J.

In these circumstances, I find myself unable to agree that the appellants have taken the "pith and marrow" of the respondent's invention.

Let us look at this matter from another point of view. I ask myself the question, could the respondent at the time he applied for his patent have got a patent for the process which the appellants employ in sticking the diamonds on a die plate by the adhesive and, for that purpose, making use of suction while arranging the diamonds and while spraying the adhesive? I do not think that question is susceptible of any but one answer. The idea of holding diamonds in place while a plastic is being set about them by the use of suction was perfectly well known and the evidence is that it was common in the art, not only in setting diamonds in jewellery but also in setting them in diamond tools. It is not, as I understand, suggested that there is anything either in the respondent's or in the appellants' arrangements for the application of suction that would not suggest itself to any skilled person possessing a competent knowledge of the art.

Mr. Gowling argues that the appellants' operation of employing suction during the arrangement of the diamonds and the application of the adhesive is really the respondent's operation in another form, that the application of the adhesive and the pouring of the molten metal are equivalent steps; and that, therefore, there was a colourable taking.

Now, the first answer to that lies in what I have just said. Subject to any actually existing patent, there was nothing patentable in the application of suction for the purpose of retaining the diamonds in place while applying the adhesive. It was an old idea and there is no invention in it. There was no invention in making use of it for the purpose of producing a diamond tool. That being so, it is quite impossible that it can be an infringement of the respondent's patent. To put it in another way, it was (subject, of course, to any actually existing patent) before the respondent applied it to his patent, part of the common stock of knowledge in the art, and to employ it constituted no patentable advance in the art and could not, therefore, be an infringement of the respondent's patent.

In the second place, the premise of the argument must be rejected. For all relevant purposes, the process of apply-

ing the adhesive and the process of pouring the metal are not equivalent. The metal is poured into the mold for the purpose of fashioning the tool to which the diamonds are to adhere permanently. The respondent employs suction during that process and as an essential part of it. The appellants do not employ suction at all during that process. For the purpose of retaining the diamonds in place at the outset and during that process, the respondent employs suction. The appellants do not employ suction at any point of time while the tool is in process of formation or while the diamonds are in the mold. It is only after the suction has completely served its purpose in another machine that the appellants begin their process of casting, of forcing the metal under centrifugal impulse into the mold where the diamonds are held, not by suction, but at the outset by the adhesive that has been applied, and afterwards by the pressure of the molten metal and by the centrifugal force. In the respondent's process the action of the molten metal is not to anchor the diamonds in place in the diamond holder as the appellants' adhesive does; on the contrary it is to envelope the diamonds so that as the molten metal cools they become embedded in the molded tool; up to that point the diamonds are kept in place by the suction of air.

Let us turn now to the claims. With the greatest possible respect, I must say that I am quite unable to find in these claims the description of a monopoly which clearly and plainly includes a prohibition against anything the appellants do. The claims to be considered are claims 1 to 4 and claim 6. The only claims referred to in the judgment of the Exchequer Court are claims 1 and 4 and they are the only claims mentioned in the pleadings, but it seems to have been agreed at the trial that the claims to be considered are the claims numbered 1 to 4 and 6. I shall consider them in their order; but before doing so I quote a passage from the judgment of Lord Russell of Killowen cited by the appellants (1).

> The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit and not to extend the monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire

(1) *Electric & Musical Industries Ld. et al.* v. *Lissen Ld., et al.*, (1938) 56 R.P.C. 23, at 39.

1939

J. K. SMIT & SONS, INC. v. MCCLINTOCK.

Duff C.J.

document, and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere. It is not permissible, in my opinion, by reference to some language used in the earlier part of the specification to change a claim which by its own language is a claim for one subject-matter into a claim for another and a different subject-matter, which is what you do when you alter the boundaries of the forbidden territory. A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims. As Lord Cairns said, there is no such thing as infringement of the equity of a patent (*Dudgeon* v. *Thomson* (1)).

The first claim is in these words:

> 1. The method of setting diamonds in a molded casting which consists in seating the diamonds to be set in a pattern holder, supporting the diamond holder in the mold and applying suction of air to the diamonds while in their seats before and during the process of molding the casting.

The method is a method of "setting diamonds in a molded casting" and "consists in" the following steps:

1. Seating the diamonds in a pattern holder;
2. Supporting the diamond holder in the mold; and
3. Applying the suction of air to diamonds while in their seats before and during the process of molding the casting.

It seems clear to me that there is nothing in this claim that suggests that the suction of air is to be applied before the pattern holder is placed in the mold. If it were otherwise, the claim would be invalid as embracing something not disclosed in the specification. The invention disclosed is one in which suction is not and cannot be applied to the diamonds before the diamond holder is placed in the mold.

But, apart from that, this, at least, would appear to be beyond argument that, if the intention of the patentee had been to make such a claim he could have expressed himself in much less obscure language. He has not performed the duty of expressing his intention as clearly as possible to claim a monopoly which prohibits the application of the suction of air solely for the purpose of arranging the diamonds in a holder and sticking them there by an adhesive before the diamond holder is placed in the mold.

The second claim reads:

> 2. The steps in the method of setting diamonds in a casting which consists in locating a pattern holder and diamonds in a mold, in supporting the diamonds to be set in a pattern holder, and applying air suction to the pattern holder and diamonds to prevent "floating" of the diamonds.

(1) (1877) L.R. 3 App. Cas. 34.

This, obviously, does not embrace the appellants' process. According to this method air suction is applied solely to prevent floating of the diamonds. It is unnecessary to repeat what has been said upon that.

Claim 3 is as follows:

3. The steps in the method of setting diamonds in a molded casting which consists in fashioning seats in a diamond holder to form a pattern holder, seating diamonds in said seats, supporting the pattern holder in a mold, and applying air suction to the diamonds to prevent "floating" of the diamonds.

and to this the same observation applies.

Claim 4 is in these words:

4. The method of setting diamonds in a tool which consists in seating the diamonds in a mold, applying air suction to the diamonds to hold them in situ, and pouring molten metal in the mold to envelope portions of the diamonds.

The method in respect of which the monopoly is claimed is a method of "setting diamonds in a tool" and the steps of the process are:

1. Seating the diamonds in a mold;
2. Applying air suction to hold the diamonds *in situ;* and
3. Pouring molten metal into the mold to envelope portions of the diamonds.

The application of air suction here is an application to diamonds which are seated in a mold and, therefore, excludes the appellants' process.

Claim 6 is in these words:

6. In a diamond-setting mold, the combination with means for seating diamonds in the mold, and means for applying air-suction to the seated diamonds to prevent "floating" of the diamonds.

This is a combination claim and the things combined are means for seating diamonds in a mold and the means for applying air suction to the seated diamonds to prevent floating, which is outside the appellants' process.

The appeal should be allowed and the appellants should have judgment with the declaration as prayed and with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Henderson, Herridge, Gowling & MacTavish.*

1939
* Oct. 13, 16.
1940
* Feb. 26.

AGNES DANLEY (PLAINTIFF) .....APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Accident—Damages—Railway trainman—Killed while engaged in switching operations—No eye-witness of accident—Verdict of jury in favour of plaintiff—Set aside by appellate court—Whether evidence sufficient to justify verdict or whether it was a matter of pure conjecture or speculation by the jury.

An action was brought under *The Fatal Accidents Act*, R.S. Sask., 1930, c. 75, by the appellant, widow of one John S. Danley, acting as executrix of his estate. Danley, an experienced railway trainman in the employ of the respondent company, was killed while engaged in his work of coupling and uncoupling of cars during switching operations on the night of October 8th, 1937. On that night, he was seen to approach the point where two cars were about to be coupled; and, a very short time later, his dead body was discovered badly crushed partly beneath one of the cars. There was no eye-witness of the accident, and therefore no direct evidence as to what the deceased actually did at the very moment he met his death or as to exactly how the accident happened; but counsel for both the appellant and the defendant exposed to the jury their respective theory as to the cause of the accident, according to the evidence. There was no exception taken to the charge to the jury by the trial judge. The jury found in favour of the appellant and awarded her $8,000 damages, bringing a verdict that Danley came to his death through the negligence of the respondent. The appellate court, setting aside the verdict, dismissed the appellant's action. The majority of the court, for the purpose of their determination of the appeal, assumed but did not hold that there was negligence on the part of the respondent company, Gordon J. being of opinion that there was no evidence of negligence; but the appellate court unanimously held that on the evidence the way in which Danley met his death was a matter of pure conjecture or speculation. On appeal to this Court,

Held, Rinfret and Kerwin JJ. dissenting, that the appeal should be allowed and the judgment of the trial judge restored.

Per Davis J.—A reasonable view, consistent with the appellant's right to recover, could be taken by the jury on the evidence; and their verdict, a verdict which reasonable men acting judicially could arrive at, ought not to have been disturbed. As Viscount Dunedin said in *Simpson* v. *L.M. & S. Ry. Co.* ([1931] A.C. 351, at 364), "the "question will always be whether the proved facts will reasonably "support the conclusion which has rested upon them."

Per Hudson J.—There was evidence before the jury upon which they could reasonably have arrived at the conclusion that there was negligence on the part of the respondent.

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

Per Rinfret and Kerwin JJ. dissenting.—Assuming negligence of the respondent and assuming Danley did not know that a coupling apparatus was in a defective condition, there was not evidence from which it might be reasonably inferred that the death of Danley was caused by such negligence of respondent. Upon the evidence the jury had before them, they could do no more than guess at the cause of the accident.

APPEAL from the judgment of the Court of Appeal for Saskatchewan, reversing the judgment of the trial judge, Maclean J. with a jury, and dismissing the appellant's action.

W. G. Currie K.C. and *S. R. Broadfoot K.C.* for the appellant.

W. N. Tilley K.C. and *H. A. V. Green K.C.* for the respondent.

THE CHIEF JUSTICE—I should allow the appeal and restore the judgment of the trial judge with costs throughout.

DAVIS J.—This is a Fatal Accidents action from the province of Saskatchewan. The appellant's husband Danley was a railway trainman in the employ of the respondent company and about midnight on October 8th, 1937, was found dead, with his body badly crushed, in the respondent's railway yards in the town of Lanigan, Saskatchewan. A moment or two before his body was found he was engaged in the ordinary course of his employment in switching operations of the railway in the said yard. A train had come in with some forty freight cars; many of them were to be left in the yards in Lanigan and other cars taken out. A new train was being made up; the crew consisted of a locomotive engineer, a fireman, a conductor and two brakemen. Danley's duties required him to operate the switches and make the necessary moves for coupling up the different cars. In making up a train the practice appears to be to have the long haul cars at the back of the train and the short haul cars at the front. Switching operations had proceeded at Lanigan for about an hour and a half when the accident happened. At that time the engine had started pushing the tender, the water car, a long haul car and, what is for convenience called,

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Davis J.

car 65, in that order. When a little speed had been acquired it was intended that the pin between the last named two cars should be pulled. The engine and tender and cars attached to it would then stop and car 65 would go down on what was known as track 4. When this operation was being performed, Underwood, the rear-end brakeman, attempted to disconnect the cars by using the uncoupling lever. He found the lever on car 65 was disconnected. He signalled the engineer to stop, which the engineer did. Underwood asked Danley to give signals to the conductor, which resulted in car 65 being thrown down on track 4 and the long haul cars which were ahead of car 65 were put on track 1. The locomotive, tender and water car were now detached from all the other cars. The locomotive was facing east. The water car was the most westerly of the three units.

It was now desired to connect the west end of the water car to the east end of car 65. The engine, pushing the tender and water car, backed up slowly. Danley's job was to make the connection. He was walking west on the south side of the water car and about opposite to its west end. He had his lantern in his right hand and was giving a slow back-up signal. The engineer was taking the signals from Danley. Just before the cars (that is, the water car and car 65) actually came together, Danley, who was still walking just at the west end of the water car, gave a signal for a still slower movement. Then the light of his lantern disappeared. The engineer said it just disappeared "quietly and naturally as if it was carried out of sight." The cars had come together, the lantern disappeared, and the brakes were applied at about the same moment. The engine stopped. The connection did not make—the engine moved westerly approximately eight feet after the water car struck car 65; car 65 moved westerly about twelve feet. The conductor was at that time standing opposite the back of the tender. Danley had passed him only a few seconds before while walking beside the car giving the slow back-up signals. The engineer not seeing Danley or the light of his lantern after the engine stopped, asked the conductor where Danley was and said that he would not make any further move until he knew where the man was from whom he had been taking the signals. No shout or scream had been heard by either the engineer or the conductor.

The conductor looked and saw Danley's body lying under and about the centre of the water car. He was lying on his face, dead. His body was badly crushed from the left shoulder down to the belt region of his body. His left arm was practically severed below the elbow; the spine was completely severed in one place; all the ribs on the left side below the third rib were fractured; and the chest completely collapsed. The very severe crushing was such as to show that the body had been subjected to a great deal of force or pressure. Dr. Hindson, who made an autopsy, said he could state definitely that Danley was never caught between the couplings of the two cars. The lantern was found on the ground, still lighted under the water car near the body.

There was no direct evidence as to what the deceased actually did at the very moment he met his death or as to exactly how the tragic accident happened. The appellant's theory of the accident, as it was put on the evidence to the jury, was that Danley was attempting in the ordinary course of his employment to operate the lever to effect a coupling, not being aware of the fact (as Underwood, the rear brakeman, was) that the lever was not working; that with his lantern in his right hand, he had reached for the lever with his left hand, and as the cars came together, had pulled forward with his left hand on the lever; that had the lever been in working condition considerable resistance would have been met with, which Danley would anticipate and would therefore pull heavily on the lever to operate the mechanism; that the lever coming suddenly up without any resistance, Danley's left hand would slip from the lever and the weight he had intended to throw on the lever to operate the mechanism would cause him to lose his balance and fall in the direction in which he was pulling, which would be toward the trucks of the advancing water car; that his right hand being occupied with the lantern, it would be natural for him to thrust out his left hand to break his fall; that such a fall would place him on his face on the track beside the advancing car; with his left arm caught, the over-hanging of the arch bars would crush him down against the ties; and as the car drifted forward would push his body out at right angles to the tracks, and as the trucks advanced and stopped, would leave the body exactly where it was found.

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Davis J.

The respondent sought to meet the case made against it by saying that there was no evidence to reasonably support it and the respondent advanced a theory of its own that the deceased went between the cars when in motion for the purpose of operating the lever, a thing he knew was prohibited by his employer, and, alternatively, that if the deceased did fall in operating the lever as alleged, he had been warned by Underwood that the lever was not working and that it was therefore negligence in himself to attempt to pull it at the time in question.

By sec. 298, ss. 1 (*c*) of the *Railway Act*, R.S.C., 1927, ch. 170, it is provided as follows:

> 298. Every railway company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means—
>
> (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

There was a good deal of evidence directed to the nature and extent, or lack, of inspection of the coupling lever by the respondent prior to the time Underwood discovered its defective condition. That was a question of fact on the evidence for the jury. It was open to the jury, as the trial judge told them, to find the inspection was not an efficient and proper inspection. The construction of the statutory provision by the trial judge—that "the defendant employer is bound in law to furnish to his employee reasonably safe equipment with which to work"—was not objected to at the trial and the respondent ought not now to be entitled to put a different construction upon it.

There is really no dispute about the fact that Underwood, the rear brakeman, knew that the lever was not working. The common law doctrine of common employment does not exist in Saskatchewan. But Underwood said at the trial that he had told Danley five minutes before the accident occurred that the lever on the particular car was not working. Asked if Danley could hear what he had said, his answer was "I could not say. He never said anything about it." The jury obviously disbelieved Underwood's statement that he had told Danley. It is hardly reasonable to assume that Danley would have proceeded in the ordinary course to attempt to couple the cars if he had been warned that the coupling was defective. It is,

of course, possible that he would have done so, but, on the other hand, it is more probable that he would not. Counsel for the respondent several times during the argument repeated the phrase "a man who knows that a lever is not working." But the jury plainly did not believe that Danley had been told.

All these matters were questions of fact for the jury. The jury found in favour of the appellant and awarded her $8,000 damages. The questions and answers were as follows:

1. Did John Steelman Danley, while in the employ of the defendant company as a trainman come to his death on the 8th day of October, 1937, through the negligence of the defendant?

Ans.—Yes.

2. If your answer to no. 1 is in the affirmative, state particulars of that negligence and in what did that negligence consist?

Ans.—The defendant company failed to provide the deceased with safe and proper equipment and that the rear end brakeman when on duty and acting for the defendant company upon noticing the defective coupling did not inform the deceased that a certain box car number C.P. 212665 had the defective coupling and thereby did not exercise the utmost precaution to avoid injury to his fellow workman.

3. Was there contributory negligence on the part of the late John Steelman Danley, and if so in what did such contributory negligence consist?

Ans.—No.

4. If your answer to no. 1 is in the affirmative and your answer to no. 3 in the negative, what damages do you allow?

Ans.—$8,000. Eight thousand dollars.

On this verdict the trial judge directed judgment to be entered for the appellant.

The use by the jury of the words "utmost precaution" in their answer to question no. 2 no doubt arose out of their reading of exhibit D. 3—the instructions from the general manager of the company to all employees, dated February 1st, 1930 (put in by the respondent), no. 2 of which instructions reading

Every employee is required to exercise the utmost caution to avoid injury to himself or his fellows, and especially in switching or other movements of trains.

Upon an appeal by the present respondent to the Court of Appeal for Saskatchewan the verdict was set aside and the action dismissed with costs. Three of the learned judges of that Court did not examine the question of negligence on the part of the company but for the purpose of their determination of the appeal assumed that

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Davis J.

there was negligence. Gordon, J.A., alone examined the evidence as to negligence and came to the conclusion that it was not open to the jury upon the facts to say that the deceased came to his death due to any negligence of the respondent. All four judges who heard the appeal took the view that there was no evidence from which the jury could reasonably infer that the defendant's negligence was the cause of Danley's death. In their view it was pure speculation to conclude that Danley fell and was crushed because he had lost his balance when pulling the defective lever; that any such theory was not only highly improbable but lay in the region of mere conjecture.

The appellant appealed to this Court, asking us to restore the judgment at the trial upon the jury's verdict.

After a careful reading of the evidence and the charge to the jury of Mr. Justice Maclean, the learned trial judge (to which charge no objection was taken) and the jury's answers to the several questions submitted to them (with which answers the trial judge expressed no dissatisfaction), I put to myself the question put by Lord Herschel in delivering the judgment of the Judicial Committee in *Peart* v. *Grand Trunk Railway Company* (1):

* * * the question is, is there ground for saying that in this case there was no evidence upon which the jury could properly have so found; or rather is the evidence such, or so scanty, that the jury ought not to have so found, and that the verdict ought at least to be set aside on the ground that it was against the weight of evidence.

I am satisfied that a reasonable view consistent with the appellant's right to recover could be taken by the jury on the evidence and that the verdict ought not to have been disturbed. As Viscount Dunedin said in the House of Lords in *Simpson* v. *L.M. & S. Ry. Co.* (2) (repeating what he had said in *Mackinnon* v. *Miller* (3)):

* * * each case must be dealt with and decided on its own circumstances, and inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony.

And again at p. 364:

The question will always be whether the proved facts will reasonably support the conclusion which has rested upon them.

The case before us was tried with a jury and it is not for an appellate court to treat the case as one for a fresh

(1) (1905) 10 O.L.R. 753, at 756 (Appendix I).

(2) [1931] A.C. 351, at 357.

(3) [1909] S.C. 373.

decision even though the jury's verdict may not commend itself to the judgment of the Court. This consideration, as Lord Tomlin said in the *Simpson* case (1), at p. 367, dealing with the conclusion of the arbitrator, "necessarily determines the angle of approach to the problem."

It is neither our duty nor our right in this appeal to draw any inference—that was for the tribunal of fact, the jury in this case. "Our duty," as Lord Shaw said in *Kerr* or *Lendrum* v. *Ayr Steam Shipping Co. Ltd.* (2).

> is a very different, a strikingly different, one. It is to consider whether the arbitrator appointed to be the judge of the facts, and having the advantage of hearing and seeing the witnesses, has come to a conclusion, which conclusion could not have been reached by a reasonable man.

I am far from saying that the verdict of the jury in this case does not commend itself to me; I think I should have arrived at the same conclusion. But that is not the point. To set aside the verdict an appellate court must be satisfied that it was a verdict which reasonable men acting judicially could not arrive at.

It is hardly necessary for me to say that I have not overlooked a careful consideration of such authorities as *McArthur* v. *Dominion Cartridge Company* (3), *Richard Evans & Co. Ltd.* v. *Astley* (4), *Grand Trunk Railway* v. *Griffith* (5), *Canadian Pacific Railway Co.* v. *Pyne* (6) and *Jones* v. *Great Western Railway Co.* (7).

I would allow the appeal and restore the judgment at the trial with costs throughout.

HUDSON J.—Danley, the deceased, was an experienced railway trainman in the employ of the defendant company and came to his death while engaged in his work for the company, towards midnight on October 8, 1937. It was the duty of Danley to attend to the coupling and uncoupling of cars during switching operations. On the night in question he was seen to approach, if not arrive at, the point where two cars were about to be coupled. A very short time later his dead body was discovered badly crushed partly beneath one of the cars. No one witnessed the intervening events and what happened can be inferred

(1) [1931] A.C. 351, at 357.
(2) [1915] A.C. 217, at 232.
(3) [1905] A.C. 72.
(4) [1911] A.C. 674.
(5) (1911) 45 Can. S.C.R. 380.
(6) (1919) 48 D.L.R. 243.
(7) (1930) 47 T.L.R. 39; 144 L.T.R. 194.

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Hudson J.

only from the surrounding circumstances. It appears that the knuckles of the couplings on the two cars were closed and the cars could not be coupled by merely coming in contact. By law the railway company is obliged to provide a lever to open couplings in such an event. There was a lever on the car in question but it had become disconnected from the coupling.

The explanation advanced by the plaintiff in the case for Danley's death was that when he pulled the lever, it being disconnected, he lost his balance and fell on the track toward and alongside the approaching water-car and was caught and crushed to death thereunder.

The defendant's contention was that Danley, in violation of his instructions and consequently of his duty, went in between the cars in order to adjust the couplings with his hands and that he was caught between the couplings and crushed.

Evidence was given to show the movement of the cars, the position and condition of the body when found, the description of the cars and of the equipment, particularly of the lever and coupling mechanism and other similar matters. Apparently the jury were not fully satisfied with the evidence given by the witnesses and asked permission to take a view of the cars in question or similar cars with similar equipment. This was arranged and two cars of the defendant with similar equipment were placed on a track and made available for inspection and were inspected by the jury and counsel for the two parties.

No exception is taken to the charge to the jury by the learned trial judge. In dealing with the question of negligence of the defendant, he adverted to the fact that the jury had had the advantage of making a personal inspection of the lever. He also said:

> If you come to the conclusion on reasonable inferences that Danley did go in there in violation of that rule, even to further his work and help things along, then he was doing something which he was absolutely forbidden to do and he is not entitled to any compensation for doing that. That in itself is contributory negligence on his part and no matter what amount of sympathy or sentiment you may have it is absolutely forbidden and the plaintiff is not entitled to damages if you find that is the way he received his injury. Now is that the way he came to his death? You have heard the doctor describe where the injuries started, at a point up on the left shoulder, then the ribs beginning to be pressed in and so on down to the belt line. You have the evidence as to his

height. You have the evidence he was holding a lantern in his right hand, that he was leaving his left hand free to work. You have the position where he was found with his head on one rail, one arm nearly off. It is a question for you gentlemen. Can you account for that position and those injuries by coming between those couplings? If you find he went in to these couplings, and he was an experienced trainman, then he violated the rules of the company and is not entitled to damages. If on the other hand you come by reasonable deduction to the conclusion that he did not have proper information, did not understand or hear, did not have definite enough information from Underwood, went along, reached for the lever, that it moved more freely than he expected and as a result of the freer movement he was thrown, stumbled or got into or under the car, got his injuries that way, then there was no contributory negligence on his part. It is a matter for you, gentlemen, as I have said. There is no little evidence, there has to be a certain amount, not guess work but reasoning from undisputed facts and reasoning in such a way that you are satisfied as to the reasonable probabilities.

The jury brought in a verdict holding that Danley came to his death through the negligence of the defendant, such negligence consisting in that:

> The defendant company failed to provide the deceased with safe and proper equipment and that the rear end brakeman when on duty and acting for the defendant company upon noticing the defective coupling did not inform the deceased that a certain box car number C.P. 212665 had the defective coupling and thereby did not exercise the utmost precaution to avoid injury to his fellow workman;

and that there was no contributory negligence on the part of Danley.

From this verdict the defendant appealed to the Court of Appeal for Saskatchewan and in that court the verdict was set aside and judgment entered for the defendant, dismissing the plaintiff's action. The majority of the court assumed but did not hold that there was negligence on the part of the defendant company, but held that on the evidence the way in which Danley met his death was a matter of pure conjecture. Mr. Justice Gordon agreed with the majority on the last point and further held that there was no evidence of negligence on the part of the defendant.

In my opinion, on the authorities, the question to be answered by the appellate court is this: Was there no evidence before the jury upon which such jury acting reasonably could infer that Danley probably came to his death in the way suggested by the plaintiff?

The line between mere conjecture and reasonable inference in this case is particularly difficult to draw. The evi-

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Hudson J.

dence of the witnesses as appearing on the record in regard to the circumstances surrounding the accident was, in the opinion of the learned judges of the Court of Appeal, insufficient to say more than that what happened must necessarily be a matter of pure conjecture. The jury after proper instructions by the trial judge took a different view. Their personal inspection of the cars and equipment probably added to their knowledge and certainly did add to their appreciation of the oral evidence. Their visit to these cars might well have changed what theretofore seemed "possible" to what appeared "probable."

We in this Court have not had the advantages of the jury and I do not feel justified in holding that there was no evidence before the jury upon which they could reasonably have arrived at the conclusion which they did. The jury found negligence on the part of the defendants and I think there was evidence to support that finding. I would, therefore, allow the appeal and restore the judgment at the trial with costs throughout.

The judgment of Rinfret and Kerwin JJ. (dissenting) was delivered by

KERWIN J.—After going over the entire record, I have concluded that the appeal should be dismissed, as, generally speaking, I agree with the reasons for judgment of Chief Justice Turgeon. Assuming negligence, and assuming that Danley did not know that the coupling apparatus on car 212665 was in a defective condition, was there any evidence from which it might be reasonably inferred that the death of Danley was caused by negligence, or is that matter one of pure conjecture?

The latest decision in the House of Lords, on the subject, would appear to be *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1), where upon the facts it was found that if it had not been for the defendants' breach of a statutory duty the accident there in question would not have happened. In the later case of *Stimson* v. *Standard Telephones* (2), the Court of Appeal referred to the same matter and found in favour of the plaintiff. Sir Wilfrid Greene extracted the following from the opinion of Lord MacMillan in the *Caswell* case (1):—

(1) (1939) 3 A.E.R. 722; 55 T.L.R. 1004.
(2) (1939) 4 A.E.R. 225.

The mere fact that at the time of an accident to a miner his employers can be shown to have been in breach of a statutory duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was causally associated with the breach of statutory duty.

Sir Wilfrid Greene then continued:—

I take that to mean this. To adopt an example put by MacKinnon, L.J., in the course of the argument, it would not be sufficient to show that a workman was found in the neighbourhood of a dangerous machine unconscious, with a wound upon him which might have been caused by the dangerous part of the machine, or might have been caused in some other way by the use of, for instance, a hand tool which the workman had to use. If that were all that appeared, then it would not be shown—although the breach of statutory duty would be established owing to the failure to fence the machine—that that accident was causally associated with the breach of the statutory duty, because the facts would be equally consistent with its having been due to some other cause.

In each case the circumstances must be examined. Having examined the proof in the present appeal and considered the able argument of counsel for the appellant, I am unable to find that the jury had before them any evidence upon which they could do more than guess at the cause of the unfortunate accident. I agree with the learned Chief Justice of Saskatchewan that the matter is one of pure conjecture and I would dismiss the appeal, with costs.

Appeal allowed and judgment of trial judge restored with costs throughout.

Solicitor for the appellant: *W. G. Currie.*

Solicitors for the respondent: *Weir & Hamilton.*

JOHN TRENHOLM.....APPELLANT;

AND

THE ATTORNEY-GENERAL OF ONTARIO .....} RESPONDENT.

1939
* Nov. 23.
1940
* Jan. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Habeas Corpus—Person arrested on criminal charge and remanded by magistrate to gaol—Later committed as mentally ill—Warrant of Lieutenant-Governor of Province, for conveyance to and detention in hospital, dated after expiration of remand on criminal charge—Invalidity of warrant—Criminal Code (R.S.C., 1927, c. 36), s. 970 (as enacted in 1935, c. 56, s. 15)—Appeal to Supreme Court of Canada from judgment of Court of Appeal for Ontario affirming refusal of release from hospital on habeas corpus—Jurisdiction to hear appeal—

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1940

TRENHOLM v. ATTORNEY-GENERAL OF ONTARIO.

*Supreme Court Act (R.S.C., 1927, c. 35), s. 36 (clause excepting from Court's jurisdiction appeals from judgments "in criminal causes and in proceedings for or upon a writ of habeas corpus * * * arising out of a criminal charge.").*

Appellant, arrested on a criminal charge, was remanded to gaol by a magistrate on January 3 (1938) until January 10. On January 7, appellant having been examined as to his mental condition, an information was sworn, under the Ontario *Mental Hospitals Act* (now R.S.O., 1937, c. 392), alleging that appellant was mentally ill, and on examination and inquiry by a magistrate he was committed as mentally ill. The warrant of the Lieutenant-Governor of Ontario, for appellant's conveyance to and detention in a specified hospital, was dated January 12, and on January 15 appellant was conveyed from the gaol to the hospital. The form of the warrant was that attached to the regulations issued under said Ontario Act and to be used where s. 32 (1) of that Act (R.S.O., 1937, c. 392) would apply; but the Court was told that the same form was used in Ontario when it was intended to proceed under s. 970 (as enacted in 1935, c. 56) of the *Criminal Code*. Appellant applied for his release from the hospital on *habeas corpus*. His application was dismissed by Hogg J., ([1939] 3 D.L.R. 627), his appeal to the Court of Appeal for Ontario was dismissed, and he appealed to this Court.

Held (Rinfret and Crocket JJ. dissenting on the ground of want of jurisdiction): The appeal should be allowed, and an order should go for appellant's release (the order not to issue until after a time fixed).

Per the Chief Justice and Davis and Kerwin JJ.: Said s. 32 (1) of the Ontario *Mental Hospitals Act* could have no application, as appellant was not imprisoned "for an offence under the authority of any of the statutes of Ontario" or "for safe custody charged with an offence" under the authority of any such statutes; moreover, the proceedings (discussed) indicated that the warrant was not issued as a result of proceedings commenced under said Ontario Act. The warrant could not be said to be legally issued under said s. 970 of the *Criminal Code*, as at the time of its issue the remand on the criminal charge had expired and appellant was not then "imprisoned in safe custody charged with an offence" within the meaning of s. 970 (1) (s. 680, *Criminal Code*, also referred to by Davis J.). There was therefore no authority for appellant's detention. This Court had jurisdiction to hear and determine the appeal. The objection to jurisdiction on the ground that the proceedings were "criminal causes" or "proceedings for or upon a writ of *habeas corpus* * * * arising out of a criminal charge" within the exception to this Court's jurisdiction in s. 36 of the *Supreme Court Act* was answered by the fact that after the expiry of the remand there was no criminal cause or charge in existence, and therefore the application for appellant's discharge could not arise thereout; it arose out of his detention in the hospital under the invalid warrant issued without any legal authority.

Per Rinfret and Crocket JJ. (dissenting): The appeal should be quashed for want of jurisdiction. It falls within the clause of s. 36 of the *Supreme Court Act* which excepts from this Court's jurisdiction appeals "in criminal causes and in proceedings for or upon a writ of *habeas corpus* * * * arising out of a criminal charge." The warrant, and the affidavits produced on the return of the *habeas*

corpus order, shewed that the proceedings before Hogg J. and the custody from which appellant sought his discharge arose out of a criminal charge within the meaning of said excepting clause, and this in itself is conclusive against this Court's jurisdiction; the point now taken that, the period of remand having expired when the warrant was issued, the warrant was void and of no effect, while a point to be determined by Hogg J. (had it been discovered and suggested before him) in considering the question of the legality of appellant's custody, is not one which this Court has a right to consider, as it involves a decision upon the merits of the *habeas corpus* application; the only point for this Court to determine upon the question of its jurisdiction is, not whether the question of the legality of appellant's custody at the time was rightly or wrongly determined, but simply whether the *habeas corpus* proceedings arose out of a criminal charge. (It would have been quite another matter, had the question come before this Court by way of appeal from the decision of a judge of this Court in the exercise of his concurrent original jurisdiction, as to issue of a writ of *habeas corpus ad subjiciendum*, under s. 57 of the *Supreme Court Act*).

APPEAL from the order of the Court of Appeal for Ontario dismissing (without written reasons) the present appellant's appeal from the order of Hogg J. (1) dismissing his application for his release from the Ontario Hospital, Toronto, on *habeas corpus*.

The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed with costs throughout; appellant to be discharged from custody; the order not to issue until after the expiration of two weeks. Rinfret and Crocket JJ. dissented, being of opinion that this Court had no jurisdiction to entertain the appeal.

No one appeared for appellant.

K. G. Gray K.C. for respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—This is an appeal by John Trenholm from an order of the Court of Appeal for Ontario dismissing an appeal from an order of the Honourable Mr. Justice Hogg which dismissed the application of the appellant for his discharge from the Ontario Hospital, Toronto. The original application was "for an order for a writ of *habeas corpus* for the release of the said John Trenholm from

(1) [1939] 3 D.L.R. 627; [1939] Ont. W.N. 224.

1940

TRENHOLM v. ATTORNEY-GENERAL OF ONTARIO.

Kerwin J.

the Ontario Hospital at Toronto; or for such further or other order as may seem just." An affidavit of the Superintendent of the Ontario Hospital was filed, stating:—

2. John Trenholm is at present a patient in the Ontario Hospital, Toronto, having been admitted to the said hospital on the 15th day of January, 1938, pursuant to *The Mental Hospitals Act*, R.S.O., 1937, chap. 392, on a warrant of the Lieutenant-Governor, dated the 12th day of January, 1938, copy of which is attached and marked Exhibit A to this my affidavit.

Paragraphs 9, 10 and 11 of the affidavit state:—

9. The said John Trenholm was brought before Magistrate A. L. Tinker on January the 7th, 1938, and the said Magistrate Tinker conducted an inquiry into the mental condition of the said John Trenholm.

10. For the purposes of the inquiry, the said John Trenholm was examined by Dr. G. A. McLarty and Dr. John Chassels, and both of the said medical practitioners certified that the said John Trenholm was mentally ill. Copy of the certificate of Dr. McLarty is attached and marked Exhibit B to this my affidavit and copy of the certificate of Dr. John Chassels is attached and marked Exhibit C to this my affidavit.

11. The said Magistrate A. L. Tinker issued his certificate based on the aforesaid inquiry, copy of which is attached and marked Exhibit D to this my affidavit.

From the very outset the position taken on behalf of the respondent was that an error had been made in the Superintendent's affidavit and that Trenholm was not in the institution as a result of any proceedings taken under *The Mental Hospitals Act* but that the Lieutenant-Governor's warrant referred to was issued in pursuance of section 970 of the *Criminal Code* as enacted by section 15 of chapter 56 of the Statutes of 1935. Apparently the matter was treated as if a writ of *habeas corpus ad subjiciendum* had been issued and a return made thereto because the Court then examined into the truth of the facts set forth in what was treated as a return.

From this examination it appears that Trenholm, in 1932, was charged with attempted murder and in August of that year was admitted to the Psychiatric Hospital, whence he was transferred to the Ontario Hospital, Toronto. He escaped from that hospital on November 13th, 1935, was later apprehended, placed in the Psychiatric Hospital on January 26th, 1936, and again transferred to the Ontario Hospital, Toronto. While he was in the hospital, the original information charging him with attempted murder was resworn on December 15th, 1936, asking for the issue of a warrant instead of a summons, and a warrant was accordingly issued on the same day. He escaped on June

18th, 1937, and was arrested on December 31st, 1937, under the warrant of December 15th, 1936. He was brought before Magistrate Jones on January 3rd, 1938, and remanded to the Toronto gaol until January 10th, 1938.

On January 6th, 1938, the Assistant Crown Attorney, by a letter written on the instructions of the magistrate, requested the surgeon at the Toronto gaol to conduct an examination into the mental condition of Trenholm and to report. On the same day the gaol surgeon and another doctor, by separate documents, certified that Trenholm was mentally ill and a proper person to be confined in an Ontario hospital. These certificates follow the form prescribed by the regulations under *The Mental Hospitals Act,* R.S.O., 1937, chapter 392, and reference is made in each certificate to section 20 of that Act. The Revised Statutes of 1937 were not then in force but section 20 of the present Act is the same as section 21 of the statute then in force, chapter 39 of the Statutes of 1935.

On the same day, January 6th, these certificates were directed to be sent from the Toronto gaol to the office of the Magistrates' Clerk at the City Hall, Toronto. It is not shown whether they were received there January 6th or 7th but on the latter date an information was sworn before Magistrate Tinker under the Ontario Act alleging that Trenholm was mentally ill. No warrant under the Ontario Act for Trenholm's apprehension was issued as he was then in custody but at the end of the information appears a notation "committed mentally ill," signed by the magistrate. On the same day, the magistrate issued a certificate, under the Ontario Act, that he had personally examined Trenholm and "I do hereby further certify that from such personal examination, and from the evidence adduced thereon, I am of opinion that he is mentally ill, and pending his transfer to an institution, I have committed him into the care and custody of The Governor of Toronto Gaol." This certificate and the doctors' certificates were sent on the same day to the office of the Deputy Minister of Health for Ontario. It is not clear how they were sent or the exact date they were received, as the Deputy Minister of Health can only state that they were received early in January. They were sent, however, by him by mail to the Superintendent of the Ontario Hospital, Toronto, and received by the latter on January 10th.

1940

TRENHOLM v. ATTORNEY-GENERAL OF ONTARIO.

Kerwin J.

The Lieutenant-Governor's warrant dated January 12th, 1938, which is produced as being the justification for Trenholm's detention at the Ontario Hospital, prepared by the Deputy Minister of Health and signed by him, is as follows:—

Albert Matthews

(Seal) Ontario

By the Honourable

Albert Matthews

Lieutenant-Governor of the Province of Ontario

To the Superintendent, Common Gaol, Toronto

And to the Superintendent of the Ontario Hospital, Toronto,

And to the Provincial Bailiff,

Greeting:

Whereas the mental illness of John Trenholm at present confined in the Common Gaol, Toronto, has been duly certified pursuant to and in accordance with the statute in that behalf,

Now by this warrant I do hereby command and authorize you the said Superintendent of the said Common Gaol, Toronto to deliver such person into the custody of the Provincial Bailiff who shall receive and convey such person to the said Ontario Hospital: Toronto.

And I do hereby command and authorize you the said Provincial Bailiff to convey such person from the said Common Gaol, Toronto to the said Ontario Hospital: Toronto.

And I do hereby command and authorize you the said Superintendent of the said Ontario Hospital, to receive such person into your custody in the said Ontario Hospital, there to safely keep him until I order such person back to imprisonment, or until his discharge is directed by me or other lawful authority:

Given under my Hand and Seal, in the City of Toronto, in the County of York, this Twelfth day of January in the year of our Lord, one thousand nine hundred and thirty-eight and in the Second year of His Majesty's Reign.

By Command

B. T. McGhie,
Deputy Minister of Health.

F. V. Johns,
Assistant Provincial Secretary

This warrant was sent to the Assistant Provincial Secretary who signed it and in due course it was submitted to and signed by the Lieutenant-Governor of Ontario. The form of warrant is that attached to the regulations issued under the Ontario Act and to be used where subsection 1 of section 32 of the present Act would apply. That subsection reads:—

(1) The Lieutenant-Governor, upon evidence satisfactory to him that any person imprisoned in any prison, reformatory, reformatory prison, reformatory school, industrial school or industrial refuge for an offence under the authority of any of the statutes of Ontario, or imprisoned for

safe custody charged with an offence, or imprisoned for not finding bail for good behaviour or to keep the peace, is mentally ill, mentally deficient or epileptic, may order the removal of such person to a place of safe keeping, and such person shall remain there, or in such other place of safe keeping as the Lieutenant-Governor from time to time may order, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor, who may then order such person back to imprisonment if then liable thereto, or otherwise to be discharged, provided that where such person is confined in an institution he shall, if and when he is not liable to imprisonment, be subject to the direction of the Minister, or such other person as the Lieutenant-Governor in Council may designate, who may make such orders or directions in respect of such person as he may deem proper.

That subsection could have no application to the circumstances of this case as Trenholm was not imprisoned for an offence under the authority of any of the statutes of Ontario, or imprisoned for safe custody charged with an offence under the authority of any such statutes.

We are told, however, that the same form is used in Ontario when it is intended to proceed under section 970 of the *Criminal Code* as enacted in 1935. Subsection 1 of that section reads as follows:—

The Lieutenant-Governor, upon evidence satisfactory to him that any person imprisoned in any prison other than a penitentiary for an offence, or imprisoned in safe custody charged with an offence, or imprisoned for not finding bail for good behaviour, or to keep the peace, is insane, mentally ill, or mentally deficient, may order the removal of such person to a place of safe keeping; and such person shall remain there, or in such other place of safe keeping as the Lieutenant-Governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor, who may then order such person back to imprisonment, if then liable thereto, or otherwise to be discharged; provided that where such person is confined in a mental hospital or other provincial institution, he shall, if and when he is not liable to be returned to imprisonment, be subject to the direction of the provincial Minister of Health, or such other person as the Lieutenant-Governor in Council may designate, who may make such orders or directions in respect of such insane person as he may deem proper.

It is contended that the warrant was legally issued under this section but in our view that is not so. The warrant is dated January 12th and it is shown that it was not until January 15th that it was handed by the Deputy Minister of Health to the Provincial Bailiff who, upon the same day, took Trenholm from the Toronto gaol to the Ontario Hospital, Toronto. The remand on the criminal charge had expired January 10th, and it cannot be said, therefore, that at the time of the issue of the warrant,

1940

TRENHOLM v. ATTORNEY-GENERAL OF ONTARIO.

Kerwin J.

Trenholm was "imprisoned in safe custody charged with an offence" within the meaning of section 970; it follows that there was no authority for the issue of the warrant.

As already explained, it is not suggested on behalf of the respondent—in fact it was disclaimed—that the warrant was issued as a result of proceedings commenced under the Ontario Act by the information of January 7th, 1938. That this is so is borne out by the fact that the certificates of the two doctors were issued before the swearing of the information, and furthermore, if it was intended to proceed under the Ontario Act, the only warrant that would be required thereunder, if all proper preliminary steps had been taken, would be a warrant signed by the Deputy Minister of Health (present section 29, subsection 2, and Form 11 attached to the Regulations).

There is therefore no authority for the appellant's detention. It was argued that this Court has no jurisdiction to hear and determine the appeal because of the provisions of section 36 of the *Supreme Court Act*.

> 36. Subject to sections thirty-eight and thirty-nine hereof, an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction (except in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge, or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty) where such judgment is,
>
> (*a*) a final judgment; or
>
> (*b*) a judgment granting a motion for a nonsuit or directing a new trial.

Section 39 has no application as section 42 enacts:—

> Nothing in the three sections last preceding shall affect appeals in cases of *mandamus* and *habeas corpus*.

We are not concerned with section 38.

It is contended that these proceedings are "criminal causes" or "proceedings for or upon a writ of *habeas corpus* * * * arising out of a criminal charge." The short answer to this contention is that after the expiry of the remand there was no criminal cause or charge in existence, and the application for the appellant's discharge from the Ontario Hospital could not, therefore, arise thereout. It arises out of his detention in the institution under an invalid warrant issued without any legal authority.

The Court is not sitting in judgment upon the action of the Lieutenant-Governor in determining that the appellant was at the time mentally ill. All that we are determining is that the Lieutenant-Governor had no jurisdiction to direct the Superintendent of the Ontario Hospital to receive and keep Trenholm and that an order should go for the appellant's release.

In the course of these proceedings an affidavit, however, has been made by the Superintendent of the Ontario Hospital stating that at a conference of the medical staff of the institution held on December 22nd, 1938, the following conclusions were reached:—

(*a*) that the said John Trenholm is mentally ill
(*b*) that the judgment of the said John Trenholm is obviously impaired
(*c*) that the said John Trenholm is potentially dangerous as a result of the mental illness from which he suffers
(*d*) that the said John Trenholm should be confined in a mental hospital.

As against this, one of the doctors who signed a certificate on January 6th, 1938, that Trenholm was mentally ill and a proper person to be confined in an Ontario Hospital re-examined Trenholm on December 2nd, 1938, and on December 7th, 1938, reported in writing the result of the examination and concluded his letter as follows:—

> I would consider this patient, while suffering from a mental condition, might be discharged from the Ontario Hospital, if some responsible party would assume some supervision over him, and that he be kept entirely away from the environment of 227 Kenilworth avenue. If some arrangement were made to carry out these two provisions, I feel the patient might be allowed out on probation.

Since then the appellant's wife has made an affidavit in which she states her intention, if her husband were released, to remove with him to some other city and to keep him removed from the environment of their present home in Toronto. Under these circumstances and in view of the lapse of time since the latest medical examination of the appellant, the order will not issue until after the expiration of two weeks, to give the proper authorities an opportunity to take such proceedings, if any, as they may deem advisable from the point of view of the public and of the appellant.

1940

TRENHOLM v. ATTORNEY-GENERAL OF ONTARIO.

Kerwin J.

The judgment of Rinfret and Crocket JJ. (dissenting on the ground of want of jurisdiction) was delivered by

CROCKET J.—I am of opinion that this appeal, which comes to us from a judgment of the Ontario Court of Appeal, confirming the decision of Mr. Justice Hogg, refusing to discharge the applicant from the custody of the Superintendent of the Ontario Mental Hospital, falls within the clause of s. 36 of the *Supreme Court Act,* which expressly excepts appeals "in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge" from the appellate jurisdiction of this Court.

The applicant had the right on the return of the *habeas corpus* order to have the legality of his imprisonment enquired into and determined by the Judge, who granted the order, whether his imprisonment was under a warrant which charged him with a criminal offence or not. The learned Judge, on perusing the affidavit of the Superintendent of the Ontario Hospital, in which he alleged the applicant was confined on a warrant of the Lieutenant-Governor, dated the 12th day of January, 1938, and a copy of such warrant which was annexed to the Superintendent's affidavit, and other affidavits then produced before him, and considering the whole question of the validity of the applicant's custody, held that the applicant was legally confined in that hospital under the warrant of the Lieutenant-Governor, as authorized by s. 970 of the *Criminal Code.* The relevant language of that section of the *Criminal Code* is as follows:

> The Lieutenant-Governor, upon evidence satisfactory to him that any person imprisoned in any prison * * * for an offence, or imprisoned in safe custody charged with an offence, * * * is insane, mentally ill, or mentally deficient, may order the removal of such person to a place of safe keeping; and such person shall remain there, or in such other place of safe keeping as the Lieutenant-Governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor, who may then order such person back to imprisonment, if then liable thereto, or otherwise to be discharged; * * *

The original warrant of the Lieutenant-Governor and the original affidavits, which were produced before the learned Judge on the return of the *habeas corpus* order, have been sent to the Registrar of this Court since the hearing of this appeal.

I think they shew that the proceedings before Mr. Justice Hogg and the custody, from which the applicant sought his discharge, arose out of a criminal charge within the meaning of the stated exception in s. 36 of the *Supreme Court Act* and that this Court has, therefore, no jurisdiction to hear the appeal as it has come before us.

Mr. Justice Hogg on the hearing of the *habeas corpus* application distinctly held that Trenholm was then confined in the Ontario Hospital by authority of the Lieutenant-Governor's warrant, issued in accordance with the terms of the above quoted section of the *Criminal Code,* "as a step in the proceedings arising out of the charge against Trenholm of attempted murder."

It is now sought to take the appeal out of the exception of s. 36 upon the ground that Trenholm, who had been brought before a magistrate on January 3rd, 1938, under a warrant issued on the original information in the criminal case, had been remanded by the magistrate upon that charge until January 10th, and thereupon committed to the Toronto gaol, and that, the period of remand having expired when the Lieutenant-Governor's warrant was issued, under which he was transferred from the common gaol to the Ontario Hospital, the Lieutenant-Governor's warrant was void and of no effect.

This ground, which was not called to the attention of Mr. Justice Hogg on the *habeas corpus* hearing before him, and seems to have been discovered for the first time on the hearing of the appeal before this Court, obviously goes to the question of the authority of the Lieutenant-Governor to issue the warrant under which Trenholm was held at the time of the *habeas corpus* hearing. With all respect, the very statement of the ground itself to my mind demonstrates that this appeal is an appeal in proceedings for or upon a writ of *habeas corpus,* which has arisen out of a criminal charge within the meaning of the clause of s. 36 of the *Supreme Court Act* above quoted, which expressly excepts such a case from the jurisdiction of this Court. While the point is one which, had it been discovered and suggested on the *habeas corpus* hearing before Mr. Justice Hogg, sitting as a Supreme Court Judge having original *habeas corpus* jurisdiction in the Province of Ontario, it would clearly have been his duty to determine in considering the question of the legality of the appli-

1940

TRENHOLM v. ATTORNEY-GENERAL OF ONTARIO.

Crocket J.

cant's custody at that time, it is to my mind not one which we have any right to consider upon the present appeal, if the *habeas corpus* proceedings now before us arose out of a criminal charge.

The only point we have now to determine upon the question of this Court's jurisdiction to hear an appeal from the judgment of the highest court of final resort in Ontario under s. 36, is, not whether the learned Judge below rightly or wrongly determined the question of the legality of Trenholm's present custody, but simply whether the *habeas corpus* proceedings before him arose out of a criminal charge.

To hold that we have jurisdiction to hear the appeal on the ground above mentioned plainly to my mind itself involves a decision upon the merits of the *habeas corpus* application, which was solely directed to the validity of Trenholm's present custody. Such a decision would make the merits of the *habeas corpus* application the test of the jurisdiction of the Court to hear an appeal under s. 36 instead of what that section so unequivocally prescribes as the test thereof, viz.: whether the application itself and the proceedings thereupon have arisen out of a criminal charge. Such a decision, it seems to me, with the greatest possible respect, would be to fly directly in the face of the express, unambiguous and unconditional words of the exception to this Court's appellate jurisdiction, which Parliament has placed in s. 36, and could be justified, in my judgment, only by reading them as necessarily implying that the criminal charge, out of which the *habeas corpus* proceedings have arisen, must be a valid subsisting charge, upon which the applicant might still be prosecuted, and not one, in connection with which he had any good legal ground to apply for his discharge from custody under the provisions of the *Habeas Corpus Act*. If such a principle is to be affirmed, it seems to me that the exception set out in s. 36 might just as well be expunged, for I can conceive of no criminal case or criminal charge, which, upon such a basis, could be brought within its terms.

I should perhaps say that it would have been quite another matter if the question had come before us by way of appeal under the provisions of s. 58 from the decision of any one of the judges of this court in the exercise of the concurrent original jurisdiction, with which its mem-

bers individually are invested by s. 57 to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

For these reasons I would quash the appeal as one which the Court has no jurisdiction to hear.

DAVIS J.—I concur in the judgment of my brother Kerwin and would only add a word as to the remand. By sec. 680 the justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded. But when a remand has expired without any further hearing or appearance the justice becomes *functus* and thereafter the accused cannot be said to be imprisoned in safe custody "charged with an offence" within the meaning of sec. 970. That being so, there was no authority under said sec. 970 in the Lieutenant-Governor, subsequent to the expiration of the remand, for the issue of the warrant in question. 59 J.P. 682. Stone's Justices' Manual, 62nd edition, pp. 34-35.

Appeal allowed with costs.

Solicitor for the appellant: *Paul I. B. Hinds.*

Solicitor for the respondent: *Kenneth G. Gray.*

ANDREW LEZNEK (PLAINTIFF) .....APPELLANT;

AND

THE CITY OF VERDUN (DEFENDANT)..RESPONDENT.

1939
*Nov. 3.
1940
*Feb. 26.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Negligence—Municipal corporations—Repairs to public buildings done by contract—Work of cleaning windows given by sub-contractor to independent contractor—Latter injured by fall—Transom bar of window frame giving way—Liability of city under paragraph 3 of article 1055 C.C.

The city respondent had a contract with one C. to effect certain repairs in its City Hall building, and those pertaining to painting and glazing were delegated to a sub-contractor. The appellant was engaged by

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1940

LEZNEK v. CITY OF VERDUN.

the sub-contractor to clean the windows. While doing that work, the appellant attempted to support himself on the transom bar of a window frame and, the transom bar giving way, lost his balance and fell to the pavement below. The appellant brought an action for damages against the city. The answers of the jury contained in their verdict were to the effect that the accident had been occasioned by the common fault of the appellant and the respondent, the fault of the appellant consisting in "not taking sufficient precaution for his personal safety and using the transom bar for a purpose for which it was not intended," and the fault of the respondent being "the failure to keep the building in proper state of repair." The trial judge, confirming the verdict of the jury, awarded $12,600 damages; but that judgment was reversed by the appellate court.

Held that the judgment appealed from should be affirmed. The effect of the jury's answers was to eliminate any responsibility under article 1053 C.C. and to place the respondent's liability under article 1055 (3) C.C. The respondent therefore could be held legally responsible only for failure to keep the building in proper state of repair for the purpose for which it was intended. The answer of the jury being that the appellant used the transom bar "for a purpose for which it was not intended," the jury thus negatived the application of article 1055 C.C. and the respondent cannot accordingly be held responsible: the jury could not find a legal foundation where there was no legal obligation.

Judgment of the Court of King's Bench (Q.R. 66 K.B. 324) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the trial judge, Duclos J., with a jury, and dismissing the appellant's action for damages.

The material facts of the case are as follows: On the 30th April, 1936, the city of Verdun awarded one Chartrand a general contract for the renovation of the City Hall for the sum of $44,499. Chartrand in turn gave a sub-contract to Heroux & Robert, who, in turn, made a contract with one Raymond for the painting of the windows of the City Hall. When Raymond's work was nearing completion, he entered into a contract with the appellant for the washing of the windows. During the course of his work the appellant, with the object of washing the outside of the windows, stood on the outside sill, and to steady himself grasped the transom, that is, a central bar of the framework for the outside shutters, and as the wood at the end of the transom had become rotten through old age and exposure to the weather, it was not sufficiently strong to support his weight and, giving way, he was precipitated to the con-

(1) (1939) Q.R. 66 K.B. 324.

crete yard below, receiving, as a result of the fall, very grave injuries, which resulted in the amputation of his leg and other injuries which totally incapacitated him. The appellant instituted the present action against the city, charging it with negligence, on the ground that the building, and particularly the window-frame, was not maintained in a proper state of repair; that the window-frame suffered from latent defects, which were completely hidden by the fresh paint; that the city failed to provide the appellant with the necessary equipment to which a safety-belt could be attached by the respondent during the course of his duties, as a result of which he was compelled to support himself by the window-frame which, had it been in a proper state of repair, would not have given way; that the city had, prior to the accident, been duly informed of the dangerous condition of the woodwork referred to, but nevertheless failed and neglected to make the necessary repairs. Upon the action being tried before a jury, the following verdict was rendered:

1. Did the plaintiff suffer an accident on or about the 15th day of October, 1936, whilst fulfilling his duties, in cleaning the windows of the City Hall, the property of the defendant in the city of Verdun? Ans. Yes.

2. Was the said accident due to the breaking of the transom bar fixed to the window frame of the said building? Ans. Yes.

3. Was the said transom bar of the window frame the property, in the possession and under the care and control of the city of Verdun? Ans. Yes.

4. Was the said transom bar of the window-frame in a defective and dangerous condition? Ans. Yes.

4a. Did the plaintiff suffer damages as a result of the said accident and, if so, what amount? Ans. $18,000.

5. Was the said accident due to the sole fault, imprudence, negligence and lack of care of the defendant, and, if so, then what did such fault, imprudence and lack of care consist of?

9—They are not solely responsible.

3—Solely responsible.

6. Was the said accident occasioned by the sole fault of the plaintiff? Ans. No.

7. Was the said accident occasioned by the common fault of the plaintiff and defendant, and, if in the affirmative, say in what fault?

(*a*) of the plaintiff consisted.

9—Not taking sufficient precautions for his personal safety, and using the transom's bar for a purpose for which it was not intended.

(*b*) of the defendant;

For failure to keep the building in proper state of repair—3 against.

1940

LEZNEK v. CITY OF VERDUN.

8. If you answer question number 7 in the affirmative what amount do you reduce from the total amount given?

$5,400; all in favour except 1 or 30%.

The trial judge, holding that the city as owner of the premises—including the window-bar—which was the immediate cause of the accident, should be held responsible for the damages caused by want of repairs under article 1055 C.C., and that the appellant's use of the same was reasonable, dismissed the respondent's motion for a judgment *non obstante veredicto*, and, maintaining the appellant's motion for judgment in accordance with the verdict, condemned the respondent to pay the sum of $12,600. The city appealed to the appellate court and contended that the verdict, and the judgment, should not have been based on the mere fact that the window-bar gave way because it was old and decayed, but should have taken into account the purpose it was designed to serve, and that, since the appellant submitted it to a strain entirely foreign to that purpose, the accident was due to his own fault, and his action should have been dismissed.

Louis St-Laurent K.C., M. Gameroff and *S. Fenster* for the appellant.

L. E. Beaulieu K.C. and *Francis Fauteux K.C.* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—In my view the judgment of the Court of King's Bench dismissing the appellant's action was justified by the answers of the jury to the questions put to them.

It was open to the Court of King's Bench to give a judgment different from that rendered by the trial judge on the facts as found by the jury. (Art. 508-1 C.C.P.).

The appellant was not working for the city of Verdun. The city had contracted with one Chartrand to effect certain repairs in its City Hall building. Among these repairs were those pertaining to painting and glazing which had been delegated to a sub-contractor; and the appellant was engaged by the sub-contractor to clean the windows. He was an independent contractor of his own.

While doing that work the appellant attempted to support himself on the transom bar of a window frame, the

transom bar gave way, the appellant lost his balance and fell to the pavement below.

The jury was asked to determine the cause of the accident. Their answers were to the effect that the accident had been occasioned by the common fault of the appellant and the respondent and that the fault of the appellant consisted in

not taking sufficient precaution for his personal safety and using the transom bar for a purpose for which it was not intended

and that the fault of the respondent was the

failure to keep the building in proper state of repair.

The effect of the jury's answers was to eliminate any responsibility under article 1053 of the Civil Code and to place the respondent's liability under article 1055 C.C., paragraph 3, which reads as follows:—

The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.

We may disregard that part of the article which deals with "an original defect in its construction," since the answer of the jury is limited to the "want of repairs."

Now the interpretation given to that article has been invariably that the want of repairs must be looked at from the viewpoint of the purpose for which the building or part of building was intended.

Le défaut d'entretien ou le vice de construction s'apprécient eu égard à la destination qu'avait reçue la partie du bâtiment à la ruine de laquelle est dû le dommage à réparer (Aubry et Rau, Fifth Ed. Tome 6, page 433).

Planiol (Vol. 6, No. 609) says that the proprietor should not be held responsible

s'il prouve que le vice ou la vétusté n'auraient pas entrainé la ruine sans l'acte fautif de la victime.

(See also Demogue, Obligation, vol. 5, pages 313 and 325); *Bourassa* v. *Grégoire* (1).

In this case, therefore, the respondent could be held legally responsible only for failure to keep the building in proper state of repair for the purpose for which it was intended.

Such is the meaning of paragraph 3 of article 1055 C.C.

(1) (1926) Q.R. 42 K.B. 154.

1940

LEZNEK v. CITY OF VERDUN.

Rinfret J.

Now the answer of the jury was that the appellant used the transom bar "for a purpose for which it was not intended." The jury thus negatived the application of article 1055 C.C. and the necessary result must be that the respondent, under the circumstances, could not be held legally responsible. The jury could not find a legal foundation where there was no legal obligation.

As for the other contentions of the appellant, they were disregarded and set aside by the verdict of the jury, which is strictly limited to the alleged responsibility under article 1055 C.C.

Upon the finding of the jury that the appellant used the transom bar for a purpose for which it was not intended, the respondent was relieved of any legal responsibility under that article and the Court of King's Bench was right in reversing the judgment of the trial judge and in dismissing the action. The appeal ought, therefore, to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Seymour Fenster.*

Solicitors for the respondent: *Fauteux & Fauteux.*

1939

* Oct. 30, 31.

1940

* Feb. 26.

OSCAR BENOIT (PLAINTIFF) .....APPELLANT;

AND

BLANCHE LAJOIE (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Will—Substitution—Legacy of usufruct to grandchildren—Right by substitutes to dispose by will under certain conditions—Lapsing of such legacy—Interpretation—Intention of testator—Arts. 756, 831, 893, 944, 956 C.C.

By his will in authentic form one L. C. Gravel bequeathed to his wife the usufruct of the remainder and residue of all his estate; and by clause four of his will he bequeathed, subject to his wife's right of usufruct, the remainder and residue of the same property to his daughter, Maria Gravel, wife of Louis Joseph Lajoie, to hold and enjoy as institute, subject to the obligation of delivering over the ownership thereof to her issue in the first degree. By clause nine of his will he disposed as follows: "It is my will and intention that any

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Hudson JJ

substitute inheriting the ownership of my property, in the event of the opening of his legacy, be placed in possession thereof as actual owner only when he has attained the age of thirty, and that until then he have only the use and usufruct thereof, without power to sell, pledge or alienate any part of his share of capital or of realty, while being allowed to dispose thereof by will, in the event of death before attaining such age providing it be in favour of his children of full age or, in default thereof, in favour of any one of the substitutes of his choice under the said substitution, while nevertheless having the right to bequeath the right of enjoyment of his share to his consort, but during widowhood only, whether he have issue or not, and in default of such a will, the share of any of the said substitutes under the said substitution dying while of age but under thirty shall devolve to his children or, in default of children, to the other substitutes under the said substitution, according to the conditions hereinbefore provided in the event of the decease under age of any substitute under the said substitution without leaving issue of full age." L. C. Gravel's wife died in Montreal on August 16th, 1900, and her daughter Maria Gravel also died in Montreal on September 16th, 1916. By this last decease the substitution created by L. C. Gravel's will became open and the property thereby affected devolved to the seven children of Maria Gravel. Marguerite Lajoie, one of these children, who was one of the substitutes, made on December 13th, 1919, at the age of 24 years and some months, a will in authentic form whereby she disposed of the estate she inherited from her grandfather, in the following terms: "3. Desiring to avail myself of the rights conferred upon me by clause nine of the solemn will of my grandfather, the late Louis Charles Gravel, * * * to dispose by will of my share in his estate as one of the substitutes under the said will, I give and bequeath to my above-named husband the use and usufruct during his lifetime, or until his remarriage, of my share in the said estate of my late grandfather above named, as one of the substitutes under the said will, and to my two sisters Hortense Lajoie and Blanche Lajoie, in equal parts, the ownership of my said share in the said estate, subject to the said usufruct of my said husband during his lifetime or until his remarriage." When she made her will Marguerite Lajoie was childless; and it is only on August 21st, 1925, that is at the age of thirty years and nearly ten months, that she gave birth to her first child, Louise Clerk. Marguerite Lajoie, left a widow in 1926 at the age of thirty-two, married the appellant at the age of thirty-five and died at the age of forty leaving no other will but the one above mentioned. Her lawful heirs, that is, her daughter Louise Clerk and her husband Oscar Benoit, accepted her succession. In his own name, as well as in his capacity of tutor to his minor daughter, the appellant asked that the bequest to the respondent be declared null and void.

Held, reversing the judgment of the Court of King's Bench (Q.R. 68 K.B. 117), that clause 3 of Marguerite Lajoie's will was to take effect only in the event of her dying under the age of thirty without leaving any children; and that, this contingency not having occurred, the legacy dependent upon it remained without effect: it lapsed from the moment that the condition to which it was subject was fulfilled and on Marguerite Lajoie's attaining the age of thirty.—In order to determine "what was the real intention of" the testatrix, a "fair and literal meaning" must be given to the terms and expressions

1940

BENOIT v. LAJOIE.

which she used to manifest it (*Auger* v. *Beaudry*, [1920] A.C. 1010); and, in doing so, the conclusion must be that the testatrix did not intend to avail herself of the unlimited right to dispose by will and the general power conferred upon her by the Civil Code, but that she only wished to "avail herself of the rights" conferred upon her by her grandfather's will, i.e., that she wished merely to provide for the contingency arising in the event of her dying before the age of thirty years.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, McDougall J., and dismissing the appellant's action.

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

Gustave Monette K.C. for the appellant.

Aldéric Laurendeau K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—L'appelant en appelle à cette Cour d'un jugement de la Cour du Banc du Roi (1) qui, par une majorité des juges, a rejeté son action pour faire déclarer nul et de nul effet un certain legs fait en faveur de l'intimée.

La Cour Supérieure avait maintenu l'action et avait fait droit à la demande de l'appelant.

Voici dans quelles circonstances la question se présente:

M. Louis-Charles Gravel, en son vivant marchand de Montréal, par son testament en forme authentique a légué à son épouse l'usufruit du reste et du résidu de tous ses biens meubles et immeubles, droits et actions mobiliers et immobiliers.

Par la clause quatrième de son testament il a légué, sujet au droit d'usufruit de son épouse, le reste et résidu des mêmes biens à sa fille, Maria Gravel, épouse de Louis Jos. Lajoie, pour par elle en jouir comme grevée de substitution à la charge d'en rendre et remettre la propriété à ses enfants au premier degré, sans en exclure par là les enfants de ceux d'entr'eux alors prédécédés et ayant laissé des enfants pour les représenter par souche.

Par la clause neuvième de son testament il a ordonné ce qui suit:—

(1) (1939) Q.R. 68 K.B. 117.

Je veux et entends que tout appelé à recueillir la propriété de mes biens, advenant l'ouverture de son legs, n'en soit mis en possession par lui-même qu'à l'âge de trente ans, et que jusque-là, il n'en ait que la jouissance et usufruit, sans pouvoir vendre, engager ou aliéner aucune partie de sa part de capital ou de biens-fonds, tout en pouvant disposer par testament, au cas de décès avant tel âge, pourvu que ce soit en faveur de ses enfants atteignant l'âge de majorité, ou à leur défaut, en faveur d'aucun des appelés à la dite substitution de son choix, tout en ayant la liberté de léguer le droit de jouissance de sa part à son conjoint, mais ce pendant viduité seulement, qu'il ait laissé des enfants ou non, et à défaut de testament dans les conditions ci-dessus, la part d'aucun des dits appelés à la dite substitution décédant en âge de majorité, mais avant d'avoir atteint l'âge de trente ans, sera recueillie par ses enfants, ou à leur défaut, par les autres appelés à la dite substitution, aux conditions ci-dessus prévues pour le cas du décès en minorité d'aucun appelé à la dite substitution sans laisser d'enfants atteignant l'âge de majorité.

L'épouse de M. Gravel est décédée à Montréal, le 16 août 1900. Sa fille, Maria Gravel, est aussi décédée au même lieu, le 16 septembre 1916. Par ce dernier décès la substitution créée par la testament de M. Gravel s'est trouvée ouverte et les biens qui en faisaient l'objet ont été recueillis par les sept enfants de Maria Gravel.

L'une des enfants de Maria Gravel et l'une des appelés à la substitution, alors qu'elle n'était âgée que de vingt-quatre ans et quelques mois, fit un testament en la forme authentique; elle y disposait des biens lui venant de son grand-père, dans les termes suivants:—

3. Voulant user des droits que me confère l'article neuf du testament solennel de mon grand-père, feu M. Louis Charles Gravel, reçu devant M. Narcisse Pérodeau et son confrère, notaires, le 30 décembre 1892, de disposer par testament de ma part dans les biens de sa succession, comme l'une des appelés à la substitution créée en vertu du dit testament, je donne et lègue à mon époux susnommé, la jouissance et l'usufruit durant sa vie, ou jusqu'à son convol en secondes noces, de ma part dans les biens de la dite succession de feu mon grand-père susnommé, comme l'une des appelés à la substitution créée en vertu dudit testament et la propriété de ma dite part dans les dits biens, par parts égales, à mes deux sœurs Hortense Lajoie et Blanche Lajoie, sujet au dit usufruit de mon dit époux durant sa vie, ou jusqu'à son convol en secondes noces.

Par ce même testament elle instituait son époux, Maurice Clerk, son légataire résiduaire universel, mais ce legs s'est trouvé caduc parce que son époux l'a prédécédé.

Au moment où elle fit son testament, Marguerite Lajoie n'avait pas d'enfants; elle n'en a pas eu avant l'âge de trente ans. Ce n'est que le vingt et un août 1925, savoir à l'âge de trente ans et près de dix mois que son enfant, Louise Clerk, lui est née.

Devenue veuve en 1926, à l'âge de trente-deux ans, Marguerite Lajoie, s'est remariée à l'âge de trente-cinq ans

1940
BENOIT
v.
LAJOIE.
Rinfret J.

avec l'appelant, et elle est décédée à l'âge de quarante ans sans autre testament que celui dont il vient d'être question et qui porte la date du treize décembre 1919. Ses héritiers légitimes, savoir, sa fille, Louise Clerk, et son mari, Oscar Benoit, ont recueilli sa succession.

Tant en son nom personnel que comme tuteur à Louise Clerk qui est mineure, Oscar Benoit, l'appelant, demande que le legs à l'intimée soit déclaré nul et sans effet.

Nous n'avons plus à nous occuper des intérêts de Hortense Lajoie qui a prédécédé sa sœur Marguerite. La seule intéressée est maintenant mademoiselle Blanche Lajoie.

Suivant nous, la décision de cette cause dépend uniquement de l'intention qu'avait la testatrice lorsqu'elle a inséré dans son testament la clause troisième que nous avons reproduite ci-dessus.

Il n'y a pas de doute qu'en sa qualité de grevée Marguerite Lajoie pouvait, durant la substitution, disposer par testament de son droit éventuel aux biens substitués, sujet au manque d'effet par caducité (Art. 956 C.C.).

Comme grevée elle possédait pour elle-même le titre de propriétaire (Art. 944 C.C.). En vertu de la loi, elle possédait la liberté illimitée de tester (Art. 831 C.C.). Elle aurait pu faire un testament en vertu duquel elle léguait tous ses biens. Ce testament aurait pris effet après son décès (Art. 756 C.C.). Et, pourvu qu'elle fût décédée après avoir atteint l'âge de trente ans, les biens venant de la succession de son grand-père eussent été compris parmi ceux qu'elle aurait ainsi légués. La naissance de son enfant après qu'elle avait atteint l'âge de trente ans n'aurait pas par elle-même opéré la révocation de ce testament (Art. 893 C.C.).

Mais la solution de la question qui nous est soumise ne dépend pas des pouvoirs généraux ou de la capacité légale de Marguerite Lajoie. Nous n'avons pas à nous demander ce qu'elle aurait pu faire. Ce que nous avons à rechercher c'est ce qu'elle avait l'intention de faire. Et nous devons trouver cette intention à l'aide des termes et des expressions qu'elle a employés pour la manifester.

En effet, comme le dit Lord Buckmaster, rendant le jugement du Conseil Privé dans la cause de *Auger* v. *Beaudry* (1):

(1) [1920] A.C. 1010, at 1014.

It is now recognized that 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.

La clause que nous étudions débute par ces mots:

Voulant user des droits que me confère l'article neuf du testament solennel de mon grand-père, feu M. Louis Charles Gravel, reçu devant M. Narcisse Pérodeau et son confrère, notaires, le 30 décembre 1892, de disposer par testament, de ma part dans les biens de sa succession, comme l'une des appelés à la substitution créée en vertu du dit testament.

Cette phrase est bien claire. La testatrice n'entend pas user de la liberté illimitée de tester et du pouvoir général qui lui sont octroyés par le Code Civil; elle veut simplement "user des droits" que lui confère le testament de son grand-père. En d'autres termes, elle veut seulement pourvoir à ce qui arriverait au cas où elle décéderait avant l'âge de trente ans—dans les limites qui lui sont assignées par le testament de son grand-père.

En vertu de ce testament, si elle meurt avant d'avoir atteint l'âge de trente ans la propriété de la part des biens de son grand-père doit aller à ses enfants; et, à défaut d'enfants, aux autres appelés à la substitution. Elle a, cependant, deux droits qu'elle peut exercer par testament:

Premièrement: elle peut léguer le droit de jouissance de sa part à son conjoint pendant viduité;

Deuxièmement: elle a le droit de choisir et d'indiquer parmi les appelés ceux qui recueilleront la propriété, à défaut d'enfants.

Au moment où elle fait la disposition contenue dans la clause troisième, elle n'a pas d'enfants. Elle procède donc à exercer les droits qui lui résultent du testament de son grand-père et qui sont compatibles avec l'état de choses existant à ce moment-là.

Tout ce qu'elle entend faire, d'après les termes mêmes de la clause en litige, c'est se servir des droits qui lui sont conférés par son grand-père pour léguer à son époux l'usufruit de sa part qu'il n'aurait pas eu autrement, et pour faire le choix des appelés à qui elle entend léguer la propriété.

Mais comme elle le dit: elle veut simplement "user des droits" qui lui sont conférés par le testament. Elle indique donc clairement qu'elle entend se servir de ses droits dans les limites qui lui sont assignées par la clause neuf du testament du grand-père et que les legs qu'elle

1940
BENOIT
v.
LAJOIE.
Rinfret J.

fait ainsi sont nécessairement subordonnés aux conditions prévues à ce testament, c'est-à-dire, son décès avant d'avoir atteint l'âge de trente ans et sans laisser d'enfants qui atteindraient l'âge de majorité.

Bien respectueusement nous croyons que c'est bien là le sens qui se dégage des expressions que Marguerite Lajoie a employées et nous ne pouvons y voir l'intention de se servir de son pouvoir général de tester. Il en résulte, suivant nous, que la clause devait prendre effet au cas seulement où se rencontreraient les conditions qu'elle prévoit, c'est-à-dire, si Marguerite Lajoie mourait avant trente ans sans laisser d'enfants.

Comme l'événement prévu ne s'est pas produit le legs auquel il était subordonné est resté sans effet. Il est devenu caduc du moment que la condition à laquelle il était soumis s'est accomplie et dès que Marguerite Lajoie eut atteint l'âge de trente ans.

L'appelant nous dit:—

> Ce n'est pas le legs qui devient inefficace. Marguerite Lajoie avait toute capacité de disposer de ses biens, et en ce qui concerne ceux qui lui venaient de son grand-père, la restriction que le testament de ce dernier lui imposait était simplement que la disposition qu'elle en ferait resterait sans effet au cas où elle décéderait avant d'avoir atteint l'âge de trente ans.

C'est également ce que paraît avoir décidé la majorité de la Cour du Banc du Roi.

Mais, à notre humble avis, cette interprétation ne tient aucun compte de la phrase introductive de la clause 3 du testament.

Nous ne perdons pas de vue que la testatrice est décédée plusieurs années après avoir atteint l'âge de trente ans et sans avoir révoqué son testament. L'intimée voudrait que nous trouvions là une intention de ratifier le testament, mais nous ne voyons pas comment ce fait peut aider à soutenir la cause de l'intimée. En admettant que le silence de la testatrice pendant les années subséquentes de sa vie ait eu pour effet de confirmer la disposition qu'elle avait faite dans le clause 3 de son testament, cette confirmation ne peut s'entendre que de la clause telle qu'elle a été redigée et telle qu'elle doit être interprétée. Si l'interprétation que nous soumettons ci-dessus est la bonne, toute confirmation ultérieure, surtout toute confirmation tacite, ne saurait modifier le sens originaire de la clause.

1940

BENOIT v. LAJOIE.

Rinfret J.

Par ces motifs nous croyons que l'appel doit être maintenu et que le jugement de première instance doit être rétabli avec dépens.

Appeal allowed with costs.

Solicitors for the appellant: *Monette, Filion & Meighen.*

Solicitors for the respondent: *Laurendeau & Laurendeau.*

GEORGE ALEXANDER MORRISON (SUPPLIANT) ..... APPELLANT;

1939

* Nov. 20, 21

AND

1940

* March 4.

* April 30.

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Petition of Right for damages—Suppliant struck by motorcycle driven by R.C.M.P. constable on driveway of Federal District Commission—Negligence of an "officer or servant of the Crown while acting within the scope of his duties or employment upon a public work" within s. 19 (c) of Exchequer Court Act, R.S.C., 1927, c. 34 (as it stood in 1936).

The accident in question occurred on August 23, 1936, on a driveway in the city of Ottawa, constructed and maintained by the Federal District Commission, a body created by c. 55 of the Statutes of Canada, 1927. The cost of construction of the driveway was defrayed out of moneys voted by Parliament for the purpose and the driveway is maintained out of such moneys. A part of the driveway passed through land used by the City of Ottawa for an agricultural exhibition and it was the practice of the Exhibition Association to obtain permission from the Commission to place barriers across the driveway at the east and west limits of the exhibition grounds for the purpose of preventing the public from gaining access to those grounds through from the Driveway; and such barriers were there on the day of the accident. On the first day of exhibition week, G., a R.C.M.P. constable (who had been engaged as traffic officer on the Driveway in the previous year during exhibition week, when the same part of it had been closed to the public) was driving his motorcycle on the Driveway in discharge of his duty of patrolling it for the purposes (*inter alia*) of enforcing traffic regulations and protecting the Commission's property. When, driving westerly, he reached the eastern limits of the exhibition grounds he received a signal to pass through the open gate of the barrier and proceeded on his way. In approaching the western limits of the grounds, on rounding a curve, he found his vision impaired by the sun, and when he became aware of the barrier there erected, though he

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ. Rinfret J. was not present on the re-hearing as to the amount of damages on April 30, 1940, the re-hearing being, by consent, before four Judges.

1940

MORRISON
v.
THE KING.

immediately applied his brakes (which were in perfect order), he did not succeed in stopping until he had passed through and some few feet beyond the gate, which appellant, gatekeeper, was in the act of opening to allow G. to pass. Appellant was struck by the motorcycle and injured, and sued the Crown for damages.

Held: (1) G. was negligent in not immediately bringing his motorcycle under control when he found his vision affected by the sun. Appellant was not guilty of contributory negligence.

(2) G. at the time of the accident was an "officer or servant of the Crown" and "acting within the scope of his duties or employment upon" a "public work," within the meaning of s. 19 (*c*) (as it then stood) of the *Exchequer Court Act,* R.S.C., 1927, c. 34. Conceding that he was not engaged in traffic control when in the part of the Driveway within the ambit of the exhibition grounds (though even there he was charged with protecting Crown property—shrubs, trees, etc., on the Driveway border), yet even when passing through those grounds (to resume his duty as traffic officer beyond them) he was acting within the scope of his duty as traffic officer upon the Driveway (*The King* v. *Schrobounst,* [1925] S.C.R. 458, the authority of which has been recognized in *The King* v. *Mason,* [1933] S.C.R. 332, *The King* v. *Dubois,* [1935] S.C.R. 378, *The King* v. *Moscovitz,* [1935] S.C.R. 404, and *Salmo Investments Ltd.* v. *The King,* [1940] S.C.R. 263).

Judgment of Maclean J., [1938] Ex. C.R. 311, dismissing appellant's petition of right, reversed.

APPEAL by the suppliant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing his petition of right, in which he asked damages for personal injuries suffered when, on August 23, 1936, he was struck by a motorcycle driven by a constable of the Royal Canadian Mounted Police on a Driveway constructed and maintained by the Federal District Commission in the city of Ottawa. The suppliant (appellant) alleged that the accident was caused by negligence of the said constable and that the latter was at the time of the accident an "officer or servant of the Crown" acting "within the scope of his duties or employment upon" a "public work" within the meaning of s. 19 (*c*) of the *Exchequer Court Act,* R.S.C., 1927, c. 34 (as it stood at the time of the accident). The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed and judgment given to the suppliant for damages (fixed, on a re-hearing as to the amount on April 30, 1940, at $9,500) with costs throughout.

(1) [1938] Ex. C.R. 311.

A. W. Beament K.C. and *R. A. Hughes* for the appellant.

A. Lemieux K.C. (*W. R. Jackett* with him on said re-hearing as to amount of damages) for the respondent.

The judgment of the Chief Justice and Rinfret, Davis and Kerwin JJ. was delivered by

THE CHIEF JUSTICE—The first question concerns the application of section 19 (*c*) of the *Exchequer Court Act* and that question subdivides itself into two branches: (*a*) whether the Driveway between Confederation Park and Hog's Back is a "public work" within the meaning of that enactment; and (*b*) if so, whether Constable Glencross was an "officer or servant of the Crown acting within the scope of his duties or employment upon" that "public work" when the acts of negligence with which he is charged occurred.

The Driveway was constructed and is maintained by the Federal District Commission, a body created by chapter 55 of the Statutes of Canada, 1927. The cost of construction was defrayed out of moneys voted by Parliament for the purpose and the Driveway is maintained out of such moneys and it is not seriously open to question that the Driveway is a "public work" within the meaning of section 19 (*c*) of the *Exchequer Court Act*. It is argued, however, on behalf of the Crown that this enactment has no application in the present case because Glencross, assuming he was chargeable with negligence in the acts complained of, was not at the time an "officer or servant of the Crown acting within the scope of his duties or employment upon" a "public work."

A brief statement of the facts is necessary.

The Driveway between Confederation Park and Hog's Back follows the bank of the Rideau Canal through a tract of land, which, in 1904, was leased by the Crown to the City of Ottawa at a rental of one dollar a year to be used solely for the purposes of an Agricultural Exhibition (with the right to resume possession of any part of the tract on notice). It was not until the year 1927 that the part of the Driveway passing through this tract was constructed. The Commission decided shortly after the construction of this part of the Driveway not to erect a barrier fencing

1940
MORRISON
v.
THE KING.
Duff C.J.

off the Driveway from the Exhibition Grounds proper, but it has been entirely controlled along with the rest of the Driveway by the Commission and the Commission's exclusive right of possession has not been disputed. Traffic over it has been governed by the traffic by-laws of the Commission and it has been the practice, during the week of the Exhibition, for the Exhibition Association to obtain permission from the Commission to place barriers across the Driveway at the east and west limits of the Exhibition Grounds for the purpose of preventing the public from gaining access to those grounds through from the Driveway.

The duty of patrolling the Driveway for the purposes (*inter alia*) of enforcing traffic regulations and protecting the property of the Commission is discharged by constables belonging to a motorcycle squad of the R.C.M.P. and, on the day when the appellant was injured (August 23rd, 1936, the first day of the week of the Exhibition), one Glencross was assigned to this duty and came on duty shortly before four o'clock in the afternoon. Proceeding southerly and westerly from Confederation Park, he arrived at the eastern boundary of the Exhibition Grounds where the Exhibition Association had (as usual during the week of the Exhibition) erected a barrier. There he received a signal from the attendant to pass through the open gate and then proceeded westerly towards the western limit of the Exhibition Grounds at a speed which he estimated at between 23 and 25 miles per hour.

At the westerly limit also the Association had, as usual, placed a barrier with the permission of the Commission and a gate which was 12 feet wide and 8 feet high; and it was there that the appellant was stationed as gatekeeper. His duties were to exclude the public from entering the Exhibition Grounds through the gate but to allow the employees of the Hydro-Electric Corporation and the motorcycle squad patrolmen to pass freely in both directions. The predecessor of Glencross had several times that day passed through this gate in the execution of his duty of patrolling the Driveway.

Glencross, cycling westerly on the Driveway, found, as he rounded a curve between two and three hundred feet

east of this barrier and gate, that the sun was shining directly in his eyes and his vision was naturally impaired thereby. It was, indeed, only when he had reached a point about fifty or sixty feet from the barrier that he became aware, as he says, that the roadway was barricaded. He immediately applied his brakes (which were in perfect order) but did not succeed in stopping his motorcycle until he had passed through the gate, which the appellant was then in the act of opening (in order to allow him to pass), and some few feet beyond it. The appellant received a severe blow and suffered permanent injuries.

The Crown contends that Glencross was not acting within the scope of "his duties or employment upon a public work" while proceeding along the Driveway within the limits of the Exhibition Grounds.

It may be conceded that Glencross was not engaged in traffic patrol when in the part of the Driveway within the ambit of the Exhibition Grounds. But when one takes account of the facts, this does not appear to be relevant. Even within the Exhibition Grounds he was admittedly charged with the duty of protecting the property of the Crown,—the shrubs, trees, flowers and bushes on the border of the Driveway. Moreover, the duty of Glencross as traffic officer required him to patrol the Driveway between Confederation Park and Hog's Back. He was conveying himself in a motorcycle which he had in his possession as such traffic officer to enable him to perform his functions as such officer. When he arrived at the easterly limit of the Exhibition Grounds it was his duty to go along the Driveway to the westerly gate in order to resume his duty as traffic officer when he arrived there. Even passing through the Exhibition Grounds he was, under the decision in *The King* v. *Schrobounst* (1), acting within the scope of his duty as traffic officer upon the Driveway. In that case it was held by this Court that the driver of a bus employed by the Crown to take workmen engaged on the Welland Canal from their homes to the Canal was acting in his "duties or employment upon" a "public work" (the Welland Canal) while so engaged. The case is indistinguishable; and its authority has been recognized

(1) [1925] S.C.R. 458.

1940
MORRISON
v.
THE KING.
Duff C.J.

in *The King* v. *Mason* (1); *The King* v. *Dubois* (2); *The King* v. *Moscovitz* (3), and *Salmo Investments Ltd.* v. *The King* (4).

There remains the issue of the negligence of Glencross. He had been engaged as traffic officer on the Driveway in the previous year during the week of the Exhibition when the same part of the Driveway had been closed to the public; and he had, a minute or two before, passed the eastern limit of the grounds where there was a barrier across the Driveway and an attendant on guard.

I wish to avoid harsh language, but it does seem plain that a traffic officer of Glencross's experience, when, in approaching the western entrance, he found his vision affected by the sun, as he says it was, ought to have realized the necessity of bringing his motorcycle instantly under control in the interests of the safety of others as well as of himself.

As to contributory negligence, it was, as I have said, part of the duty of Morrison to let the traffic officers through his gate, and the constable relieved by Glencross had passed through more than once that same day. He had every reason to suppose that a constable on duty as traffic officer would be acquainted with the practice which had been in force in other years and with which the traffic officer engaged throughout the day had been to his knowledge familiar.

[The judgment here deals with the amount of damages. The damages were subsequently, on a re-hearing as to the amount on April 30, 1940, fixed at $9,500, for which amount judgment was directed, with costs throughout].

The appeal will be allowed and there will be judgment for the amount [of damages, fixed later, as aforesaid, at $9,500], with costs throughout.

CROCKET J.—I agree that this appeal should be allowed and judgment entered in favour of the suppliant for [the amount of damages. The damages were subsequently fixed, on a re-hearing as to the amount on April 30, 1940, at $9,500] with costs throughout.

(1) [1933] S.C.R. 332.
(2) [1935] S.C.R. 378.
(3) [1935] S.C.R. 404.
(4) [1940] S.C.R. 263.

1940

MORRISON v. THE KING.

Crocket J.

I think the evidence clearly proves that the suppliant's injuries were solely caused by the negligence of a servant of the Crown while acting in the scope of his duties or employment upon a public work within the meaning of s. 19 of the *Exchequer Court Act,* [reference to the amount of damages, which amount was later fixed as aforesaid].

Appeal allowed with costs.

Solicitors for the appellant: *Hughes & Laishley.*

Solicitor for the respondent: *Auguste Lemieux.*

C. H. McFADDEN (DEFENDANT).....APPELLANT; 1939

* Nov. 13.

AND

JOHN R. McGILLIVRAY (PLAINTIFF)...RESPONDENT. 1940

* Feb. 26.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Collision—Trial judge's charge to jury—Alleged misdirection—Rate of speed—Question as to need of car lights burning—Substantial wrong or miscarriage—New trial.

The action arose from a collision between appellant's and respondent's motor cars. Each party claimed that the collision was caused entirely by the other's negligence and claimed damages. Judgment was given at trial on the jury's findings in favour of respondent and an appeal to the Court of Appeal for Ontario was dismissed. Appeal was brought to this Court on the ground of misdirection in the trial judge's charge to the jury.

Held (the Chief Justice dissenting): There should be a new trial, on the ground of misdirection.

Per Rinfret and Kerwin JJ.: On construction of the trial judge's charge, there was misdirection in that he told the jury that appellant's allegation that respondent was travelling at an excessive rate of speed under the circumstances was not open to them since respondent was not exceeding the statutory limit of 50 miles per hour; also in that he told the jury that respondent was under no obligation to have his car lights burning, and said: "As I remember it, every witness said that they could see 100 yards. Why would lights need be on if you could see 100 yards without lights. There is no law in this province requiring lights on under those circumstances—that is, at any rate, after dawn and before dusk—during the day-time." Such misdirection occasioned substantial wrong or miscarriage. Appellant was entitled to a finding from the jury, not merely on the question as to negligent driving of his own car but also on the question of respondent's negligence, and in particular as to whether both drivers were negligent. Two allegations of negligence on the part of respondent

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1940

McFADDEN v. McGILLIVRAY.

were really withdrawn from consideration of the jury, and the Court should not place itself in the position of attempting to determine what, on a proper direction, would be solely within the province of the jury on these vital matters.

Per Davis J.: The trial judge's directions virtually withdrew from the jury a consideration of the vital question as to the degree of care reasonably to be expected from both drivers under the fog conditions existing at the time.

Per the Chief Justice (dissenting): The trial judge told the jury in the most pointed way that, if they accepted appellant's account, then respondent's conduct amounted to negligence which was the cause of the collision. The issue at the trial was an issue of credibility and, the jury having rejected appellant's case, he ought not to have an opportunity of putting the same case or another case before another jury because of inaccuracies in the charge which must, in view of the nature of the critical issue and the manner in which that issue was placed before the jury, have been quite innocuous.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Kelly J. at trial, upon the findings of the jury, in favour of the plaintiff for $6,530.69 damages. The action arose out of a collision between two motor cars, owned by the plaintiff and defendant respectively. Plaintiff was the sole occupant of his car. Defendant and the driver, Larsen, who was killed in the accident, were the occupants of defendant's car. Each party claimed that the collision was caused entirely by negligence of the other party, and each claimed damages (the defendant by way of counterclaim) for personal injuries and for destruction of his car. The accident occurred on Ontario provincial highway no. 2 about three miles east of Bowmanville on the morning of October 15, 1938, at about 7.30 o'clock, as alleged by plaintiff, or seven o'clock, as alleged by defendant. There was evidence that there was intermittent fog. The jury found that the driver of defendant's car was, and that plaintiff was not, guilty of negligence causing or contributing to the accident. The grounds of the appeal to this Court were alleged misdirections in the trial judge's charge to the jury.

P. E. F. Smily K.C. and *R. B. Burgess* for the appellant.

J. M. Bullen K.C. and *J. D. Conover* for the respondent.

THE CHIEF JUSTICE (dissenting)—I find myself unable to concur in the judgment of the majority of the Court.

I do not enter at large upon my reasons because I cannot state them fully without a discussion of the details of the evidence, which is inadvisable in view of the fact that there is to be a new trial. I will say simply that the appellant at the trial advanced a case which was based upon his own evidence. The learned trial judge told the jury in the most pointed way that, if they accepted the appellant's account of what occurred, then the respondent's conduct amounted to negligence which was the cause of the collision. The jury found that the respondent was not chargeable with any negligence either causing or contributing to the collision. I think the issue at the trial was an issue of credibility, and, the jury having rejected the appellant's case, he ought not to have an opportunity of putting the same case or another case before another jury because of inaccuracies in the charge which must, I think, in view of the nature of the critical issue and the manner in which that issue was placed before the jury, have been quite innocuous.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—I would allow the appeal and order a new trial. In view of this, it would be inadvisable to discuss the evidence and I restrict my remarks, therefore, to a short statement of the reasons why I consider such an order should be made.

After considering the charge of the learned trial judge in its entirety, I have concluded the jury were there told that the allegation of the appellant (defendant) that the respondent (plaintiff) was travelling at an excessive rate of speed under the circumstances, was not open to them since the respondent was not exceeding the statutory limit of fifty miles per hour. This, of course, was misdirection.

I have also come to the conclusion that there was misdirection in the charge where the jury were told that the respondent was under no obligation to have the lights on his automobile burning. The learned trial judge continued:—

> As I remember it, every witness said that they could see one hundred yards. Why would lights need be on if you could see one hundred yards without lights. There is no law in this province requiring lights on under those circumstances,—that is, at any rate, after dawn and before dusk,—during the day-time.

1940

McFADDEN v. McGILLIVRAY.

Kerwin J.

This was really withdrawing from the jury another allegation of negligence made by the appellant against the respondent, and this defect was not cured by other passages in the charge.

Objection was taken by the appellant that the jury had been given a wrong basis for the calculation of damages,—damages of both parties,—when the trial judge told them to be generous. This was probably corrected when the jury were recalled and they were told that they should not, in that connection, be unreasonable.

Under section 27 of the Ontario *Judicature Act* a new trial is not to be granted on the ground of misdirection "unless some substantial wrong or miscarriage has been thereby occasioned." I take it that it was really on this ground that the Court of Appeal affirmed the judgment at the trial, because Mr. Justice Riddell, after pointing out

> that it would have been well had the learned judge been more explicit on the question of negligence and drawn the attention of the jury to the necessity and obligation of other duty in respect of care according to the circumstances of the case,

continues:—

> But we are unable to see that this resulted in injury to the case of the defendant.

With great respect, I find myself unable to agree with this conclusion. The appellant was entitled to a finding from the jury, not merely on the question of the negligence of the driver of his own car but also on the question of the negligence of the respondent, and in particular as to whether both drivers were negligent. Two allegations of negligence on the part of the respondent were really withdrawn from the consideration of the jury, and the Court should not place itself in the position of attempting to determine what, on a proper direction, would be solely within the province of the jury on these vital matters.

The appellant is entitled to his costs of the appeal to the Court of Appeal and to this Court. The costs of the first trial should abide the result of the new trial.

DAVIS J.—The directions of the learned trial judge virtually withdrew from the jury a consideration by them of the vital question as to the degree of care reasonably to

1940

MCFADDEN v. MCGILLIVRAY.

Davis J.

be expected from both drivers under the fog conditions existing at the time.

The appeal should be allowed and a new trial directed. The appellant is entitled to the costs of his appeal to the Court of Appeal and to this Court. The costs of the first trial should abide the event of the new trial.

HUDSON J.—I agree that the appeal should be allowed and a new trial directed on the ground of misdirection of the jury by the learned trial judge. I refrain from making any observations in regard to the evidence.

Appeal allowed with costs; new trial ordered.

Solicitors for the appellant: *Johnston, Grant, Dods, Smily & Adams.*

Solicitor for the respondent: *J. D. Conover.*

1939

* Oct. 19.

1940

* Feb. 26.

DONALD McLENNAN .....APPELLANT;

AND

FLOSSIE McLENNAN .....RESPONDENT.

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

Husband and wife—Divorce—Alimony—Jurisdiction of New Brunswick Court of Divorce and Matrimonial Causes—Allowance of permanent alimony upon divorce—Matters to be considered—Discretion of trial judge—Review by appellate court.

Per curiam: The New Brunswick Court of Divorce and Matrimonial Causes has jurisdiction, upon the granting of a decree for divorce *a vinculo matrimonii,* to award permanent alimony or maintenance.

The legislation, and its history, with regard to or affecting the Court's jurisdiction, discussed. *MacIntosh* v. *MacIntosh,* 54 N.B. Rep. 145, and *Hyman* v. *Hyman,* [1929] A.C. 601, at 614, cited.

Respondent, who had been granted a decree of divorce from her husband on the ground of adultery, petitioned for an order for permanent alimony. This was refused by the trial judge (Judge of the Court of Divorce and Matrimonial Causes) on the ground that the facts did not justify it. His judgment was reversed by the Supreme Court of New Brunswick, Appeal Division, which awarded permanent alimony (13 M.P.R. 524); and its judgment was now upheld by this Court (*per* the Chief Justice and Kerwin and Hudson JJ.; Rinfret and Crocket JJ. dissenting as to said award in this case).

*PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

1940

McLENNAN v. McLENNAN.

Per Kerwin J.: Respondent was entitled to alimony unless some legal ground may be found upon which to base a refusal. Any discretion that may have been vested in the trial judge is a judicial discretion and the mere fact that he determined not to grant alimony does not absolve appellate courts from examining the record to see if that discretion was properly exercised. On the facts shown by the evidence, respondent was not disentitled to alimony.

Per Hudson J.: Plaintiff is entitled to alimony on the grounds stated by Le Blanc J. in the Appeal Division (13 M.P.R. 524, at 545-552).

Per Rinfret and Crocket JJ. (dissenting): The Judge of the Court of Divorce and Matrimonial Causes has the right to refuse to award alimony to a wife upon a decree of divorce on the ground of her husband's adultery; and an appellate court is not justified in interfering with his discretion unless it plainly appears that that discretion was not judicially exercised. In the present case the trial judge's discretion was properly exercised in refusing upon the evidence to make an order for permanent alimony, and the Appeal Division was not justified in reversing his decision. (As to consideration of wife's earnings or means, especially where the parties have long lived apart, *Goodheim* v. *Goodheim*, 30 L.J. (P. M. & A.) 162, *Burrows* v. *Burrows*, L.R. 1 P. & D. 554, *George* v. *George*, *ibid*, p. 554, *Holt* v. *Holt*, *ibid*, p. 610, and *Bass* v. *Bass*, [1915] P. 17, cited. As to what does or does not justify in law a wife in leaving her husband's home, *Currey* v. *Currey*, 40 N.B. Rep. 96, *Hunter* v. *Hunter*, 10 N.B. Rep. 593, *Evans* v. *Evans*, 1 Hagg. Cons. 35, and *Russell* v. *Russell*, [1897] A.C. 395, cited).

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which (Baxter C.J. dissenting), reversing the judgment of Grimmer J., Judge of the Court of Divorce and Matrimonial Causes, awarded to the present respondent (who had been granted a decree of divorce) permanent alimony to be paid by her husband, the present appellant. Special leave to appeal to the Supreme Court of Canada was granted (subject to terms) by the Appeal Division.

C. J. Jones K.C. for the appellant.

J. J. F. Winslow K.C. for the respondent.

THE CHIEF JUSTICE—I would dismiss the appeal with costs.

The judgment of Rinfret and Crocket JJ. (holding that there was jurisdiction in the New Brunswick Court of Divorce and Matrimonial Causes to award permanent alimony, but dissenting on the ground that the judgment of

(1) 13 M.P.R. 524; [1939] 2 D.L.R. 622.

the judge of that court in refusing to grant it in this case should not have been reversed by the Appeal Division) was delivered by

CROCKET J.—On December 6th, 1937, Mr. Justice Grimmer, sitting as Judge of the Court of Divorce and Matrimonial Causes of the Province of New Brunswick, at the suit of the respondent granted a decree dissolving the respondent's marriage to the appellant, which had been solemnized on July 10th, 1907, on the ground of adultery, the appellant not having appeared or defended the action.

Thereupon she filed a petition for an order for permanent maintenance or alimony, which, after an answer had been filed by the appellant, came on for hearing before the learned judge in May, 1938. The appellant himself gave no evidence on this hearing; only the respondent and one other witness in her behalf gave evidence. His Lordship, having taken the matter under consideration, later gave judgment refusing the prayer of the respondent's petition on the ground that no cruelty, force or coercion had been exercised by her husband to justify her in leaving him, as she did, in 1928, and that she was quite able to support herself, as she had done for more than eight years before she brought her action for divorce.

The respondent appealed from this judgment to the Appeal Division of the Supreme Court. On the hearing of this appeal, the Appeal Division remitted the case to the trial judge "for hearing of evidence that might have been adduced at the trial." In pursuance of this order the case again came before the learned trial judge when both parties were represented by counsel. His Lordship, commenting upon the terms of the order of the Appeal Court, said he did not know what his position was exactly. "There is a judgment," he said,

> which is *res judicata*. Whether that is to be wiped out and we are to go on *de novo* or just where I am at I do not know. There is nothing in the order of the Court—it is remitted to the judge to hear evidence that might have been adduced at the trial and evidently was not adduced. What I am to do is to take evidence; whether we are to begin in the middle of the previous proceedings, at the beginning of it or at the foot of it, revoke or cancel the judgment and begin *de novo* I do not know.

Counsel for the respondent then proceeded to examine the respondent, who was subjected to a long cross-examination by counsel for the appellant. The appellant was then

1940
McLENNAN
v.
McLENNAN.
Crocket J.

sworn and examined by his counsel and cross-examined by counsel for the respondent. Two other witnesses were also examined. No further judgment appears to have been given in the Court of Divorce, but the evidence taken on the further hearing before the trial judge, having been reported to the Appeal Division, the case was re-argued there in February, 1939, with the result that the appeal was allowed and judgment entered (*per* LeBlanc and Harrison, JJ., Baxter, C.J., dissenting) for the appellant, ordering the respondent to pay to the appellant the sum of $40 per month during the lifetime of the appellant.

It is from this judgment that the appeal now comes before us.

Two main grounds were urged in support of the appeal: first, that the New Brunswick Court of Divorce and Matrimonial Causes possesses no jurisdiction on the granting of a decree for divorce *a vinculo matrimonii* to award permanent alimony or maintenance; and, second, that, if it does possess such jurisdiction, it lies entirely in the discretion of the judge of that court to award or to refuse it on granting a decree at the suit of the wife, and that there is nothing to indicate that in refusing it in the present case he did not exercise that discretion judicially.

As to the first ground, the origin of the jurisdiction of the New Brunswick Court of Divorce and Matrimonial Causes is found in an Act of the General Assembly of that province, cap. 5, 31 George III (1791), intituled "An Act for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery, and Fornication." Sec. 5 of that Act provided that

> all causes, suits, controversies, matters, and questions, touching and concerning Marriage, and contracts of Marriage, and Divorce, as well from the bond of matrimony, as divorce, and separation, from bed and board, and alimony, shall, and may be heard, and determined, by, and before the Governor, or Commander in Chief of this Province, and His Majesty's Council,

and constituted the Governor or Commander in Chief and Council aforesaid or any five or more of the said Council together with the Governor or Commander in Chief as President, "a Court of Judicature, in the matters and premises aforesaid, with full authority, power, and jurisdiction, in the same."

Sec. 9 of that Act provided that the causes of divorce from the bond of matrimony and of dissolving and annulling marriage are and shall be frigidity, or impotence, adultery, and consanguinity within the degrees prohibited in and by an Act of Parliament made in the thirty-second year of the reign of Henry VIII, intituled "An Act for marriages to stand, notwithstanding precontracts," and no other causes whatsoever.

Shortly after this Act came into force the Court of the Governor and Council promulgated a number of practice and procedure rules, applying to all citations, libels, answers, their service, filing, etc. These rules applied to all divorce suits alike, whether for dissolution of the bond of matrimony, for separation from bed and board, or for annulment. The Court of the Governor and Council continued to exercise the jurisdiction vested in it by this Act until the year 1860, when an Act was passed by the Legislature of the Province, cap. 37 of 23 Vict., constituting a new Court of Record under the name of the Court of Divorce and Matrimonial Causes, and transferring to it "all jurisdiction now vested in or exercisable by the Court of Governor in Council" under the authority of the first-mentioned statute

in respect of suits, controversies and questions concerning marriage, and contracts of marriage, and divorce, as well from the bond of matrimony as divorce and separation from bed and board, and alimony.

The Act of 1860 was intituled "An Act to amend the Law relating to Divorce and Matrimonial Causes." It provided that the Governor in Council should appoint one of the Judges of the Supreme Court to be the judge of the newly established court, and that he should have power and authority to hear and determine all causes and matters cognizable therein, subject to appeal to the Supreme Court, whose decision should be final. It provided by sec. 10 that the practice and proceedings of the said court should be

conformable as near as may be to the practice of the Ecclesiastical Court in England, prior to an Act of Parliament made and passed in the year 1857, intituled *An Act to amend the Law relating to Divorce and Matrimonial Causes in England*, subject however to the provisions of this Act, and the existing rules, orders and practice as now established in the Court of Governor and Council in this Province.

The court was empowered to make rules and regulations concerning the practice and procedure, and the forms to be

1940
McLENNAN v. McLENNAN.
Crocket J.

used under the Act, and to regulate the fees payable on all proceedings, and to alter or revoke the same or any of them as may from time to time be considered necessary. It also provided that all parts of the original Act, cap. 5 of 31 George III, 1791, as were inconsistent with the provisions of the new Act should be repealed as soon as the latter came into operation on July 1st, 1860.

In 1869 further rules of practice were promulgated by the then Judge of the Court. Like those formerly promulgated by the Governor and Council, these later rules made no distinction between suits for divorce, whether for dissolution of the bond of matrimony or for divorce and separation from bed and board or for annulment, though No. 5 of these rules provided that every libel containing a claim for alimony shall state the property or income of the husband. The forms of the citation and libel will be found at pp. 249 and 250 respectively of Earle's Supreme Court Rules and it will there be observed that both the citation and the libel are made to apply to suits of divorce from the bond of matrimony for adultery.

This last Act was re-enacted as cap. 50 of the Consolidated Statutes of New Brunswick (1877) without any substantial change in any of the provisions I have quoted. The only alteration made in the Consolidation of 1877 which could have any possible bearing upon the point now under review will be found in sec. 3 requiring the practice and proceedings in the court to conform to the practice of the Ecclesiastical Court in England, whereby different words are substituted for the concluding words of sec. 10 of the original Court of Divorce and Matrimonial Causes Act. For the words

> subject however to the provisions of this Act and the existing rules, orders and practice as now established in the Court of Governor and Council in this Province

the words

> subject however to the provisions of this chapter, and such rules and orders as are now in force in the said court, and consistent with the provisions of this chapter, whether such rules and orders were made by the said court or by the Court of Governor and Council

were substituted. In addition to this change, cap. 50 of the Consolidation of 1877 did away with the declaration contained in the original Act of 1860 that the decision of the Supreme Court from any decision of the Divorce Court

should be final, and by sec. 17 declared that from any decision of the Supreme Court of the Province in such a suit an appeal

> may be made to Her Majesty in Her Majesty's Privy Council, under such rules and regulations as Her Majesty may prescribe, or to any other Court of Appeal having jurisdiction.

The provisions of both ss. 3 and 17 of the Consolidation of 1877 were re-enacted in cap. 115 of the Consolidated Statutes of the Province in 1903 and again in the Revised Statutes of 1927, without any change whatever, as were all of the provisions of the original Court of Divorce and Matrimonial Causes Act of 1860, in so far as those provisions related to the jurisdiction or powers of that court, and these enactments are still the recognized law of the Province.

Having regard to the jurisdiction of the Governor and Council in respect of the subject of Marriage and Divorce, as defined in cap. 5 of 31 George III, 1791, and the transfer of that entire jurisdiction to the Court of Divorce and Matrimonial Causes, as constituted by cap. 37 of 23 Vict., and to the fact that this jurisdiction has been exercised by the latter court under rules of practice and procedure, promulgated by the judge thereof as well as by the original Court of the Governor and Council, for now nearly 80 years, both in suits for dissolution from the bond of matrimony, as well as for divorce from bed and board, without any distinction being discoverable either in the provisions of the original Act or of the Act of 1860 and its re-enactments as to the application of the court's express jurisdiction over alimony to both classes of divorce, I find it impossible to assent to the contention that it was the intention of these Acts that the court should not have the power to award alimony except upon a decree for divorce *a mensa et thoro* as in the Ecclesiastical Courts of England prior to the enactment of the English Court of Divorce and Matrimonial Causes Act of 1857. Prior to the last mentioned Act the Ecclesiastical Courts had no power to grant any decree for a divorce *a vinculo matrimonii*. This could be done only by a special Act of the Parliament of Great Britain and Ireland, which, of course, possessed the power to grant or withhold permanent alimony or maintenance to a petitioning wife in its discretion, according to the circumstances of the particular case dealt with.

1940

McLENNAN v. McLENNAN.

Crocket J.

When "The Court for Divorce and Matrimonial Causes" was established in England in 1857 and invested by 20 & 21 Vict., c. 85, with jurisdiction to dissolve marriages upon any of the grounds specified in sec. 27, as well as with jurisdiction to pronounce decrees for judicial separation (but not for divorce *a mensa et thoro,* though providing that a decree for a judicial separation should have the same force and the same consequences as a divorce *a mensa et thoro* then had), and all other jurisdiction formerly exercisable by the Ecclesiastical Courts of England, except in respect of marriage licences, the newly established court was empowered, "if it shall think fit, on any such decree" to order that the husband should to its satisfaction

> secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable,

and also upon any petition for dissolution of marriage to make interim orders for payment of money by way of alimony or otherwise as it would have in a suit instituted for judicial separation. (See sec. 32 of 20 & 21 Vict., c. 85).

It is pointed out in Browne & Watts on Divorce (10th ed.), 1924, in its chapter on Alimony and Maintenance that the English Divorce Court as established in 1857 derived its power to order alimony—whether *pendente lite* or permanent—in cases other than suits for dissolution, from sec. 6 of 20 & 21 Vict., ch. 85, by which all jurisdiction then vested in the Ecclesiastical Courts in respect of all causes, suits and matters matrimonial, including suits of nullity of marriage, was transferred to the Divorce Court. So that it would appear that even the Ecclesiastical Courts, before the transfer of their jurisdiction to the English Divorce Court, were empowered to award alimony, not only to the petitioning or respondent wife on decreeing a separation from bed and board in the case of a still subsisting marriage, but to award alimony to the *de facto* wife upon a decree declaring her marriage to have been null and void *ab initio,* and that this jurisdiction passed to the English Court for Divorce and Matrimonial Causes in virtue of sec. 6 of the Act of 1857. How then can it be held that "alimony" as used in the New Brunswick Acts of 1791 and 1860 must be confined to an award

1940

McLENNAN v. McLENNAN.

Crocket J.

made to a woman who still maintains her status as wife in a suit for a divorce *a mensa et thoro*? Assuming, however, that that is the true interpretation of the word "alimony," as applicable to the Ecclesiastical Courts of England, or to the English Court for Divorce and Matrimonial Causes, it is quite another matter to say that the word carries the same meaning in the New Brunswick Acts referred to. If that were so, the New Brunswick Court would be without jurisdiction upon or after pronouncing a decree either for dissolution or nullity of any marriage to make provision in any circumstances for the support or maintenance of the petitioning or respondent wife. As I have already pointed out, the existing New Brunswick Court of Divorce and Matrimonial Causes derives its jurisdiction to dissolve or annul marriages, as well as to decree separation from bed and board, and alimony, from the original Act of 1791, which makes no reference whatever to the Ecclesiastical Courts of England, and the requirement of the present Act that the practice and proceedings of the Court shall be conformable as near as may be to the former practice of the Ecclesiastical Court in England before the enactment of the English Divorce Act has no application where the provisions of the New Brunswick Act or any rules or orders, whether made by the existing Court or the original Court of Governor and Council, otherwise provide.

The jurisdiction of the New Brunswick Court of Divorce and Matrimonial Causes to award alimony upon the granting of a decree for the dissolution of marriage on the ground of adultery was never questioned until it was challenged in the Appeal Division upon an appeal from a decree dissolving the marriage of one MacIntosh, at the suit of his wife. That case was tried before me during my term of office as Judge of the Court of Divorce and Matrimonial Causes. While granting the petitioning wife the decree prayed for, I refused to grant permanent alimony to her in the special circumstances of the case (1). In the Appeal Court the respondent's counsel, among other grounds, raised the point that the trial court had no jurisdiction to grant permanent alimony or maintenance in cases brought for the dissolution of marriage. The Appeal

(1) *MacIntosh* v. *MacIntosh*, (1927) 54 N.B. Rep. 145, at 145-151.

1940

McLENNAN v. McLENNAN.

Crocket J.

Court (1) unanimously refused to interfere with the discretion exercised by the trial judge in refusing alimony, but, in view of the far-reaching effects which a decision sustaining the contention of the respondent's counsel that the Divorce Court possessed no power to grant permanent alimony in any suit for the dissolution of marriage would have, not only upon future litigation, but upon cases where alimony had been granted in actions of divorce for adultery, decided to give judgment upon that question. White, J., in delivering the judgment of the court said (2):

> It is difficult to suppose that the Legislature, in enacting that adultery should be a ground for dissolution of the matrimonial bond, intended to leave the guilty husband in the full enjoyment of the property obtained from his wife by marriage, and at the same time to relieve him from all liability to provide by alimony for his wife's maintenance. If that was the intention of the Legislature, the result would be that the wife could only obtain a divorce for adultery by completely impoverishing herself. I cannot believe that such was the intention of the Act.

Such being the construction which the New Brunswick Court of Divorce and Matrimonial Causes has consistently placed upon the enactment from which it derives its jurisdiction ever since its constitution in the year 1860, as an examination of its records by a former registrar of the court disclosed before the unfortunate destruction of many of them in the year 1936, and the pronouncement of the Appeal Division in the *MacIntosh* case (1) in 1927 having been since accepted as deciding the question of the jurisdiction of the New Brunswick Divorce Court to award permanent alimony or maintenance in suits for dissolution from the bond of matrimony on the ground of adultery, we should hesitate, even if the language of the enactment in question in connection with other relevant provisions of the Act and the rules of court made thereunder were such as to make the point doubtful, to now place a different construction upon it. So far as I am concerned, I cannot perceive how any other construction than that upon which the New Brunswick Divorce Court has always acted could reasonably be placed upon the jurisdiction, which the Legislature conferred upon it in respect of suits for divorce from the bond of matrimony. As Lord Hailsham, L.C., considering an appeal from a judgment of the Court of Appeal to the House of Lords in the case of *Hyman* v.

(1) (1927) 54 N.B. Rep. 145. (2) 54 N.B. Rep. at 162.

1940

MCLENNAN v. MCLENNAN.

Crocket J.

Hyman (1), in which a decree for dissolution of marriage had been granted by the English Court for Divorce and Matrimonial Causes on the ground of the husband's adultery, said (2):

> The power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution.

Lord Buckmaster in the same case, said that the phrase "alimony or maintenance," as used in the English Divorce Act of 1857 and its amendments, was in his opinion "a legal pleonasm rather than a legal exactitude."

As to the second ground, it cannot, I think, be questioned that the Judge of the Divorce Court has the right, if he sees fit to exercise it, to refuse to award alimony to a wife upon a decree dissolving her marriage on the ground of her husband's adultery, and that an Appeal Court is justified in interfering with the trial judge's discretion only when it plainly appears that that discretion was not judicially exercised. As already pointed out, the English Court for Divorce and Matrimonial Causes was empowered by sec. 32 of 20 & 21 Vict., cap. 85, to order alimony or maintenance on such a decree only "if it should think fit," and, if it should choose to award any alimony at all, it was required to have regard to the fortune and ability of the husband, as well as to the conduct of the parties, in fixing the amount it should deem reasonable in the circumstances It was in no way fettered in suits for dissolution by the principles or rules upon which the Ecclesiastical Courts had formerly acted, even with regard to interim orders for the payment of alimony *pendente lite,* as it was in all other suits, in respect of which the jurisdiction of the Ecclesiastical Courts was transferred to it, and whose decisions were consequently supposed to be binding upon it.

In 1861, however, in *Goodheim* v. *Goodheim* (3), Sir Cresswell Cresswell, sitting in the Court for Divorce and Matrimonial Causes as Judge Ordinary, and dealing with a petition for alimony *pendente lite* and the contention put forward in behalf of the petitioning wife that her earnings ought not to be taken into consideration in awarding alimony, inasmuch as the Ecclesiastical Courts never

(1) [1929] A.C. 601. (2) At p. 614.
(3) (1861) 30 L.J. (P. M. & A.) 162.

1940

McLENNAN v. McLENNAN.

Crocket J.

did so, pointed out that in questions of alimony the Ecclesiastical Courts always acted on the assumption that the wife had nothing and the husband everything. "Such a principle," he said,

is inapplicable where the wife is actually earning money, as alleged in the answer to the petition. If the husband were earning a salary of £100 a year as a tutor in a family, and the wife were earning an equal salary as a governess in another family, it would be absurd to hold that alimony should be awarded to her, without taking her income into consideration.

On these grounds he declined to make any order for alimony *pendente lite*. And this, notwithstanding the express provision of sec. 22 of the *Divorce and Matrimonial Causes Act* of 1857, that in all suits and proceedings, other than proceedings to dissolve any marriage, the said court

shall proceed and act and give relief *on principles and rules* which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

It should be noted in this connection that sec. 12 of the New Brunswick Court of Divorce Act, as it now appears in cap. 115 of the R.S.N.B., 1927, under the heading of "procedure," that that section does not require the New Brunswick Court to "proceed and act and give relief on principles and rules," which shall be conformable as near as may be to the *principles and rules* on which the Ecclesiastical Courts of England formerly proceeded and acted, but that

the *practice and proceedings* of the court shall be conformable, as near as may be, to the practice of the Ecclesiastical Court in England prior to the enactment of the English *Divorce and Matrimonial Causes Act,* and then,

subject however to the provisions of this chapter, and such rules and orders as are now in force in the court, and consistent with the provisions of this chapter, *whether such rules and orders were made by the court or by the said Court of Governor in Council.*

Rule 66 of the rules of that court expressly provides that the Judge upon an application for maintenance shall make such order *as he shall think fit,* though the Judge of the court before the promulgation of the said rule had always had the right to grant or refuse alimony or maintenance, either *pendente lite* or permanent, in virtue of the transfer

to it of the "full authority, power and jurisdiction" of the Court of Governor and Council, and of the provisions of the Act of 1860, constituting the present court, as has already appeared.

The principle laid down by Sir Cresswell Cresswell in the *Goodheim* case (1) in 1861 has ever since been consistently followed by the courts of England in respect of alimony *pendente lite.*

In *Burrows* v. *Burrows* (2)—a case in which the parties had been living separate for several years and the wife admitted that she lived with her son and acted as his housekeeper and that he allowed her £30 a year—Lord Penzance, sitting as Judge Ordinary, refused to make an order for alimony *pendente lite* in a suit by a wife for judicial separation on the grounds of adultery and cruelty.

In *George* v. *George* (3), in the same volume of the Law Reports, in which it was proved that the wife, who was suing for dissolution of marriage, had been living separate and apart from her husband for several years, was in service and received £14 a year wages, besides being provided with board and lodging, Lord Penzance said:

> The wife is able to support herself by means of her own exertions, and she has long lived apart from her husband without an allowance. If I were to allot alimony, I should be placing her in a better position than she was in before she instituted this suit. I shall therefore make no order for alimony.

In the same volume of the Law Reports at p. 610 will be found another case, *Holt* v. *Holt* (4)—where the husband was suing for dissolution of marriage—in which Lord Penzance said:

> I think the husband ought not to be called on to pay alimony for the time during which the wife had other means of support. * * * The ground upon which the court proceeds is, that she was living in such a manner that she had means of support independent of her husband.

In *Bass* v. *Bass* (5)—which was an appeal from an order of Bargrave Deane, J., suspending an order for alimony made by the registrar of the court, and giving the husband leave to cross-examine the wife on her affidavit in support of an application for alimony *pendente lite* in

(1) 30 L.J., P.M. & A. 162. (2) (1867) L.R., 1 P. & D. 554.
(3) (1867) L.R. 1 P. & D. 554.
(4) (1868) L.R. 1 P. & D. 610. (5) [1915] P. 17.

1940

McLENNAN v. McLENNAN.

Crocket J.

a suit brought by her husband for divorce on the ground of her adultery, Kennedy, L.J., in his reasons in the Court of Appeal said:

> Turning now to the question of alimony, it appears to me to be also clear that this question depends upon the possession or non-possession by the wife of sufficient means of support; and it is only right that, if the husband is called upon to provide maintenance by way of alimony, it should be open to him to prove, if he can, that the wife has no need of that alimony, the quantum of which, if granted, will depend on such considerations as the income of the husband. The question whether the wife has sufficient means of support is the main issue on which the grant of alimony depends. * * * It may be that this source [the respondent's means of support] is the co-respondent, but it is impossible not to accede to the argument that the husband must have an opportunity before the registrar to show that his wife has sufficient support.

Swinfen Eady, L.J., said he was of the same opinion. "The husband," he added,

> objects to paying it [alimony *pendente lite*] on the short ground that the wife has sufficient means of support independently of him. It cannot be disputed that, if that be so, it would not be proper to order the husband to pay alimony *pendente lite*, and the authorities have gone so far as to decide in terms in *Madan* v. *Madan* (1), a case stating the practice of the court and decided so long ago as 1867, that "if the husband can prove that his wife has sufficient means of support independent of him, even although they be derived from the co-respondent, she will not be entitled to an allotment of alimony," the principle being that maintenance should be provided by the husband for his wife, but that if she has it already, whether from the co-respondent or any one else, the husband ought not to be ordered to pay alimony.

Browne & Watts (10th ed., 1924, at p. 148) cites these and other cases as authority for its statement that:

> In allotting alimony *pendente lite* the wife's earnings and power of maintaining herself must be taken into consideration, especially where the parties are very poor.
>
> Where the husband and wife have been living apart for many years, and the wife has been supporting herself, and is still able to do so, alimony *pendente lite* will not be allotted, except under special circumstances.
>
> Where the wife has sufficient means of support independent of the husband, even although they be derived from the co-respondent, she will not be entitled to an allotment of alimony.

That this long established principle of the English courts was one of the reasons of the learned trial judge's refusal to award permanent alimony or maintenance in the case at bar cannot be doubted. He explicitly found upon the petitioner's own evidence that she lived separate and apart from her husband for a very long time—nearly nine years—and was quite able to support herself and was still

(1) (1867) 37 L.J. (P. & M.) 10.

1940

McLENNAN v. McLENNAN.

Crocket J.

quite able to do so, and that no special circumstances were presented by her disclosing any change in her condition or position in life, and added that, while he might be in error, and subject to correction, he understood

> the rule of this Court that has been followed for a very long time is that when husband and wife have been living separate and apart for many years and the wife has been supporting herself and is still able to do so, that help such as is asked for in this case will not be allotted except under special circumstances.

In fact he cited *George* v. *George* (1), above referred to.

This, however, was not his only reason. He coupled with it the fact that the petitioner had unnecessarily and unjustifiably left her husband's home in November, 1928, without any cruelty, force or coercion having been exercised by her husband to compel her to leave him and that she lived quite independently of him without even asking for any aid or assistance from him during the nearly nine years which intervened before filing her petition for divorce.

His Lordship, in finding that the petitioner was not justified in separating herself from her husband in 1928, undoubtedly was acting upon the authority of two well known decisions of the Supreme Court of New Brunswick, which firmly established in that Province the long recognized rule of the Ecclesiastical Courts of England, as well as of the House of Lords, that no conduct, which falls short of legal cruelty, will be recognized by the courts as justifying the separation of husband and wife, and that to constitute such legal cruelty there must be "either actual bodily hurt or injury to health or such acts or circumstances as are likely to produce an apprehension of such hurt or injury." See judgment of Barker, C.J., in *Currey* v. *Currey* (2), where he said: "This is substantially the rule acted upon by this Court in *Hunter* v. *Hunter*" (3).

In both these New Brunswick cases there was evidence, not only of hopeless incompatibility, of mutual dislike, aversion and hatred between the parties and of rude and abusive language, but of actual physical violence used by the husband against the wife in the heat of passion, though not causing actual bodily harm; yet the court in the first case unanimously held that in the circumstances, as it and the trial judge viewed them, there was no such cruelty as would justify a court in decreeing separation.

(1) (1867) 37 L.J. Mat. 17. (2) (1910) 40 N.B. Rep. 96, at 139.
(3) (1863) 10 N.B. Rep. 593.

1940

McLENNAN v. McLENNAN.

Crocket J.

In the *Currey* case (1), nearly fifty years later, the New Brunswick Supreme Court, while dividing 3-3 upon the question of whether the husband's conduct was such as to be likely to produce an apprehension of such bodily hurt or injury to health, if the wife continued to live with him, unanimously held that the learned trial judge (McKeown, J.) was right in accepting *Russell* v. *Russell* (2), in holding that the judgment of Lord Stowell in *Evans* v. *Evans* (3) correctly laid down "the rule by which the Divorce Court must be governed as to what in point of law constituted legal cruelty."

For my part, in view of these decisions, by which he was bound, I cannot perceive how it can properly be said that the learned trial judge in the present case, in finding that upon the evidence adduced before him there was no necessity or justification for the petitioner leaving her husband's home and continuing to live quite independently of him for a period of nearly nine years before the institution of her suit for divorce, did not judicially determine that question.

The principles so firmly established by the powerful reasoning of Lord Stowell, sitting as the judge of the Consistory Court of London in the *Evans* case (3) in 1790, that there must be danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it, is still the recognized law of England, as it is of the Province of New Brunswick. Hard and inhumane as it may appear to the modern mind, the Courts of England have to this day consistently rejected repeated appeals to change it for the sake of the happiness of the parties in particular suits. More than one hundred years later the House of Lords, by a majority of the Law Lords (Lords Herschell, Watson, Macnaghten, Shand and Davey) in the celebrated *Russell* case (2) distinctly reaffirmed it, notwithstanding the passage of the Divorce Act of 1857, by which it was urged a new ground for separation and a new practice had been created, and refused to accept the proposition that the long recognized rule should be enlarged so as to include such conduct, either on the part of the wife or on the part

(1) (1910) 40 N.B. Rep. 96 at 139. (2) [1897] A.C. 395.
(3) (1790) 1 Hagg. Cons. 35.

of the husband, as renders their future marital cohabitation hopeless and impossible. Lord Herschell in his reasons said (1):

> But in laying down a proposition of law on such a subject as that with which your Lordships are dealing, it is necessary to keep in view the consequences, and not to contemplate only its operation in the particular case.

And further, that the extension of the rule in the direction contended for

> would afford no sort of guide, but would, in my opinion, unsettle the law and throw it into hopeless confusion. Views as to what is possible, or in this sense would differ most widely. Though in some instances most men would, no doubt, concur in their opinion, yet, speaking generally, the determination of the case would depend entirely upon the particular judge or jury before whom it might chance to come. Not a few would think that the discharge of the duties of married life was impossible whenever love had been replaced by hatred, when insulting and galling language was constantly used, when, in short, the ordinary marital relations no longer prevailed. * * * I have no inclination towards a blind adherence to precedents. I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development involves. But marital misconduct is unfortunately as old as matrimony itself. Great as have been the social changes which have characterized the last century in this respect, there has been no alteration —no new development. I think it is impossible to do otherwise than proceed upon the old lines.

In my opinion, the learned judge of the Court of Divorce and Matrimonial Causes properly exercised the discretion, which the law vested in him, in refusing upon the evidence adduced before him to make an order for permanent maintenance, and the Appeal Division was not justified in ignoring his decisison and itself directing the order prayed for.

The appeal, while failing on the first ground, should be allowed on the second, the judgment of the Appeal Court set aside and that of the trial judge restored.

No order should be made as to costs.

KERWIN J.—I agree with my brother Crocket that the New Brunswick Court of Divorce and Matrimonial Causes possesses jurisdiction to award permanent alimony (or maintenance) when granting a decree of divorce *a vinculo matrimonii*. This being so, I am of opinion that the petitioner, respondent, was entitled to alimony unless some

(1) At p. 460.

1940
McLENNAN
v.
McLENNAN.
Kerwin J.

legal ground may be found upon which to base a refusal. Any discretion that may have been vested in the trial judge is a judicial discretion and the mere fact that he determined not to grant alimony does not absolve appellate courts from examining the record to see if that discretion was properly exercised.

The evidence in the present case is not very satisfactory because, in my view, the trial judge refused to permit certain questions, put by counsel for the petitioner, to be answered by her. I agree, however, with the majority of the Appeal Division of the Supreme Court of New Brunswick that there is sufficient evidence to show that the petitioner is not disentitled to alimony. On the point as to her means, the evidence is ample to show that the petitioner really managed to subsist through the assistance, if not the charity, of her relatives, and the mere fact that for some years she did not ask the appellant to maintain her surely cannot disentitle her to the support she now requires. The evidence is also sufficient to show that the petitioner did not desert the respondent; on the contrary, to my mind, it shows that she was justified in leaving him even though she would not at that time be entitled to a divorce.

The appeal should be dismissed with costs.

HUDSON, J.—I have had the privilege of reading the judgment in this appeal prepared by my brother Crocket and agree with his view that the Court of Divorce and Matrimonial Causes of New Brunswick has jurisdiction to grant alimony under the circumstances of this case.

After carefully perusing the evidence and the record of the other proceedings in the action, I have come to the conclusion that the plaintiff is entitled to alimony on the grounds stated by Mr. Justice LeBlanc in the Court below (1).

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jones & Jones.*

Solicitor for the respondent: *D. R. Bishop.*

(1) 13 M.P.R. at 545-552.

IN THE MATTER OF THE TRUSTS UNDER THE WILL OF THE HONOURABLE SIR ALBERT EDWARD KEMP, K.C.M.G., DECEASED.

1939
* Nov. 14,15.
1940
* March 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Provisions for benefit of testator's wife and direction that "all income taxes which may be payable in respect of" said provisions "shall be paid out of my estate by my trustees"—Wife receiving income from other sources also—Extent of indemnification by the trustees in respect of wife's income taxes, in view of effect of taxing Acts in increasing rate of tax on gradual scale as amount of net income increases, in imposing surtax, and in treating sum paid by trustees for income tax as part of wife's income.

By clause 3 of the testator's will, he gave and devised to his trustees his residence in Toronto known as "Castle Frank" upon the following trusts: During his wife's lifetime, so long as she remained his widow, and so long as she desired to use Castle Frank as her residence, they were to keep it up in suitable condition; pay all taxes, insurance, repairs, etc.; allow her to occupy it free of rent (the furniture, etc., were given to her outright); bear the expense of maintenance and management, to cover the cost of which they were to pay her $2,250 monthly. If she should cease to occupy it as her home, she was to be paid $75,000 out of the general estate, the monthly allowance of $2,250 should cease and in lieu thereof she was to be paid $2,000 monthly during her widowhood. After the testator's death she continued to occupy Castle Frank as her residence and home.

Clause 4 of the will directed (*inter alia*) that "all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my trustees."

The testator's wife received also under the will (clause 16) a portion of the residuary estate and the income (not given free from income tax), during life and widowhood respectively, from two other portions thereof. Also she had income of her own.

Under the income taxing Acts, the tax is computed by applying, to the whole net income of the tax-payer, rates which increase on a gradual scale as the amount of the net income increases, and by imposing a surtax on incomes exceeding a certain amount. Therefore the testator's widow paid a higher rate because of the addition of her benefits under clause 3 of the will (so far as they were assessable as income against her) to her income from other sources. Also, under said taxing Acts, the sum paid by the trustees for income tax as directed by clause 4 of the will, is treated as part of her income.

The questions in issue arose under said clauses 3 and 4 of the will and had to do with the extent to which the testator's widow was entitled to be indemnified by the trustees in respect of income taxes assessed against her.

Held: The trustees must repay to the testator's widow under clause 4 of the will only such proportion of the whole of the income tax

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1940

In re KEMP.

assessed against her in respect of each year's income under each Statute imposing an income tax upon her income, as the total amount expended or paid out in such year by the trustees under the provisions of clause 3 and of clause 4 of the will (to the extent that the same is or is deemed to be assessable as income against her under the provisions of such Statute) bears to the total amount which is or is deemed to be assessable as income against her in such year under the provisions of such Statute. (Rinfret and Davis JJ. did not feel justified in taking a contrary view to the judgments in *In re Bowring*, [1918] W.N. 265, and the *Fleetwood-Hesketh* case, [1929] 2 K.B. 55, which, though not binding on this Court, carry the greatest weight. Were it not for those judgments, they would have held (as was held by McTague J., [1939] O.R. 59, before whom the questions came in the first instance) that the amount of the allowance to the testator's widow for the maintenance and management of Castle Frank (which under the will are paid upon a condition) should not increase the burden of her income taxes beyond the amount which she would have had to pay in any year, were such allowance not received by her).

Judgment of the Court of Appeal for Ontario, [1939] O.R. 245, varied to the extent that (by effect of above holding) the trustees must (subject to the principle of an apportionment as above) indemnify the testator's widow against any tax payable in respect of the sum paid by the trustees under clause 4 of the will for income tax. (The holding below that the deductions and exemptions allowed under the taxing Acts are to be calculated as belonging to and intended for the exclusive benefit of the testator's widow—subject to an apportionment, by consent, with regard to deductions in respect of charitable donations—was not disturbed).

APPEAL by Lady Kemp, widow of, and a beneficiary under the will of, Sir Albert Edward Kemp, deceased, from the judgment of the Court of Appeal for Ontario (1), allowing the appeal of certain residuary beneficiaries under the said will from the judgment of McTague J. (2), on an application by the executors and trustees of the will, by way of originating motion, for an order construing and interpreting the will and for the opinion, advice and direction of the Court upon certain questions arising out of the trusts declared in and by the will.

Clauses 3 and 4 of the will read as follows:

3. I GIVE AND DEVISE to my said Trustees my residence and lands in the City of Toronto, known as "Castle Frank," including houses, out-houses and other buildings thereon, and all the appurtenances used and enjoyed therewith (all of which are to be understood as being included in the term "Castle Frank") upon the following trusts:

(*a*) During the lifetime of my wife, Virginia, so long as she shall remain my widow, and so long as she desires to make use of the same as her residence, to keep up Castle Frank in a suitable condition for that

(1) [1939] O.R. 245; [1939] 2 D.L.R. 338.
(2) [1939] O.R. 59; [1939] 1 D.L.R. 117.

purpose; and all costs and charges for the payment of taxes, insurance and for repairs, renewals and other like expenditures for the proper structural upkeep of the said houses and buildings shall be borne by my estate and be paid by my Trustees.

(*b*) To allow my said wife during her lifetime, and so long as she shall remain my widow, to occupy Castle Frank as her home and residence, free of rent.

(*c*) The furniture, plate, pictures and other personal chattels constituting the ordinary contents of said house at the time of my death, I give and bequeath to my wife, together with any automobile or automobiles which I may then own.

(*d*) While my said wife shall occupy Castle Frank as her home and residence, my Trustees shall also bear the expense of the maintenance and management thereof; and to cover such cost, my Trustees shall pay to my wife the sum of Two Thousand Two Hundred and Fifty Dollars ($2,250) each month in advance so long as she continues to reside in Castle Frank and to use it as her home.

(*e*) If my wife shall cease to occupy Castle Frank as her home for any of the reasons aforesaid, I desire my said Trustees to raise out of my general estate the sum of Seventy-five Thousand Dollars ($75,000), which sum will enable her, if she so desires, to purchase or build or otherwise provide a suitable house for herself, including the necessary land in connection therewith, and to pay the said sum to my wife as soon as conveniently may be after she shall inform my Trustees of her desire to give up her occupation of Castle Frank; the said sum of Seventy-five Thousand Dollars ($75,000) is intended to be an absolute gift to my wife, and she shall not be obliged, unless she wishes to do so, to expend that sum or any part of it, in purchasing, building or otherwise acquiring any residence; the receipt of my wife therefor shall be an absolute discharge of my Trustees for the payment of the said sum of Seventy-five Thousand Dollars ($75,000).

(*f*) Upon my said wife ceasing to occupy Castle Frank as her residence, the monthly allowance to her of Two Thousand Two Hundred and Fifty Dollars ($2,250) for the upkeep thereof, as provided in Paragraph 2 (*d*) of this Will, shall cease; and in that event, I give her in lieu thereof, and direct my Trustees to pay to her while she shall remain my widow, a monthly allowance of Two Thousand Dollars ($2,000).

4. I DIRECT that the above provisions in favour of my wife shall be a first charge upon my estate, and shall be provided for and paid by my Trustees in priority to any other legacies payable under my said Will, and I further direct that any Succession Duties, and all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my Trustees.

By another clause (16) of the will, Lady Kemp was given a one-sixteenth portion or share of the residuary estate, and the income, during her life, from a further one-sixteenth portion or share thereof, and the income, during her widowhood, from a one-eighth portion or share thereof. (These gifts were not expressed to be free from income tax). Also Lady Kemp had at the time of her marriage and at the time of the making of deceased's will and still has, an independent income of her own.

1940

In re KEMP.

The deceased's will was dated December 1, 1927. He died on August 12, 1929.

The questions raised on the application were as follows:

Question (1) Are the amounts of income taxes which the Executors are directed under Clause 4 of the Will to repay to Lady Kemp, to be determined upon the footing

(*a*) that Lady Kemp has no income apart from the income received under Clause 3 of the Will; or

(*b*) that her income from any or all of the following sources is to enter into the computation,

(1) sources outside the Will,
(2) under Clause 16 of the Will,
(3) the repayment of income tax under Clause 4?

Question (II) If Question 1 (*b*) is in whole or part answered in the affirmative, must the Executors repay to Lady Kemp

(*a*) the whole of the income tax payable by her, or

(*b*) a proportion only of such income tax, and, if so, what proportion?

Question (III) Must the Executors, in determining the amount of income tax which they are directed to repay to Lady Kemp, take into the computation

(*a*) the whole of the deductions and exemptions allowed to her by the Income Tax Acts, or

(*b*) a proportion only of such deductions and exemptions, and, if so, what proportion, or

(*c*) no part of the said deductions and exemptions?

Question (IV) Do the "income taxes" referred to in Clause 4 of the Will include all taxes from time to time imposed on income (including the Ontario Income Tax, first imposed in 1936) or only such taxes as were imposed on income at the date of the testator's death?

Question (V) Are the income taxes which are repayable by the Executors to be paid by them out of capital or income of the estate or apportioned between capital and income and if so on what basis?

McTague J., in concluding his reasons for judgment, indicated his answers as follows:

Therefore my answers to the questions will be in the following terms. Income taxes directed to be paid by the executors under clause 4 of the will are to be determined upon the footing that Lady Kemp's income includes income from sources outside of the will, income under clause 16 of the will and repayment on income tax under clause 4. The executors should repay to Lady Kemp all additional income tax which becomes payable by virtue of the income under clause 3 being superimposed upon her income from all other sources. Deductions and exemptions are to be taken as belonging to and for the benefit of Lady Kemp and not for the benefit of the executors, subject to this, that counsel for Lady Kemp has intimated that she is willing that the executors shall have the benefit of a proportion of the saving due to deduction for charitable donations. If counsel cannot agree on an appropriate term in the formal order to cover this concession, that matter may be spoken to. The words "income taxes" referred to in clause 4 of the will, include all income taxes from time to time on income and specifically include Ontario income tax.

The income taxes repayable by the executors to Lady Kemp are to be paid out of income primarily and if there is a deficiency of income, then out of capital.

And accordingly the formal order declared that the answers to the questions should be respectively as follows:

(I) The amounts of income taxes which the Executors are directed under Clause 4 of the Will to repay to Lady Kemp are to be determined upon the footing that her income includes income from sources outside of the Will, income under Clause 16 of the Will, and the repayment of income tax under Clause 4 of the Will.

(II) The Executors must repay to Lady Kemp all income tax levied against her in excess of the income tax which would have been levied against her if she were in receipt of no income under Clause 3 of the Will.

(III) Deductions and exemptions allowed to Lady Kemp by the Income Tax Acts are to be calculated as belonging to and intended for the exclusive benefit of Lady Kemp and not for the benefit of the Executors, except that the executors shall be entitled in each year to that proportion of any deductions allowed to Lady Kemp in respect of charitable donations which the payments made to Lady Kemp under Clause 4 of the Will during such year bear to Lady Kemp's total income during such year.

(IV) The words "income taxes" in Clause 4 of the Will include all income taxes from time to time imposed on income, and specifically include the Ontario Income Tax, imposed by Act of the Legislature of Ontario.

(V) The income taxes repayable by the Executors to Lady Kemp are to be paid out of income primarily and in case of a deficiency of income, then out of capital.

On appeal to the Court of Appeal for Ontario, the judgment of McTague J. was varied, and in the formal order it was declared that the answers to the questions should respectively be as follows:

(I) The amounts of income taxes which the executors are directed under Clause 4 of the will to repay to Lady Kemp are to be determined on the footing that her income consists of

(*a*) payments made by the executors under Clause 3 of the will;

(*b*) income under Clause 16 of the will;

(*c*) repayment of income tax under Clause 4 of the will; and

(*d*) income from all other sources;

to the extent that all or any thereof are or are deemed to be assessable income of Lady Kemp under the provisions of any statute from time to time in force imposing income tax upon her income.

(II) The executors must repay to Lady Kemp under Clause 4 of the will only such proportion of the whole of the income tax assessed against her in respect of each year's income under each Statute imposing an income tax upon her income, as the total amount expended or paid out in such year by the executors under the provisions of Clause 3 of the will (to the extent that the same is or is deemed to be assessable as income against Lady Kemp under the provisions of such Statute) bears to the total amount which is or is deemed to be assessable as income against Lady Kemp in such year under the provisions of such Statute.

1940

In re KEMP.

(III) Deductions and exemptions allowed to Lady Kemp by the Income Tax Acts are to be calculated as belonging to and intended for the exclusive benefit of Lady Kemp and not for the benefit of the Executors, except that the executors shall be entitled in each year to that proportion of any deductions allowed to Lady Kemp in respect of charitable donations which the payments made to Lady Kemp under Clause 4 of the will during such year bear to Lady Kemp's total income during such year.

(IV) The words "income taxes" in Clause 4 of the will include all income taxes (which the Executors are required to repay to Lady Kemp as set forth in the answer to question II above) from time to time imposed on income, and specifically include the Ontario income tax imposed by Act of the Legislature of Ontario.

(V) The income taxes repayable by the Executors to Lady Kemp are to be paid out of income primarily, and in case of deficiency of income then out of capital.

On appeal to this Court the judgment pronounced was as follows:

"The answer to question II is as follows:

The executors must repay to Lady Kemp under clause 4 of the will only such proportion of the whole of the income tax assessed against her in respect of each year's income under each Statute imposing an income tax upon her income, as the total amount expended or paid out in such year by the executors under the provisions of clause 3 and of clause 4 of the will (to the extent that the same is or is deemed to be assessable as income against Lady Kemp under the provisions of such Statute) bears to the total amount which is or is deemed to be assessable as income against Lady Kemp in such year under the provisions of such Statute.

"The judgment of the Court of Appeal will be varied accordingly. Subject to this variation the appeal is dismissed.

"The costs of appeal of all parties will be paid out of the estate, the costs of the executors as between solicitor and client."

I. F. Hellmuth K.C. and *G. B. Balfour K.C.* for the appellant.

H. C. F. Mockridge for adult respondents.

J. M. Baird K.C. for infant respondents.

Donald M. Fleming for Executors, respondents.

THE CHIEF JUSTICE—The pertinent words of clause 4 of the will are these:

I direct * * * that all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my Trustees.

My conclusion is that the indemnity under clause 4 is a complete indemnity as to the part of Lady Kemp's income taxes in respect of which that clause takes effect.

To be precise, she is entitled in each year to be indemnified by the Trustees against (*inter alia*) any tax payable in respect of moneys received by her under the words of the clause quoted above.

I should add that I agree with the Court of Appeal as to the principle by which the amount payable as indemnity under clause 4 is to be calculated; and I think that principle governs the calculation of the amount payable pursuant to the view herein expressed.

The formal order of the Court of Appeal should be amended accordingly.

The judgment of Rinfret and Davis JJ. was delivered by

DAVIS J.—No question of the liability of Lady Kemp for income taxes (either Dominion or provincial) in respect of the particular moneys in question is raised in this appeal. The only question is: To what extent is Lady Kemp entitled to be reimbursed by the trustees of her husband's will in respect of income taxes assessed against and paid by her on certain moneys received by her from the trustees under the said will?

From the residuary part of her husband's estate she was given a one-sixteenth portion outright, the income from a further one-sixteenth portion so long as she lives, and the income from a further one-eighth portion so long as she remains the widow of Sir Edward Kemp. While the exact amounts are not disclosed in the material filed, it is admitted that they are very substantial amounts. No question is raised with respect to whatever income tax Lady Kemp may have to pay on that part of her total income which arises from these several sources; none of it is made free from income tax under the provisions of the will. Further, Lady Kemp had at the time of her marriage to Sir Edward Kemp, and retains, investments from which she receives additional income.

The question raised in these proceedings for the interpretation of the will is solely concerned with certain moneys that are paid to Lady Kemp by the trustees of her husband's will in respect of the maintenance and

1940

In re KEMP.

Davis J.

management of his large residential property in the City of Toronto known as "Castle Frank." Sir Edward dealt with that property at the very commencement of his will. He devised it to his trustees upon certain trusts and refers to it as

> my residence and lands in the City of Toronto, known as "Castle Frank," including houses, out-houses and other buildings thereon, and all the appurtenances used and enjoyed therewith (all of which are to be understood as being included in the term "Castle Frank").

During the lifetime of Lady Kemp, "so long as she shall remain my widow, and so long as she desires to make use of the same as her residence," the trustees of the will are directed "to keep up" Castle Frank in a suitable condition for that purpose, and

> all costs and charges for the payment of taxes, insurance and for repairs, renewals and other like expenditures for the proper structural upkeep of the said houses and buildings shall be borne by my estate and be paid by my trustees.

Permission is given to Lady Kemp during her lifetime so long as she remains Sir Edward's widow to occupy Castle Frank as her residence free of rent. The furniture, plate, pictures and other personal chattels "constituting the ordinary contents of said house" are given outright to Lady Kemp. Then follows this provision:

> While my said wife shall occupy Castle Frank as her home and residence, my trustees shall also bear the expense of the maintenance and management thereof; and to cover such cost, my trustees shall pay to my wife the sum of Two Thousand Two Hundred and Fifty Dollars ($2,250) each month in advance so long as she continues to reside in Castle Frank and to use it as her home.

Lady Kemp has been occupying Castle Frank as her home and residence and has been assessed for income tax in respect of her total annual income including the receipt by her of the amount of the allowance made for the maintenance and upkeep of the Castle Frank property.

It is important to observe that the particular language of the will is that while Lady Kemp shall occupy Castle Frank as her home and residence, the trustees of the will "shall also bear" the expense of "the maintenance and management thereof" and "to cover such cost" the trustees are to pay Lady Kemp $2,250 each month in advance. This provision, among others, in favour of Lady Kemp

> shall be a first charge upon my estate, and shall be provided for and paid by my trustees in priority to any other legacies payable under my

said will, * * * and all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my trustees.

It is perfectly plain that the testator's intention was that the amount of the allowance to the widow for the maintenance and management of the Castle Frank property should not be cut down in her hands by the imposition of any income tax. The effect of the language of the testator was that Lady Kemp was to be completely indemnified against all income taxes, in respect of the amount of that allowance, that she might be called upon to pay.

It is contended by counsel for Lady Kemp in effect that this money, which Sir Edward obviously considered necessary for the purpose for which it was provided, should be treated as in an air-tight compartment by itself and that the receipt of the amount of this allowance for the maintenance and management of Castle Frank should not increase the burden of income taxes payable by Lady Kemp over and above whatever amount she would have had to pay in any year were this allowance not received by her.

On the other hand, counsel for other residuary beneficiaries contended that the proper approach to the problem is to take Lady Kemp's total income from all sources in any year and the total amount of income taxes levied against her in respect thereof and, after ascertaining the proportion of the one to the other, apply that percentage or rate to that portion of her total income which is received as the allowance for the maintenance and management of the Castle Frank property.

If the latter contention prevails then it is perfectly plain, although the exact figures are not given to us, that Lady Kemp will not receive indemnity from the trustees for so much of the income tax she is required to pay in any year that she would not be required to pay but for the receipt of the amount of the allowance in question.

The moneys paid to Lady Kemp are not impressed with a trust but are paid upon a condition; and unless Lady Kemp is indemnified by the trustees for so much of her income tax as she would not otherwise be required to pay but for this allowance, the plain intention of her husband may be frustrated by judicial decision. We are not to look for some course that may appear to us to be more fair and equitable among all the members of the family than

1940

In re KEMP.

Davis J.

that which commended itself to and was plainly expressed by the testator. After all, in the interpretation of a particular will with its own particular language, very little assistance may be gained from decisions on other instruments and on other language. And if I may say so, with the greatest respect, the vice in some decisions on somewhat similar language is the approach made to the problem on the basis of determining whether the particular income should be regarded as "the bottom slice" or the "upper slice" or the "middle slice" of the total income of the person affected. That approach, it seems to me, is entirely unwarranted. It has led to the conclusion that the fair and equitable way of dealing with the matter is to take neither the bottom slice nor the upper slice, but to work out a general average which, for convenience, is sometimes spoken of as the middle slice. It seems to me that this approach to the solution of the problem may lead one entirely away from a testator's intention where it is plain that a particular sum for a particular purpose shall not be cut down in the hands of the recipient as a result of the imposition of income taxes. In such a case it may well be that the intended indemnity against income taxes occasioned by the receipt of the particular sum can only be complete when the indemnity goes to that sum of money which the recipient is required to pay in income taxes that would not be payable were it not for the receipt of the particular sum.

That was the conclusion of McTague, J., who heard the motion for interpretation in the first place, although he rather seemed to base his conclusion upon his view that the allowance arises out of some obligation on the part of Lady Kemp to reside in and keep up Castle Frank, and that, she having assumed such obligation, her husband's intention was that no income tax burden should be placed upon her as a result of her compliance with his wishes. With respect, however, I do not think that there is anything in the nature of an obligation upon Lady Kemp under the clause in question and that this case cannot be distinguished from other cases upon that ground. The Court of Appeal took a different view and followed the principle applied by Sargant J. (as he then was) in *In re Bowring* (1). Lady Kemp appealed from that judgment to this Court.

(1) [1918] W.N. 265; 34 T.L.R. 575.

Were it not for the judgments of Sargant J. (as he then was) in the *Bowring* case (1) and of the Court of Appeal in the *Fleetwood-Hesketh case* (2), I would have accepted the contention of counsel for Lady Kemp. While those decisions are not binding upon us, they are judgments that carry the greatest weight and I do not feel justified in taking a contrary view. The principle is clearly stated by Lawrence, L.J., in the *Fleetwood-Hesketh* case (2) at the foot of p. 58—"the proper way of apportioning" the total tax "between the parties is not to marshal" the several parts of the total income so that some part "may come first and profit by the * * * lighter burden of the lower scale of payments and thus throw the burden of the heavier rate upon" some other part, "but to apportion the" tax "payable on the total income of the wife upon" all the component parts of that income "in the proportion which the amount of the one bears to the amount of the other." Sankey, L.J. (as he then was) agreed with that judgment. Greer, L.J., at p. 61, in referring to the sliding scale of rates for ascertaining the total super-tax payable, said it was

> merely a convenient method of describing how the total amount payable on any given income is to be estimated, and not as a direction that the income is to be separated into slices, of which the lowest is to be free from super-tax and the highest is to bear the heaviest charge, and intermediate parts bear burdens graduated according to their relative positions.

Greer, L.J., said further that he thought the decision of Sargant, J. (as he then was) in *In re Bowring* "is useful as providing a formula."

Another point raised in the appeal was the question whether the indemnity applied to the tax upon the tax—that is, whatever be the amount of the indemnity paid by the trustees in any year, that amount becomes taxable against Lady Kemp the next year as part of her total income—and the question is whether the indemnity extends to the tax upon the tax. I think the authorities clearly indicate that it does. *Michelham's Trustees* v. *Commissioners of Inland Revenue* (3). Sub-paragraph (2) of paragraph 1 of the judgment of McTague J., as varied

(1) [1918] W.N. 265; 34 T.L.R. 575.

(2) *Fleetwood-Hesketh* v. *Fleetwood-Hesketh*, [1929] 2 K.B. 55.

(3) (1930) 144 L.T.R. 163.

1940

In re KEMP.

Davis J.

by the Court of Appeal, should be amended by adding the words "and of clause 4" after the words "under the provisions of clause 3" in the seventh line of the printed copy of the said sub-paragraph as the same appears on p. 35 of the Appeal case.

The variation sought by the respondents in their factum was not the matter of any appeal or cross-appeal on their part but in any event cannot be granted. I am satisfied that the order in respect of deductions and exemptions was a matter of consent.

CROCKET J.—I agree with the Court of Appeal that there is nothing in paragraph 4 of this will to indicate that the testator intended that Lady Kemp should be relieved, not only of all liability to pay all income taxes in respect of the moneys payable to her under the provisions of paragraph 3 for the maintenance and upkeep of the Castle Frank property as her home and residence, but that the trustees should reimburse her as well for any increase in her own personal income tax rate, which should result from the addition to her own independent income by reason of the monthly and other payments made to her by the trustees under those provisions, or, in other words, that she should be indemnified at the expense of the residuary legatees for any and all moneys which she should be required to pay as income taxes upon her whole net income over and above the income taxes which would otherwise have been payable by her.

The relevant words of the direction to the trustees are "all income taxes which may be payable in respect of the said above provisions for my wife." The direction, to my mind, is clearly limited to the payments provided for in the Castle Frank gift. Had the intention been to reimburse Lady Kemp as well for any extra income tax for which she would become liable as a result of this gift, "it would," as Robertson, C.J., says, "have been a simple matter to say so."

With all respect, however, I cannot agree with the Court of Appeal that the explicit direction in paragraph 4 to the trustees to pay out of the estate "all income taxes which may be payable in respect of the said above provisions for my wife" is to be construed as excluding the moneys, which the trustees are thus required to pay in her behalf,

from the benefits of the Castle Frank gift. In my opinion, paragraphs 3 and 4 must be read together, and clearly shew that immunity from income tax liability to the extent indicated was intended as part of this gift. The widow was to receive the monthly payments specified and other benefits unimpaired and undiminished by any liability for payment of income tax thereon. If Lady Kemp herself paid these taxes directly with her income tax upon other independent income, she was entitled to be recouped out of the estate to the amount thereof. Whether the trustees paid her the money to meet the income tax payments before they became due or recouped her afterwards, the money under the provisions of the Income Tax Act was, in my opinion, part of her income for income tax purposes, as it was also part of the intended gift. See *Michelham's Trustees* v. *Commissioners of Inland Revenue* (1).

For these reasons I am of opinion that the formal judgment of the Court of Appeal should be varied so as to provide that the trustees must repay to Lady Kemp under paragraph 4 of the will such proportion of the whole of the income tax assessed against her in respect of each year's income under each statute imposing an income tax upon her income as the total amount expended or paid out in such year by the trustees under the provisions of paragraphs *3 and 4* of the will (to the extent that the same is or is deemed to be assessable as income against Lady Kemp under the provisions of such statute) bears to the total amount, which is or is deemed to be assessable as income against Lady Kemp in such year under the provisions of such statute.

To this extent and to this extent only I would allow the appeal, with costs to all parties out of the estate, those of the solicitors for the trustees as between solicitor and client.

KERWIN J.—This is an appeal by Lady Kemp and a cross-appeal by the other residuary beneficiaries under the will of Sir Albert Edward Kemp from the order of the Court of Appeal for Ontario, which reversed the order of McTague J. in its most important provisions. The matter arose on an originating motion by the executors and trus-

(1) (1930) 144 L.T.R. 163.

1940

In re KEMP.

Kerwin J.

tees of the will for an order construing and interpreting the will, and for the opinion, advice and direction of the Court upon certain questions arising out of the trusts declared thereby.

Clauses 3 and 4 of the will read:—

3. I GIVE AND DEVISE to my said Trustees my residence and lands in the City of Toronto, known as "Castle Frank," including houses, out-houses and other buildings thereon, and all the appurtenances used and enjoyed therewith (all of which are to be understood as being included in the term "Castle Frank") upon the following trusts:

(*a*) During the lifetime of my wife, Virginia, so long as she shall remain my widow, and so long as she desires to make use of the same as her residence, to keep up Castle Frank in a suitable condition for that purpose; and all costs and charges for the payment of taxes, insurance and for repairs, renewals and other like expenditures for the proper structural upkeep of the said houses and buildings shall be borne by my estate and be paid by my Trustees.

(*b*) To allow my said wife during her lifetime, and so long as she shall remain my widow, to occupy Castle Frank as her home and residence, free of rent.

(*c*) The furniture, plate, pictures and other personal chattels constituting the ordinary contents of said house at the time of my death, I give and bequeath to my wife, together with any automobile or automobiles which I may then own.

(*d*) While my said wife shall occupy Castle Frank as her home and residence, my Trustees shall also bear the expense of the maintenance and management thereof; and to cover such cost, my Trustees shall pay to my wife the sum of Two Thousand Two Hundred and Fifty Dollars ($2,250) each month in advance so long as she continues to reside in Castle Frank and to use it as her home.

(*e*) If my wife shall cease to occupy Castle Frank as her home for any of the reasons aforesaid, I desire my said Trustees to raise out of my general estate the sum of Seventy-five Thousand Dollars ($75,000), which sum will enable her, if she so desires, to purchase or build or otherwise provide a suitable house for herself, including the necessary land in connection therewith, and to pay the said sum to my wife as soon as conveniently may be after she shall inform my Trustees of her desire to give up her occupation of Castle Frank; the said sum of Seventy-five Thousand Dollars ($75,000) is intended to be an absolute gift to my wife, and she shall not be obliged, unless she wishes to do so, to expend that sum or any part of it, in purchasing, building or otherwise acquiring any residence; the receipt of my wife therefor shall be an absolute discharge of my Trustees for the payment of the said sum of Seventy-five Thousand Dollars ($75,000).

(*f*) Upon my said wife ceasing to occupy Castle Frank as her residence, the monthly allowance to her of Two Thousand Two Hundred and Fifty Dollars ($2,250) for the upkeep thereof, as provided in Paragraph 2 (*d*) of this Will, shall cease; and in that event, I give her in lieu thereof, and direct my Trustees to pay to her while she shall remain my widow, a monthly allowance of Two Thousand Dollars ($2,000).

4. I DIRECT that the above provisions in favour of my wife shall be a first charge upon my estate, and shall be provided for and paid by

my Trustees in priority to any other legacies payable under my said Will, and I further direct that any Succession Duties, and all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my Trustees.

By clause 16, the testator made the following additional provisions for the appellant:—

(*a*) He gave her a one-sixteenth portion of his residuary estate absolutely.

(*b*) He gave her the income for life from a further one-sixteenth portion of his residuary estate.

(*c*) He gave her the income during widowhood from a further one-eighth portion of his residuary estate.

From the time of the appellant's marriage to the testator in 1925 until his death, the average monthly expense of the maintenance and management of Castle Frank exceeded the sum of $2,250. Since her husband's death the appellant has continuously occupied Castle Frank as her home and residence and she has received the stipulated monthly sum in advance for the maintenance and management thereof, all of which she has expended for those purposes. At the time of the marriage and the making of the will, the appellant had, to the knowledge of the testator, a private income of her own, which she continued and still continues to receive.

The questions propounded to the Court arise because under the Dominion *Income War Tax Act* the appellant is assessed to income tax on the benefits conferred upon her under clause 3 of the will. Without attempting a precise listing of what benefits, as between the appellant and the taxing authorities, are so taxable, it may be stated generally that they include at present the occupation of Castle Frank rent free, the upkeep thereof, and the monthly payments of $2,250. According to clause 4 of the will, "all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my trustees." It is clear that, however that expression may be construed, it must bear the same meaning if the appellant should cease to occupy Castle Frank and should receive the monthly allowance of $2,000 mentioned in paragraph (*f*) of clause 3.

Under the *Income War Tax Act,* the income tax payable is computed by the application to the whole net income of the taxpayer, of rates which increase on a

1940

In re KEMP.

Kerwin J.

gradual scale as the amount of the net income increases, and by the imposition of a surtax on incomes that exceed a certain amount. The appellant, therefore, in adding the benefits received under clause 3 of the will to her private income and to her income under clause 16, pays a higher rate than if those benefits had not been conferred upon her.

Lady Kemp's contention on the first question submitted to the Court is that the income tax that would have been payable by her if there were no such benefits should be computed, and that under clause 4 of the will the trustees should pay the difference between that sum and the total amount of the tax for which she is actually liable. That was the conclusion of Mr. Justice McTague, but the Court of Appeal, adopting the argument of the other residuary beneficiaries, determined that the proper method was that the trustees should pay only such proportion of the income tax assessed against Lady Kemp as the total amount paid out by them under clause 3 bears to the total amount assessable as income against her. In my opinion the Court of Appeal is right.

The testator provided an income for his widow other than that mentioned in clause 3; he knew that she had a private income; he knew that she would be required to pay income tax on both these items of income and made no provision that such tax should be paid by his trustees. It was only income taxes which might be payable "in respect of" the provisions made by him for Lady Kemp under clause 3 that he directed should be paid out of his estate. If taxation under the Act were a fixed rate on the dollar, each part of Lady Kemp's income would bear its proportionate share, but how may it be said that the total amount of the additional tax payable by reason of adding to her other income the benefits conferred by clause 3 is payable "in respect of" the latter? If it is not to be paid out of the estate under that clause, there is no other rule or law by which the appellant may require payment by the trustees. The contention advanced by the other residuary beneficiaries and adopted by the Court of Appeal gives full effect to the clause.

The second question arises in this way. Whatever sum the trustees pay for income taxes in respect of the provisions for Lady Kemp, made in clause 3, is treated, under

the Act, as part of Lady Kemp's income. I might here say that my own view is that clause 4 directs the trustees to pay these income taxes in the year in which they are payable and that the obligation is not upon Lady Kemp to pay the total and then seek a repayment from the trustees. If the repayment by the trustees is made in the same year, it can, of course, make no difference but it might conceivably do so if the repayment were delayed until the following year. However, the problem would still remain as to whether the extra income tax payable by Lady Kemp, because of the payment or repayment by the trustees, should be paid entirely by the estate, or whether the principle of apportionment adopted in answering the first question should apply. Mr. Justice McTague held that this extra tax should be paid by the trustees under clause 4 of the will. The objecting residuary beneficiaries agree that it is quite clear that to the extent that the repayments of tax swell Lady Kemp's total assessable income they necessarily increase the total amount of income tax payable by her, and on the principle of apportionment adopted in answering the first question, this increases the tax which each part of Lady Kemp's income must bear. But, it is submitted, the estate should not bear more of such increased income tax than the proportion thereof which the provisions for Lady Kemp under clause 3 of the will (to the extent that they form part of her assessable income) bear to her total assessable income. It is argued that for the purpose of computing the proportion, the amounts reimbursed to Lady Kemp in respect of income tax under clause 4 of the will should be treated as part of her income *apart from clause 3 of the will.*

The Court of Appeal agreed with this argument; that is, while, in the answer to question I, "repayment of income tax under clause 4 of the will" is treated as part of Lady Kemp's assessable income, according to the answer to question II, the trustees must repay to Lady Kemp only such proportion of the whole of the income tax assessed against her in respect of each year's income as the total amount expended or paid out in such year by the trustees under the provisions of clause 3 of the will bears to the total amount of Lady Kemp's assessable income. I quite agree that such extra income tax is not entirely payable in respect of the provisions made for Lady Kemp by clause

1940

In re KEMP.

Kerwin J.

3 of the will and is, therefore, not to be paid by the trustees. However, I am of opinion that, reading together clauses 3 and 4 of the will, the payments or repayments to be made by the trustees form part of the benefits conferred by clause 3 and that the proportion of Lady Kemp's income tax with respect to any year, to be paid by the trustees, should be the proportion that the total amount paid out by them in such year under the provisions of clause 3 and clause 4 bears to the total amount deemed to be assessable income of Lady Kemp in such year, and I would vary the order of the Court of Appeal accordingly.

The residuary beneficiaries other than Lady Kemp did not cross-appeal but they argue that the answer given by the Court below to question III is inconsistent with the answers given to questions I and II. The answer to question III deals with deductions and exemptions allowed to Lady Kemp by the Income Tax Acts. I would have thought that, the net taxable income being ascertained, the trustees would receive no benefit from the deductions and exemptions except that, of course, neither they nor Lady Kemp would pay any tax upon them. However, throughout the course of the proceedings Lady Kemp has agreed that the trustees should be entitled, in each year, to that proportion of any deductions allowed to her in respect of charitable donations which the payments made to Lady Kemp under clause 4 of the will, during such year, bear to Lady Kemp's total income during such year. The orders of McTague J. and the Court of Appeal include the terms of this agreement but also provide that, with that exception, deductions and exemptions allowed to Lady Kemp are to be calculated as belonging to and intended for her exclusive benefit and not for the benefit of the trustees. Bearing that in mind, I read the answer to question I as providing that by it Lady Kemp's income is to be determined on the footing of her total assessable income without subtracting any deductions and exemptions, leaving the latter to be dealt with by the answer to question III.

The judgments of the Court of Appeal in *Michelham's Trustees* v. *Commissioners of Inland Revenue* (1) and in *In re Reckitt* (2), and the other judgments cited at bar

(1) (1930) 144 L.T. 163. (2) [1932] 2 Ch. 144.

1940

In re KEMP.

Kerwin J.

were decided on the terms of other wills differently phrased and under the provisions of a taxing Act modelled in a form far different from ours, and I have been unable to secure any assistance from them in coming to a conclusion in this case. I would vary the order of the Court of Appeal to the extent indicated. All parties should have their costs out of the estate, those of the trustees as between solicitor and client.

Appeal dismissed subject to a variation in the judgment appealed from.

Solicitors for the appellant: *Balfour, Drew & Taylor.*

Solicitors for the adult residuary beneficiaries, respondents: *Osler, Hoskin & Harcourt.*

Solicitor for the infants, respondents: *P. D. Wilson,* Official Guardian.

Solicitors for the Executors, respondents: *Kingsmill, Mills, Price & Fleming.*

FUSO ELECTRIC WORKS, MICHIO HAYASHI AND TOMISABURO NARUSE (PLAINTIFFS) ..... APPELLANTS;

AND

CANADIAN GENERAL ELECTRIC COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

1939

* May 30, 31.
* June 1, 2.

1940

* Feb. 26.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent — Re-Issue — Validity — Claims.

Appellants sued (under s. 60 of the *Patent Act, 1935*) for a declaration that respondent's patent, a re-issue patent, relating to "frosted glass articles and methods of making same," was invalid and void, or a declaration that no valid claim thereof was infringed by the sale or use in Canada of appellants' electric incandescent lamps. The action was dismissed by Maclean J., President of the Exchequer Court, [1939] 1 D.L.R. 412, and appeal was brought to this Court.

At the time of the re-issue, the relevant enactment in force as to re-issue of patents was s. 27 of the *Patent Act,* R.S.C., 1927, c. 150.

In the re-issue patent no change was made in the specification but change was made in the claims. In the re-issue patent there were

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1940

FUSO ELECTRIC WORKS ET AL. v. CANADIAN GENERAL ELECTRIC CO. LTD.

four claims, the first two having been in the original patent (as claims 8 and 9) and the other two being introduced by the re-issue patent. The claims were:—

1. A bulb for electric lamps and similar articles having its inner surface covered with rounded etching pits or depressions.

2. An incandescent electric lamp bulb having on its inner surface rounded etching pits or depressions.

3. A glass electric lamp bulb having its interior surface frosted by etching to such an extent as to be free from objectionable glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices to such an extent that the strength of the etched bulb is sufficient to withstand shocks due to commercial handling.

4. A glass electric bulb having its interior surface frosted by etching to such an extent that the light is sufficiently diffused to obviate glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices, to such an extent that the strength of the bulb as compared to an unetched bulb of the same thickness has not been sufficiently reduced to preclude commercial handling.

Held: The appeal should be allowed and respondent's patent declared invalid and void.

Per the Chief Justice and Davis and Hudson JJ.: There may have been patentable invention in devising the method, dealt with in the specification, of strengthening frosted glass for the purpose (*inter alia*) of constructing glass bulbs; the real difficulty in respondent's case lay in the manner in which the claims are framed.

As to claim 1: The word "covered" is an ordinary word and, using it in its ordinary sense, it is plain on the evidence that the surfaces of appellants' bulbs do not fall within that description (nor do the surfaces of respondent's bulbs as manufactured and sold by it), and therefore (apart from any question as to whether claim 1 embodies on its proper construction a patentable monopoly) there was no infringement.

Claim 2 is too broad to constitute a valid claim, extending in its application (in the light of the evidence as to existence or production of rounded depressions) to bulbs which have not been submitted to respondent's strengthening treatment or to anything that could properly be described as a strengthening treatment.

Claims 3 and 4 would have been invalid had they been introduced in the patent originally, and also they are such as would give a new character to the invention and the re-issue patent is invalid accordingly. The effect of the evidence is that the inventor had not produced a bulb which would "obviate glare" or be "free from objectionable glare" in the normal meaning of the words (and on the evidence "glare" is not a term definable by reference to any special usage in the art) and that he had not disclosed any means of doing so; further, as regards this characteristic the claim is too indefinite—the ordinarily skilled person is not given a sufficient guide as to its limits; further, on construction of the specification, the

problem of glare was not one to which the inventor was applying himself. Nor in the original patent did the problem as to sufficiency of the bulb to withstand the shocks of commercial handling present itself to the inventor; in his specification he gives directions for producing a bulb with a high degree of strength as determined by the "bump" test, but he did not apply himself to the relation between strength as shown by that test and the sufficiency of the bulb to withstand the shocks of commercial handling. As shown by the evidence, while the interior bulb surface of respondent's commercial lamp is (forming a contrast in this respect to the surface of the patent lamp) the surface of a lamp possessing, no doubt, the characteristic described in claims 3 and 4—a lamp combining resistance to shock sufficient for commercial purposes with a high degree of absence of glare, yet this was the result of much experimentation after the invention—experimentation directed to definite commercial ends which the inventor had not in mind and leading to a procedure different from his; and the re-issue provisions of the *Patent Act* cannot legitimately be employed for the purpose of ascribing this result to the inventor and remodelling his invention to make that invention conform to it. There was nothing to support the proposition that the specification in the original patent was "defective or inoperative" by reason of any of the causes mentioned in the statute.

Moreover, as regards the re-issue patent as a whole, each of the four claims is in respect of an article, while the invention as described in the original patent is an invention of a process for strengthening frosted glass articles.

Per Rinfret and Kerwin JJ.: Upon construction of the specification and claims in respondent's original patent it is evident that if there was invention it was in a strengthening treatment and not in an article strengthened by any means whatsoever. It is clear from the claims in the re-issue patent that what is now claimed is an article; it is not a correction of the original patent made "by reason of the patentee claiming more or less than he had a right to claim as new," but, if valid, is an entirely different invention; and this an inventor and those claiming under him are not entitled to do. A re-issue is not a grant of a new patent, but must be confined to the invention which the inventor attempted to describe and claim in the original patent.

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing their action which asked for a declaration that defendant's patent no. 289,379 (a re-issue of patent no. 252,159, relating to "frosted glass articles and methods of making same") is invalid and void, or a declaration that no valid claim of said patent is infringed by the sale or use in Canada of plaintiffs' electric incandescent lamps. Maclean J. found in favour of the defendant on the question of the validity of its patent and on the

(1) [1939] 1 D.L.R. 412.

1940

FUSO ELECTRIC WORKS ET AL. v. CANADIAN GENERAL ELECTRIC CO. LTD.

question of infringement. By the judgment now reported the appeal to this Court was allowed and judgment was directed declaring the patent in question in the action invalid and void, with costs throughout.

O. M. Biggar K.C. and *Christopher Robinson* for the appellant.

C. F. H. Carson K.C. and *H. K. Thompson* for the respondent.

The judgment of the Chief Justice and Davis and Hudson JJ. was delivered by

THE CHIEF JUSTICE—The respondents are the assignees of a patent granted to Marvin Pipkin on the 28th of July, 1925, and the action out of which the appeal arises was instituted in the Exchequer Court for the purpose of obtaining a declaration under section 60 of the *Patent Act, 1935* (Stats. of Can., 1935, c. 32) that the appellants' lamps made according to a process described do not constitute infringements of the respondents' patent; and that the respondents' patent is void on various grounds.

The nature of the invention, as conceived by the patentee, is best explained, I think, by reference to the language used by the patentee himself in his specification. He says:

> My invention relates to frosted glass bulbs such as are utilized in electric incandescent lamps and similar electrical devices, and to other frosted glass articles in which the glass is thin and subject to breakage. My invention also relates to methods of preparing the frosted surface on such articles. It finds particular application to articles which are frosted on the inside. In the case of electric incandescent lamp bulbs, it has been recognized that an inside frosting is highly desirable since the advantage of light diffusion is secured thereby without the disadvantage of increased susceptibility to collection of dirt which exists when the bulb is frosted on the outside. In order to avoid the introduction of detrimental foreign materials into the lamp as much as possible, such frosting must be done by etching the glass either mechanically as by sand blasting, or chemically by reagents which have a solvent action on the glass. It has been found, however, that such bulbs are weak and break easily in response to shock. This has been shown by subjecting such lamps to the so-called "bump" test which has demonstrated that they are much weaker than the unetched bulbs and also bulbs which have been etched on the outside. The object of my invention is to overcome this defect.

The bump tester is a machine by which glass articles can be subjected to a breaking test and there is a scale

attached to this tester by reference to which the comparative strength of such articles can be indicated as shown by that test.

The inventor proceeds:

> According to my invention, after the thin glass article has been etched on the inside, preferably by chemical means, it is treated with a chemical which has a solvent action on the material of the etched surface. The glassware is found thereafter to have much higher resistance to shock, as shown by the "bump" test. The probable explanation is that the first etching produces pits in the glass having comparatively sharp angles and that these are rounded out by the treatment comprised by my invention which may be called a strengthening treatment. The sharp angled pits or depressions caused by the first etching are starting places for cracks when the bulb is subjected to shock and the rounding of such pits or depressions apparently effectually prevents such formation of cracks.

The evidence adduced on behalf of the respondents deals explicitly with, first, electric light bulbs treated according to the directions of the patent; second, electric light bulbs frosted inside, manufactured and sold by the respondents and their associates, the General Electric Co.; third, a collection of 34 bulbs delivered to the respondents' expert witness, Mr. Spencer, and shipped from Japan to this continent; and, fourth, bulbs made by the appellants' expert witness in Ottawa according to a process alleged by the appellants to be employed by them in the production of their bulbs.

As regards the first of these classes of bulbs, there was produced at the trial a photomicrograph of a part of the surface of the inside of one of them, which was marked as Exhibit 26, and which was one of the lamps actually made by the process disclosed by the patent. Spencer is most explicit in saying that this photomicrograph shows a surface in which there are no sharp angular crevices, in other words, that all the sharp angular crevices produced by the initial frosting have been rounded out by the strengthening treatment, and two drawings by him are produced in which that very clearly appears. From the photomicrograph, as well as from these drawings, it appears that the surface is covered by these shallow, saucerlike depressions separated by ridges.

As regards the second of the four categories, he produced a photomicrograph marked as Exhibit "T." In

1940

FUSO ELECTRIC WORKS ET AL. v. CANADIAN GENERAL ELECTRIC CO. LTD.

Duff C.J.

the surface represented in Exhibit "T," as the expert explains, the sharp crevices have not all been rounded out; but the rounded depressions predominate.

Exhibit Z. 1, according to the witness, is a photomicrograph illustrating what he found on the inside surface of the frosted Fuso lamps belonging to a lot delivered at his laboratory as above mentioned. Of these lamps he tested 34. On this surface the rounded depressions predominate.

As regards the fourth category, the surface is represented by a photomicrograph, Exhibit Z. 3, and there the sharp angular crevices predominate, although there are also rounded ones. Spencer says (in answer to the question, "What do you say about the rounded etching pits and the sharp angular crevices in the relative sense in that picture?"), "There are more sharp angular crevices than rounded etching pits, or rounded depressions."

Now, it is convenient, I think, to consider at this point claims 1 and 2 which are in these words:

1. A bulb for electric lamps and similar articles having its inner surface covered with rounded etching pits or depressions.

2. An incandescent electric lamp bulb having on its inner surface rounded etching pits or depressions.

As regards both these claims, the evidence to which I have referred makes very clear the meaning which would be attached to the words "rounded pits or depressions" by a person skilled in the art. As regards claim 1, the word "covered" is an ordinary word and using the word in its ordinary sense it is quite plain that the surfaces of the appellants' bulbs as shown by the photomicrograph produced by the respondents (Exhibit Z. 1) do not fall within that description; and it is not contended that the bulbs produced by the respondents have a surface of such a character. The surface produced by the process described in the patent as shown in Exhibit 26 might fairly be said to be "covered" by rounded pits or depressions, but the contrast between such a surface and that found in Exhibits "T" and Z. 1 is admitted and signalized in the evidence of Spencer. Apart altogether then from any question as to whether claim 1 embodies on its proper construction a patentable monopoly, it is clear that there is no infringement and that the appellants are entitled to succeed as regards that claim.

As to claim 2, the surface described is a surface which has some rounded pits or depressions. It is, in my opinion, too broad to constitute a valid claim. It applies with equal justice to surfaces such as that represented by the photomicrograph, Exhibit Z. 3, and to those represented by Exhibits "T" and Z. 1. It applies, in other words, to bulbs strengthened to the degree of strength that characterized the commercial bulbs of the respondents and to bulbs having an inner surface corresponding to that shown by Exhibit Z. 1 as well as to bulbs which have not been submitted to anything that could properly be described as a strengthening treatment.

Spencer puts this expressly. He says, with reference to Z. 3, that such rounded depressions as are there shown may be produced by the initial frosting treatment because of the difficulty of getting rid of the powerful acid solution employed with sufficient rapidity to prevent some of the angular crevices being rounded. But surfaces with such an extremely limited proportion of rounded crevices, he declares, are not produced by the Pipkin process which includes as essential two stages, the frosting stage and the strengthening stage. He definitely excludes bulbs having such surfaces from the category "Pipkin bulbs."

Reverting now to Pipkin's invention as he describes it. It is shown that before Pipkin's invention it was well known in the art that by the application of a solvent solution to an etched glass surface, a surface might be produced corresponding to that shown by Exhibit 26. Spencer admits that this surface is very similar to that shown in figure 2 appended to the article from Die Glashutte, Vol. 17, 1887, produced and translated. The learned trial judge is, however, right, I think, in saying that Pipkin was the first to realize the fact that the application of a solvent solution to an etched surface may result in adding strength to glass which has been weakened by the etching process; and that this result could be utilized in the manufacture of glass bulbs in the manner effected by him. It is said that the discovery of the effect of the double treatment is without patentable subject-matter because it was only a discovery. In my view it is not necessary to consider this point. I am inclined to agree with the learned trial judge that in devising his method of strengthening frosted glass for the purpose (*inter alia*) of constructing glass

1940
FUSO ELECTRIC WORKS ET AL. v. CANADIAN GENERAL ELECTRIC CO. LTD.
Duff C.J.

bulbs Pipkin must be credited with patentable ingenuity; and while the discovery was no doubt the critical as well as the primary thing, there was manufacture as well.

The real difficulty in the respondents' case seems to me to lie in the manner in which the claims are framed. I have already dealt with claims 1 and 2. I come to claims 3 and 4. These claims were introduced by a re-issue patent in 1929. I have come to the conclusion that they would have been invalid had they been introduced in the patent as originally framed for reasons which I shall mention and, further, that they constitute an attempt to give a new character to Pipkin's invention and that the re-issue patent is invalid accordingly. Claims 3 and 4 are in these words:

> 3. A glass electric lamp bulb having its interior surface frosted by etching to such an extent as to be free from objectionable glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices to such an extent that the strength of the etched bulb is sufficient to withstand shocks due to commercial handling.
>
> 4. A glass electric bulb having its interior surface frosted by etching to such an extent that the light is sufficiently diffused to obviate glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices, to such an extent that the strength of the bulb as compared to an unetched bulb of the same thickness has not been sufficiently reduced to preclude commercial handling.

The monopoly defined in these claims is in respect of an electric light bulb which has its interior surface frosted by etching to such an extent "as to be free from objectionable glare" (as in claim 3) or "that the light is sufficiently diffused to obviate glare" (as in claim 4).

The expert witnesses called on behalf of the respondents do not say that the word "glare" has any special meaning for a person skilled in the pertinent art or arts. One of them says in a general way that there is some relation between glare and brightness. That relation is not defined. It is admitted that at the time of the trial a lamp such as Exhibit 27, constructed in accordance with the directions in the patent, would not "obviate glare" to such an extent as to be commercially satisfactory. It is admitted that the glare from such a lamp is very much greater than the glare from the appellants' lamps or the lamps dealt with commercially by the respondents. It is admitted that no bulb has been put on the market which

permits a glare as great as that proceeding from the patent lamp. It seems to me that the respondents are in this position: I think the effect of the evidence is that the inventor had not produced a bulb which would "obviate glare" or be "free from objectionable glare" in the normal meaning of the words and that he has not disclosed any means of doing so. Spencer, it is true, in answer to a suggestion from his counsel, said that, by limiting the period given in the patent for the application of the strengthening solution, glare might be reduced, but there is no suggestion of this in the patent. And in the most explicit way the patent gives the minimum of that period as ten minutes. Spencer's evidence is quite explicit also upon the point that in the case of the bulb produced by him the period was that given in the patent.

Again, it appears to me that as regards this characteristic the claim is too indefinite. I think the ordinarily skilled person is not given a sufficient guide and if, as seems to be argued on behalf of the respondents, glare, within the meaning of these claims, is to be determined by reference to the efficacy in the elimination of glare of bulbs on the market in 1924, it seems to me that the person whose duty it is to ascertain the limits of the claim is left in a hopeless position. I must make it quite clear, however, that I see no justification for construing the words "free from objectionable glare" or "obviate glare" by reference to any such standard, or for giving them any meaning other than that which they receive in current usage. The expert admitted, I repeat, that "glare" is not a term which they could define by reference to any special usage in the art. In the American patent, it should be observed, the claims profess to characterize the invention by reference to the degree of brightness permitted by the frosted surface produced in comparison with the degree of brightness in a lamp made of clear glass, such comparison being expressed mathematically.

It seems very clear to me that the patentee was not directing his mind to this question of glare. The question, as he himself says, for him—the problem which he set himself to solve—was that of strengthening bulbs with inside etching. The statement in the specification is the only statement we have from him.

1940

FUSO ELECTRIC WORKS ET AL. v. CANADIAN GENERAL ELECTRIC CO. LTD.

Duff C.J.

The respondents and their associates began putting bulbs frosted on the inside on the market in 1925. Admittedly they did not use the specific method given in the patent. They did not use the solutions. A short time after they began manufacturing these bulbs they abandoned the intermediate step of washing. Their expert says that they have learned how to make a frosted bulb almost as strong as a clear bulb with the sacrifice, however, of a great deal of diffusion. They have had to compromise and they have learned how to compromise. I can quite understand that, as the result of their experience between 1924 and 1929, they might arrive at the conception that Pipkin's invention was a frosted bulb with a given degree of strength which preserved at the same time a sufficient degree of diffusion to obviate glare, but there is no document proceeding from Pipkin supporting the proposition that such was his invention as he conceived it and there is nothing before us giving the slightest support to the proposition that Pipkin's specification as signed by him was inoperative or defective by reason of any of the causes mentioned in the statute. Pipkin's specification as signed by him is the only evidence we have before us as to the character of his invention and as to the nature of the monopoly he intended to claim. It seems quite clear that the problem of glare was one to which he never applied himself.

The second feature of the invention described in claims 3 and 4 is that the interior bulb surface is characterized by the presence of rounded, as distinguished from sharp angular, crevices to such an extent that the strength of the bulb is sufficient to withstand shocks due to commercial handling.

Now, the bulb made according to the directions of the specifications is of a strength of 34 on the bump test scale. And, according to the evidence of Spencer, a strength of 8 and upwards on that scale is sufficient to enable the bulb to withstand such shocks. Pipkin says nothing about commercial handling and there is no reason to suppose that he had any such test in his mind and there is every reason to suppose that he had not. The only test to which he refers is the bump test.

Pipkin's invention, as he himself explains it, consisted in treating glass bulbs with inside frosting in such a way

as to obviate the weakness of such bulbs. He gives directions in his specification for producing a bulb with a high degree of strength as determined by the bump test, but he did not apply himself to the relation between strength as shown by the bump test and the sufficiency of the bulb to withstand the shocks of commercial handling. That problem did not present itself to him, just as the problem of the elimination of glare did not present itself.

I have already mentioned that the respondents' expert contrasts the surface of the respondents' commercial lamps as shown by the photomicrograph "T" with the surface of the patent lamp as shown in the photomicrograph Exhibit 26. He says they are radically different. Now, the surface manifested by Exhibit "T" is the surface of a lamp possessing, no doubt, the characteristic described in claims 3 and 4, a lamp combining resistance to shock sufficient for commercial purposes with a high degree of absence of glare. But this was the result of much experimentation by the respondents after Pipkin's invention,—experimentation directed to definite, commercial ends which Pipkin had not in mind, and leading to a procedure different from Pipkin's. The re-issue provisions of the *Patent Act* cannot legitimately be employed for the purpose of ascribing this result to Pipkin and remodelling his invention to make that invention conform to it.

As regards the re-issue patent as a whole, moreover, the whole four claims are claims, each of them, in respect of an article, while Pipkin's invention, as described by himself in the patent of 1925, the original patent, is an invention of a process for strengthening frosted glass articles.

For these reasons the re-issue patent is invalid and void and the appellants are entitled to a declaration to that effect. The appeal should be allowed with costs throughout.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—This is an action by the appellants,—a partnership known as Fuso Electric Works and the persons forming such partnership,—against the respondent, Canadian General Electric Company, Limited, under section 60 of the current *Patent Act*, being chapter 32 of the Statutes

1940

FUSO ELECTRIC WORKS ET AL. v. CANADIAN GENERAL ELECTRIC CO. LTD.

Kerwin J.

of 1935. Both subsection 1 and subsection 2 of that section were relied upon, as the statement of claim seeks a declaration that Canadian Patent No. 289379 granted to respondent for new and useful improvements in "Frosted Glass Articles and Methods of Making Same" was invalid and void, and a declaration that no valid claim of the patent was infringed by the sale or use in Canada of the appellants' electric incandescent lamps known as Fuso Lamps. In the Exchequer Court the action was dismissed, as the President considered that the patent was valid and that the appellants either did or would infringe the patent.

One of the reasons advanced by the appellants in alleging that the patent was invalid is that

> it is not for the same invention as that for which Patent No. 252159, of which it is a re-issue, was granted and in the issue of the latter there was in fact no inadvertence, accident or mistake nor was such letters patent inoperative or defective.

The learned President did not deal with this contention but, in my opinion, the point is well taken and is sufficient to justify the allowance of the appeal.

It may be stated at once that the plaintiffs clearly are interested persons, within the meaning of subsection 1 of section 60 of the 1935 Act, and that there appears to be no reason to disbelieve the evidence of Naruse, one of the appellants, that he and Hayashi, another of the appellants, are the sole members of the partnership carrying on business under a name translated into English as Fuso Electric Works. The patent in suit, issued to the respondent and dated April 30th, 1929, was a re-issue of Patent No. 252159, granted to the respondent as assignee of one Pipkin on July 28th, 1925. The relevant statutory provision in force at the time of the re-issue was section 27 of the *Patent Act,* R.S.C., 1927, chapter 150, which section is as follows:—

> 27. Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more or less than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent, within four years from its date or within one year from the thirteenth day of June, one thousand nine hundred and twenty-three, and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the

same invention for any part or for the whole of the then unexpired residue of the term for which the original patent was or might have been granted.

2. In the event of the death of the original patentee or of his having assigned the patent, a like right shall vest in his assignee or his legal representatives.

3. Such new patent, and the amended description and specification, shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent.

4. The Commissioner may entertain separate applications, and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a re-issue for each of such re-issued patents.

In its petition for a re-issue the respondent merely states:—

That the petitioner is advised that the said patent is deemed defective, or inoperative, by reason of insufficient description or specification, and that the errors arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention.

It does not appear from the documents filed on the application,—nor was any evidence adduced in the action to show,—what the alleged error was or why the patent was deemed defective or inoperative, and even yet it is difficult, if not impossible, to define the position taken by respondent in these respects.

The specifications in the old patent and in the re-issue are exactly the same; only the claims are altered. The inventor, Pipkin, in his specification states:—

My invention relates to frosted glass bulbs such as are utilized in electric incandescent lamps and similar electrical devices, and to other frosted glass articles in which the glass is thin and subject to breakage.

This statement indicates, it is said, that Pipkin's invention, when disclosed, will be that of a new article. The specification continues:—

My invention also relates to methods of preparing the frosted surface on such articles. It finds particular application to articles which are frosted on the inside.

This, it is stated, indicates that Pipkin's invention would also be of a method. The specification continues:—

In the case of electric incandescent lamp bulbs, it has been recognized that an inside frosting is highly desirable since the advantage of light diffusion is secured thereby without the disadvantage of increased susceptibility to collection of dirt which exists when the bulb is frosted on the outside. In order to avoid the introduction of detrimental foreign

1940
FUSO ELECTRIC WORKS ET AL. v. CANADIAN GENERAL ELECTRIC CO. LTD.
Kerwin J.

materials into the lamp as much as possible, such frosting must be done by etching the glass either mechanically as by sand blasting, or chemically by reagents which have a solvent action on the glass. It has been found, however, that such bulbs are weak and break easily in response to shock. This has been shown by subjecting such lamps to the so-called "bump" test which has demonstrated that they are much weaker than the unetched bulbs and also bulbs which have been etched on the outside. The object of my invention is to overcome this defect.

Pipkin then states that after the thin glass article has been etched on the inside, preferably by chemical means, it is treated with a chemical which has a solvent action on the material of the etched surface, and that the glassware is found thereafter to have much higher resistance to shock. He gives a probable explanation of why this should be so:—

> The probable explanation is that the first etching produces pits in the glass having comparatively sharp angles and that these are rounded out by the treatment comprised by my invention which may be called a strengthening treatment. The sharp angled pits or depressions caused by the first etching are starting places for cracks when the bulb is subjected to shock and the rounding of such pits or depressions apparently effectually prevents such formation of cracks.

He continues:—

> Although the scope of my invention includes other reagents having the solvent action on the etched surface, I prefer to use for this purpose a solution of alkalin fluoride combined with hydrofluoric acid.

He gives examples of solutions which he deems especially efficient and examples of those which he considers not as satisfactory, and describes a specific application of his invention. Then follow the claims. The first six of these are method claims, in which Pipkin subjects the etched surface of glass lamp bulbs and similarly thin glass articles to the action of a reagent having a solvent action on the material of the surface; to the action of a fluoride containing a reagent; to the action of an alkalin fluoride containing a reagent; to the action of a reagent containing ammonium bifluoride. Claims 8 and 9, which will be adverted to later, are article claims as is also number 7:—

> 7. An article of glass of a thickness similar to that of an incandescent lamp bulb and having a surface thereof covered with rounded etching pits or depressions.

Now upon the construction of the specification and the claims, it is evident, I think, that if Pipkin made any invention (which it is unnecessary to determine), it was in a strengthening treatment and not in an article strengthened by any means whatsoever.

When we come to the re-issue we find that the respondent, as assignee of Pipkin, reduced the number of the claims to four. Numbers 1 to 7 of the old claims are abandoned; 8 and 9 of the old claims appear in the re-issue as numbers 1 and 2. The re-issue claims are as follows:—

1. A bulb for electric lamps and similar articles having its inner surface covered with rounded etching pits or depressions.

2. An incandescent electric lamp bulb having on its inner surface rounded etching pits or depressions.

3. A glass electric lamp bulb having its interior surface frosted by etching to such an extent as to be free from objectionable glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices to such an extent that the strength of the etched bulb is sufficient to withstand shocks due to commercial handling.

4. A glass electric bulb having its interior surface frosted by etching to such an extent that the light is sufficiently diffused to obviate glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices, to such an extent that the strength of the bulb as compared to an unetched bulb of the same thickness has not been sufficiently reduced to preclude commercial handling.

These claims, it will be remembered, are in a patent, alleged to be valid, wherein appears precisely the same specification as was in the original patent. It is clear that what is now claimed is an article; it is not something more or less than Pipkin has a right to claim as new but, if valid, is an entirely different invention, and this an inventor and those claiming under him are not entitled to do. The re-issue is not the grant of a new patent but must be confined to the invention which the inventor attempted to describe and claim in the original patent.

For these reasons the appellants are entitled to a declaration that Patent No. 289379 is invalid and void. The security deposited by the appellants to cover any damages which the respondent might suffer through the operation of the injunction order issued by the Exchequer Court on January 5th, 1937, as varied by the order of February 1st, 1937, should be paid out to the appellants. The appellants are entitled to their costs of the action and of this appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Smart & Biggar.*

Solicitors for the respondent: *Macfarlane, Thompson, Littlejohn & Martin.*

1940
*Mar. 15, 18.
*April 23.

CANADIAN TIRE CORPORATION, LIMITED (DEFENDANT)..... APPELLANT;

AND

SAMSON-UNITED OF CANADA LIMITED AND SAMSON-UNITED CORPORATION (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Infringement—Substance of the invention—Essential or non-essential elements.

This Court dismissed defendant's appeal from the judgment of Maclean J., [1939] Ex. C.R. 277, holding that the patent in question was valid and had been infringed by defendant. The patent was for improvement in fans and the invention related to fans for producing air currents and had for its principal object to provide such a fan with flexible fan blades of suitable material and shape to give the blades stability for an efficient operation of the fan combined with sufficient flexibility to cause any portion of the moving blades to yield when a stationary rigid or semi-rigid member is brought in contact with them, and to be self-restoring to normal position when the intruded member is withdrawn. This Court *held* that the substance of the invention lay in shaping the blade in such fashion as to maintain the rigidity of its base and body while leaving the edges sufficiently flexible to be harmless; and in this there was novelty and invention, and in substance this has been taken by defendant; that the bow-like slot in which the rubber blades were inserted, an element not taken by defendant, was only a particular means for maintaining the cupped shape of the base and body of the blade and thereby imparting to it the necessary rigidity; and, as a particular means only for maintaining this rigidity which was the essential thing, it was non-essential.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that, as between the plaintiffs and the defendant, the claims in question (numbers 1 to 8, inclusive, and 15 and 18) of letters patent number 370,548, were valid and had been infringed by the defendant. The said letters patent were granted to the plaintiff Samson-United Corporation, the assignee of Abe O. Samuels, the applicant, and the plaintiff Samson-United of Canada, Limited, was

(1) [1939] Ex.C.R. 227; [1939] 3 D.L.R. 365.

*PRESENT:—Duff C.J. and Crocket, Davis, Hudson and Taschereau JJ.

the exclusive licensee for Canada. The patent was granted for an alleged new and useful improvement in fans. The specification stated (*inter alia*) that the invention.

> relates to fans for producing air currents and has for its principal object to provide such a fan with flexible fan blades of suitable material and shape to give the blades stability for an efficient operation of the fan combined with sufficient flexibility to cause any portion of the moving blades to yield when a stationary rigid or semi-rigid member is brought in contact with them, and to be self-restoring to normal position when the intruded member is withdrawn.

Leave to appeal was granted by a judge of this Court.

W. L. Scott K.C. and *Cuthbert Scott* for the appellant.

M. Crabtree K.C. and *E. G. Gowling* for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—I think the decision in this appeal turns upon the question whether the bow-like slot in which Samuels' rubber blades are inserted is an essential element in his invention. If it is, there is no infringement because that element has not been taken.

I have come to the conclusion, however, that this is only a particular means for maintaining the cupped shape of the base and body of the blade and thereby imparting to it the necessary rigidity; and, as a particular means only for maintaining this rigidity which is the essential thing, it is non-essential. The point is not without difficulty but it does not, as I see it, lend itself to extended discussion. The substance of the invention lies in shaping the blade in such fashion as to maintain the rigidity of its base and body while leaving the edges sufficiently flexible to be harmless. In that I think there was novelty and invention and, in substance, this has, I think, been taken. I do not discuss it further but this in no way implies any disrespect to the able and careful argument of Mr. Scott.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ewart, Scott, Kelley, Scott & Howard.*

Solicitors for the respondents: *Crabtree & McKee.*

1939
*June 6, 7, 8, 9, 12, 13.
1940
*April 23.

CHARLES A. KAUFMAN (DEFENDANT)... APPELLANT;

AND

BELDING-CORTICELLI LIMITED AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invalidity—Existing art—Analogous user—No invention—Patent, granted in October, 1933, attacked under s. 61 (1) (c) of Patent Act, 1935, c. 32—Patentee's rights not governed thereby—Said Act, ss. 81, 82; Patent Act, R.S.C. 1927, c. 150, s. 37A (as enacted in 1932, c. 21, s. 4); Interpretation Act, R.S.C. 1927, c. 1, s. 19 (1) (c).

This Court dismissed an appeal from the judgment of Maclean J., [1938] Ex.C.R. 152, holding that defendant's patent in question was invalid. The patent was for improvement in hosiery and the manufacture thereof, and the alleged invention for which it was granted was described in the specification as relating "to full-fashioned hosiery, particularly of real silk, and to methods of and means for making the same."

Per the Chief Justice, Rinfret and Kerwin JJ.: It is a case of analogous user. The method in defendant's alleged invention was analogous to that already used in connection with other articles of wear; and the difference between the problem met by defendant's use of the method for his purposes and the problem solved a long time before by use of the method in connection with other articles was not sufficiently wide to justify the conclusion that defendant's application of the method involved invention. The trial judge's finding that the problem met by defendant had not earlier presented itself as an acute one in the trade (thus negativing, as a factor, any existence of a long-felt and unsatisfied want) was warranted upon the evidence as accepted by him.

The doctrine of analogous user arises from the necessity appreciated by the courts that people must be safe-guarded against undue interference with the use of the accumulated stock of experience and knowledge gathered in their own and other trades.

Disagreement expressed with the view (taken by the trial judge as a further ground against defendant) that defendant's rights were governed by s. 61 (1) (*c*) of *The Patent Act, 1935* (c. 32), in view of the fact that his patent was granted in October, 1933 (more than a year prior to the enactment of said s. 61 (1) (*c*)), and in view of s. 81 of that Act, and of s. 37A (enacted in 1932, c. 21, s. 4) of the *Patent Act*, R.S.C. 1927, c. 150, which s. 37A was in force at all relevant dates. In view of s. 19 (1) (*c*) of the *Interpretation Act* (R.S.C. 1927, c. 1), defendant's rights under said s. 81 of said Act of 1935 could not be affected by s. 82 of that Act (repealing, *inter alia*, said s. 37A, enacted in 1932).

Per Davis J.: Defendant's alleged invention lay within the limits of the existing art, in the sense that it was such a development as an ordinary person skilled in the art could naturally make without any inventive step.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson, JJ.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiffs were entitled to the declarations claimed by them, and that the defendant's counterclaim be dismissed. By the formal judgment of the said Court, it was declared and adjudged that the defendant's letters patent no. 336,234 are, and always have been, null and void and of no effect, and said letters patent were vacated and set aside; and it was further ordered and adjudged that defendant's counterclaim (asking for a declaration that plaintiffs had infringed said letters patent, an injunction, damages, etc.) be dismissed. The patent was for improvements in hosiery and the manufacture thereof, and the alleged invention for which it was granted was described in the specification as relating "to full-fashioned hosiery, particularly of real silk, and to methods of and means for making the same."

A. J. Thomson K.C. and *B. V. McCrimmon* for the appellant.

O. M. Biggar K.C. and *Christopher Robinson* for the respondents.

The judgment of the Chief Justice and Rinfret and Kerwin JJ. was delivered by

THE CHIEF JUSTICE.—I have been unable to convince myself that this is not a case of analogous user. I think the learned trial judge was right in his view that if there were invention in Kaufman's disclosure it rested in the idea, that is to say, that once the idea was grasped, there were no difficulties in applying it to the knitting of full-fashioned silk stockings which it required invention to overcome. It is quite true that the problem in weaving silks and the problem in outer wear and necktie knitting was not precisely that which presented itself by the rings in silk stockings; but in both weaving and outer wear and necktie knitting, the multiple shuttle method or the multiple carrier method was applied to overcome irregularities due to variations in colour as well as in size. Friedlander, in his letter of the 9th of December, 1931, pointed out the analogy.

(1) [1938] Ex.C.R. 152; [1938] 2 D.L.R. 342

1940

KAUFMAN v. BELDING-CORTICELLI LTD., *et al.*

Duff C.J.

Mr. Thomson pressed upon us with great force the difference between the nature of the irregularities encountered in weaving and in other branches of the knitting art and the irregularities in translucency which he argues Kaufman set himself to overcome. As I have already intimated, he has not convinced me that the difference between the two problems is sufficiently wide to justify the conclusion that the application to the one problem of the method by which the other problem had been solved a long time before involved invention. The judgments of the courts make it sufficiently clear that the doctrine of analogous user arises from the necessity appreciated by the courts that people must be safeguarded against undue interference with the use of the accumulated stock of experience and knowledge gathered in their own and other trades.

The strongest point made on behalf of the appellant is that in this view there is no explanation of the fact that a solution was not reached earlier. This argument was put before us with great ability and is supported by a very considerable body of evidence. The learned trial judge has found as a fact, largely on the strength of the evidence of Feustel, that the problem did not present itself as an acute one in the trade, that is to say, that by reason of commercial demand it did not require a solution, until about the year 1930, and the reasons for this are given by Feustel. Feustel's evidence has been accepted by the learned trial judge.

Mainly from that evidence, as well as from the fact that almost contemporaneously with Kaufman a number of other inventors conceived the idea of applying the multiple carrier method for the purpose of overcoming in the manufacture of silk stockings the blemishes of rings or bands, the learned trial judge has concluded that the problem then for the first time really demanded a solution. I have no doubt, and I think it appears clearly from his judgment, that the learned trial judge was also influenced in arriving at his conclusion by the consideration that, in his view, if the problem had become acute at an earlier stage, it would certainly have been solved in the same way. If the learned trial judge was wrong in his opinion as to the time when the problem first really demanded a solution from the commercial point of view, then one's

own *prima facie* conclusion as to the absence of invention might well be overborne by the evidence of the existence of a long-felt and unsatified want.

The weight to be accorded Feustel's evidence was peculiarly a matter for the trial judge who had means of forming an opinion on the value of that evidence which are denied us.

I am constrained to the conclusion that his judgment cannot properly be reversed.

The learned trial judge also based his judgment on other grounds involving the interpretation and application of section 61 (1) (*c*) of *The Patent Act, 1935*. I should not wish to be understood as either agreeing with or dissenting from his views as to the application of the enactment of that subsection to the facts in evidence here, if the section were relevant. I think it desirable, however, to say this: Kaufman's Canadian patent was granted in October, 1933. His applications, both in the United States and Canada, of course, preceded that date and, by section 81 of the statute of 1935, his patent

> shall be deemed to have been properly issued if all the conditions of the issue of a valid patent which may have been or shall be in force, either at the date of the application therefor or at the date of the issue thereof, have been satisfied.

Subsection (*c*) of section 61 was not enacted until more than a year after the date of the issue of Kaufman's patent and at all the relevant dates section 37A of ch. 150, R.S.C. 1927 (introduced by section 4 of chapter 21 of the statutes of 1932), was in force,—at the date of Kaufman's U.S. application, at the date of his Canadian application, and at the date of the issue of his patent. I am, therefore, quite unable to agree with the view of the learned trial judge that Kaufman's rights are governed by the enactment in subsection (*c*) of section 61.

Mr. Biggar relied on section 82 of the statute of 1935, but that section must be read in light of section 19 of the *Interpretation Act* which is in these words:

> 19. Where any Act or enactment is repealed or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation shall not, save as in this section otherwise provided, . . . (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked.

1940

KAUFMAN v. BELDING-CORTICELLI LTD., et al.

Duff C.J.

Obviously, Kaufman's rights under section 81 could not be affected by the repeal of the statute of 1932.

There was an alternative point made by Mr. Biggar based upon section 8 (1) of ch. 150, R.S.C. 1927. On that point I express no opinion.

The appeal should be dismissed with costs.

DAVIS, J.—The real question in this appeal, it seems to me, is whether the development in the trade which in fact has been made required inventive skill or was merely the natural development in the particular art. The development was undoubtedly of great utility and commercial advantage, but the evidence of a rather sudden material change in the conditions of the trade creating a new demand to be met, is very strong.

While the question is one of very considerable difficulty, my conclusion is that the alleged invention lies within the limits of the existing art, in the sense that it was such a development as an ordinary person skilled in the art could naturally make without any inventive step. I agree upon this ground that the appeal must be dismissed.

HUDSON, J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tilley, Thomson & Parmenter.*

Solicitors for the respondents: *Smart & Biggar.*

1939

*Nov. 17, 20

1940

*March 4.

OTTAWA BRICK & TERRA COTTA CO. LTD. AND JAMES KELSO (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN MARSH (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Collision—One motor truck passing another while latter veering to left for purpose of making left turn—Responsibility for accident—Evidence—Findings—Highway Traffic Act, R.S.O., 1937, c. 288, ss. 39 (1) (c) (d), 12 (1) (b).

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1940

OTTAWA BRICK & TERRA COTTA CO. LTD. v. MARSH.

The action was for damages by reason of a collision, at night on an Ontario provincial highway, between plaintiff's motor truck and defendant's motor truck, both going westerly, while plaintiff's driver was attempting to pass defendant's truck which was veering to the left for the purpose of a left turn to be made on to a side-road which it was approaching. The trial judge found that the whole proximate cause of the accident was plaintiff's driver's negligence and gave judgment for defendant. The Court of Appeal for Ontario, [1939] O.R. 338, apportioned the blame for the accident, 75% against plaintiff's driver and 25% against defendant's driver, and gave judgment accordingly. On appeal to this Court, it was *held* that, in view of the findings at trial and the evidence (discussed), the judgment at trial should be restored. (Davis J. dissented, holding that on the evidence defendant's driver was clearly guilty of negligence contributing to the accident, that there was evidence wrongly admitted, and that certain evidence given unduly affected the trial judge's view of the whole case; rather than direct a new trial, he would take advantage of s. 4 of *The Negligence Act*, R.S.O., 1937, c. 115, and award one-half the damages assessed).

Secs. 39 (1) (*c*) (left turn at intersection of highways), 39 (1) (*d*) (duty of driver before turning left), and 12 (1) (*b*) (rear-view mirror) of *The Highway Traffic Act*, R.S.O., 1937, c. 288, considered with regard to matters in question.

APPEAL by the defendants, and cross-appeal by the plaintiff, from the judgment of the Court of Appeal for Ontario (1) allowing the plaintiff's appeal from the judgment of Urquhart J. dismissing the plaintiff's action and giving judgment for defendant company on its counterclaim.

The action was for damages by reason of a collision of motor trucks on or about July 19, 1938, in the night-time on provincial highway no. 2 at about two miles east of Prescott, Ontario. Both trucks were going westerly. At the time of the collision the driver (Burns) of the plaintiff's tractor and trailer was in the act of passing the motor truck of the defendant company, driven by defendant Kelso, and the latter was veering from the north or right hand side of the highway to the south for the purpose of making a left turn on to a road running south from the said provincial highway. The plaintiff claimed damages for loss of his tractor, trailer and cargo and loss of use of the vehicles. The defendant company counterclaimed for damage to its motor truck and for loss of use thereof while undergoing repairs.

(1) [1939] O.R. 338; [1939] 3 D.L.R. 137.

1940

OTTAWA BRICK & TERRA COTTA CO. LTD. v. MARSH.

Urquhart J., at trial, dismissed the plaintiff's action and gave judgment on defendant company's counter-claim for $110.25. In case on appeal he were found wrong, he fixed the plaintiff's damages at $9,000.

An appeal by the plaintiff was allowed by the Court of Appeal for Ontario (Riddell J.A. dissenting) (1), which held that both drivers were guilty of negligence contributing to the accident, and apportioned the blame, 75% against the plaintiff's driver and 25% against the defendant (driver) Kelso. Plaintiff was therefore given judgment against the defendants for 25% of the amount at which the trial judge had assessed plaintiff's damages, with costs of action and appeal, and defendant company was given damages for 75% of the judgment recovered by it at the trial (without costs).

The defendants appealed to the Supreme Court of Canada. The plaintiff cross-appealed, asking that he be given a much larger proportion of the damages assessed.

W. F. Schroeder K.C. and *W. R. Burnett* for the appellants.

T. J. Agar K.C. for the respondent.

THE CHIEF JUSTICE—I should allow the appeal.

CROCKET J.—I agree that this appeal should be allowed and the judgment of the learned trial judge (Urquhart J.), dismissing the respondent plaintiff's action and allowing the defendant's counter-claim, restored with costs throughout.

There was ample evidence to warrant the trial finding that the driver of the plaintiff truck, which was drawing a heavily loaded trailer along the trunk highway at the time of the collision, was wholly responsible therefor by reason of his failure before attempting to pass the defendant truck to see that he could do so in safety. His Lordship distinctly found that the defendant driver, in approaching the side-road leading from the south side of the trunk highway, which he was about to enter, was gradually edging towards the centre of the road, which it was his duty to do in making a left hand turn; that he had his arm out

(1) [1939] O.R. 338; [1939] 3 D.L.R. 137.

for a distance of probably some 250 feet before the driver of the plaintiff truck attempted to pass him with his heavily loaded trailer, so that at least ten inches of his hand and wrist extended beyond his over hanging truck box and would be clearly visible to the driver of any car coming from behind for 200 feet, if the head lights of the latter were good; and that the driver of the oncoming plaintiff truck, as a consequence of his failure to keep a proper lookout, failed, not only to observe the outstretched hand of the defendant driver, but also the flashing on and off of the rear light of his truck, and the fact that the latter was starting to edge towards the centre of the road for the purpose of making his left hand turn into the side-road, which was marked with signs.

Upon these findings no other conclusion, it seems to me, is possible than that there was no negligence on the part of the defendant appellant or its driver, which materially contributed to cause the collision. Whether or not there had been any negligence on the part of the defendant itself in respect of its failure to provide in its truck a proper reflector, which would in all circumstances enable the driver to see a car approaching him from behind, or negligence on the part of the driver himself, in not slowing down, even more than he did, and putting his head through the open window at his side, as it was contended he should have done, to make sure before turning into the side-road that there was no danger from behind, such negligence could properly be held to have materially contributed to the collision, only if the plaintiff's driver could not have avoided it by the exercise of due care. The undoubted effect of the findings of the learned trial judge, to my mind, is that he could have done so, and that his failure to exercise such care in the circumstances was accordingly the sole cause of the damage claimed for.

DAVIS J. (dissenting)—This appeal arises out of a collision of two motor trucks on the Toronto-Montreal highway at a point a few miles east of Prescott some time near midnight on July 19th, 1938. The respondent's (plaintiff's) truck was being driven by one Burns. A trailer was attached to the truck and a load of 32 bales of cotton was being carried. The total gross weight was about 16 tons.

1940

OTTAWA BRICK & TERRA COTTA CO. LTD. v. MARSH.

Davis J.

As a result of the collision, the truck and the trailer and the cotton were all destroyed by fire. The trial judge assessed the respondent's total loss at $9,000. The appellants' (defendants') truck was much smaller and was empty—it weighed about 7,500 pounds. The appellants counterclaimed in the action for the damage to their truck at $110.25. There is no claim by either party for any personal injuries.

Both trucks were travelling in the same direction—westerly. At the time of the collision the appellants' truck, driven by one Kelso, was ahead of the other though it had passed the respondent's truck some three or four miles back. Kelso admits that he was aware, after he passed it, that there was a truck following him, but he was not aware, he says, that there was any vehicle near him until the crash. The facts immediately surrounding the collision are plain and are really not in dispute. The appellants' driver, Kelso, intended to turn into a side road which runs southerly from the main highway to a farm and a coal yard. The highway was paved—20 feet in width—and had a solid white dividing line down the centre of it. The trial judge considered the road to be "a particularly dangerous one at this point." Although the trial judge said that "this side road was perfectly visible, being marked with signs," we are in as good a position from the photographs and plans as the trial judge was in this regard and the road cannot fairly be said to be visible to an approaching motorist at midnight—it was obviously, as Burns, the respondent's driver, said, nothing different from numerous such side roads that run into the main highway all along the route. The side road was not marked with any highway signs—the only sign was one placed six feet back from the highway with the words "Redden's Coal Yard," and not lighted. Now 200 feet before Kelso, the appellants' driver, would have reached the point of entrance to this side road he says he began to veer his truck over to the south, that is, to his left hand side—he himself describes his course as "anglewise"—and that after continuing this course for about 100 feet the respondent's big truck from behind, in attempting to pass, collided with his truck. The left front fender and wheel of the appellants' truck and the right front fender and

wheel of the respondent's truck came into collision. It is clear on the evidence that at that time the left front wheel of the appellants' truck had got two feet over the centre line on the south side of the highway.

The appellants' driver, Kelso, did not see or hear the respondent's large and heavy truck and trailer behind him or know that it was there. He says very frankly he did not. His truck had a cabin in the front of it in which he was sitting behind the wheel on the left hand side with two passengers beside him. His truck, he says, was travelling about fifteen miles an hour and the other truck at approximately thirty-five to forty miles an hour. The maximum statutory speed is fifty miles an hour. Assuming the speed of the two trucks, as Kelso puts it, when his truck began to veer over to the left hand side, 100 feet before the point of impact, the respondent's truck could not have been then more than 200 feet behind him. And yet Kelso neither heard him nor saw him. It was a type of cabin which did not permit the driver conveniently to put his head out far enough to see what was behind him. The trial judge thought that such a cabin was "a menace to safe driving." Kelso used what is described in the evidence as a rear-view mirror and in his examination for discovery he said he was looking in this mirror when he was 250 feet from "the top of the hill" (a point about 150 or 200 feet before he came to the point where he commenced to angle across the highway) and that he did not look again in the mirror. Then during the trial on cross-examination:

Q. When you went to cross the centre line where there might have been some danger, did you look out of this open window that you had beside you?
A. No.
Q. You did not take the trouble to look at all?
A. No.

And again:

Q. Can you offer to his Lordship any explanation why you would not see it [the other truck] if you had looked?
A. There was a curve there, and his lights shone in the field south of the road.
Q. And you knew there was a curve there?
A. Yes, but I did not know there was a truck there.

The action was tried by Urquhart, J., without a jury, and the learned trial judge at the conclusion of the argu-

1940

OTTAWA BRICK & TERRA COTTA CO. LTD. v. MARSH.

Davis J.

ment of counsel for the respondent (plaintiff) said to him, "I think it is quite hopeless, Mr. Thompson," and did not find it necessary to hear counsel for the appellants (defendants).

Quite apart from any statutory provisions, and much emphasis by counsel for both parties before us was put upon sec. 39 of the Ontario *Highway Traffic Act*, R.S.O., 1937, ch. 288, it was an act of the plainest sort of negligence for the appellants' driver to attempt to make a left hand turn across the highway at the place and at the time he attempted to do so without making sure that his movements would not adversely affect a car coming along behind him. It was near midnight in midsummer on a principal highway and it would have been a very simple thing for the driver to have stopped and made sure of traffic behind him before attempting to turn across the highway. And it was his plain duty to do so, if, as he says, the cabin of his truck made it impossible for him to put out his head far enough to get a view of what was behind him. And yet the driver of that truck was wholly exonerated from responsibility for the collision by the trial judge and the respondent's action against him and the owner of his truck was dismissed, with costs. The trial judge thought that Kelso did all he could, and that he was turning in a reasonable manner, having observed no oncoming vehicle behind. I fear that the fact that the respondent's driver Burns had taken some beer during the afternoon and again in the evening before starting out on his journey unduly affected the trial judge's view of the whole case. Although the appellants in their defence had set out specifically some ten or twelve items of alleged negligence, intoxication of the driver Burns was not even suggested and when evidence was brought out at the trial of the taking of the beer, the appellants' counsel stated to the judge:

> There is nothing very serious about it, my Lord.

And yet at the very beginning of the trial judge's reasons for judgment he refers to the taking of the beer by the driver Burns and says:

> His condition can only be imagined, and I would find it was such that it would have a tendency to make him less observant and more reckless if, in fact, he was not completely under the influence of liquor.

And the trial judge reverts to the matter at the close of his reasons for judgment when he says:

> It seems to me that the whole proximate cause of this accident was the condition of the plaintiff driver and his failure to keep a proper look-out, possibly combined with the dimness of his lights. * * * I find that the plaintiff driver failed in his duty. I have no doubt whatever that such failure was largely caused by the beer he had consumed; it dimmed his senses and rendered him much less observant. That being so, I find that the plaintiff driver was wholly responsible for the accident, and exonerate the defendant driver Kelso.

There was no admissible evidence upon which the trial judge could reach any such conclusion as to the drunkenness of the driver Burns. The defendants' counsel, Mr. Schroeder, who is always very earnest and careful in the presentation of his cases, frankly stated to the judge, as above pointed out, that there was nothing very serious about it, and that was said after inadmissible evidence had been admitted, subject to objection, by the trial judge. Burns had with him at the time of the collision a "hitch-hike" passenger named Charlebois who was not called as a witness though the evidence indicates that he was at the time of the trial working in a restaurant at Cobourg, Ontario. The trial judge admitted, notwithstanding objection, during the cross-examination of the highway traffic officer Rose, called by the plaintiff, what the witness described as "a whole line of lingo" given him by Charlebois. The witness gave what Charlebois said to him when in the doctor's car after the accident, but the witness added:

> I just looked at the man and considered that he was pretty nearly frantic; he was choking.

The alleged statement by Charlebois that the driver Burns had been drinking all the way from Montreal was in itself utterly false, if made, because Burns had only taken over the driving of the truck at Morrisburg, about 14½ miles back of the place of the collision. Morrisburg is a town on the St. Lawrence river about 100 miles west of Montreal. The truck had been brought from Montreal by another driver altogether and Burns took it over at Morrisburg to drive it on to Toronto. But in any event the vice of the evidence is that it was merest hearsay. It was tendered and admitted upon a theory that it was a statement made in the presence of Burns. But the evidence

1940

OTTAWA BRICK & TERRA COTTA CO. LTD. v. MARSH.

DAVIS J.

is plain that whatever was said was said at a time when Burns, while physically present, had, according to the doctor's evidence, been given morphine and was suffering pain from burns received before getting out of the burning truck. Charlebois himself was in a "sort of raving condition" at the time. Rose, the traffic officer, says that when he returned to Morrisburg and found that Burns had just taken charge of the truck there and that Charlebois had only gotten into the truck there, hitch hiking, "I dismissed what he said."

Dr. O'Connell, a near-by physician who was called at the time of the accident, washed Burns' arm with alcohol and gave him morphine. The doctor said he did not detect any smell of intoxicating drink on Burns and that there was nothing about his condition to make him think he was under the influence of liquor. Rose, the traffic officer, had said that when he saw Burns at a near-by farmhouse after the accident,

> the man was suffering, and the doctor was looking after him then.

and added:

> I could smell liquor on his breath; it seemed to be in the air that night; I could smell it everywhere; I could smell the doctor's alcohol that he had been working with; but the man was injured, and I would not care to pass judgment on him. His feet were injured. He was helped out to the doctor's car; the doctor was anxious to get him away to the hospital.

The evidence of Rose was given prior to the time that Mr. Schroeder told the trial judge that there was nothing very serious about it, and yet the trial judge shortly afterwards during the course of the trial said:

> I felt sure Mr. Schroeder was going to make more of it.

Now Burns had driven from Toronto down to Morrisburg with another truck during the previous evening and after eight hours' sleep in Morrisburg was up and around at about 2 p.m. He did not leave with the truck in question, arriving from Montreal, until about 11 p.m. He admitted frankly that he had some beer during the afternoon and evening and Mr. Schroeder said to the Court during the evidence about the beer, "I am not alleging he was intoxicated." Burns said that between two and five o'clock in the afternoon he had taken three glasses of draught beer when he went to a hotel at two o'clock;

that he went for a swim around four o'clock and got back around five o'clock, and that he then had some more beer —be bought a quart bottle. Later he had his supper about 6.30 o'clock and he took about three-quarters of a glass of beer right after supper. He did not drink anything else that day besides beer; he had brought no liquor with him from Toronto and he had not bought any while in Morrisburg. Then when he was starting out on his trip at about eleven o'clock at night, he had one glass more. The admissions of Burns were, of course, admissible but they do not go any such length as to warrant the trial judge taking the view he did of the whole case on the basis of a reckless, drunken driver.

The difficulty is to determine what disposition of the case ought now to be made by this Court. Like most motor car collision cases, this case turns on its own particular facts and where the findings of fact by the trial judge were obviously controlled by the evidence of the beer and which evidence (the alleged statements of Charlebois being wholly inadmissible) permeated his whole view of the broad estimate of responsibility for the collision, we are not in a position where, in my opinion, we can safely or fairly rest upon the findings. A new trial in such circumstances might be in many respects a satisfactory course, but it is a course which inevitably would work a great hardship on one, if not on both, of the parties. The respondent's (plaintiff's) driver was plainly guilty of at least some negligence that contributed to the collision and sec. 4 of *The Negligence Act*, R.S.O., 1937, ch. 115, provides that

> If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

I would therefore take advantage of that provision and award the respondent judgment for $4,500, being one-half the amount of the damages assessed by the trial judge.

In my opinion, the appeal should be dismissed with costs, the cross-appeal allowed and the judgment appealed from set aside and judgment directed to be entered in favour of the respondent in the sum of $4,500, with costs throughout.

1940

OTTAWA BRICK & TERRA COTTA CO. LTD. v. MARSH.

Kerwin J.

KERWIN J.—This is an appeal by the defendants, the owners and driver respectively of a truck, from a judgment of the Court of Appeal for Ontario. The trial judge had dismissed the action brought by the respondent, the owner and driver of another truck, for damages sustained by reason of a collision between the two trucks and had allowed the appellants' counterclaim, as he found the respondent was solely to blame for the occurrence. In the Court of Appeal, Mr. Justice Riddell agreed with the trial judge. Mr. Justice McTague and Mr. Justice Gillanders were satisfied that the respondent had been guilty of negligence and in fact adopted the findings of the trial judge with respect thereto but differed from the view of the trial judge and Mr. Justice Riddell in that they considered that Kelso, the driver of the appellants' truck, was at fault to the extent of twenty-five per cent.

While the trial judge placed considerable emphasis upon the quantity of beer consumed by the respondent, he also ascribed the proximate cause of the accident to the respondent's

> failure to keep a proper lookout, possibly combined with the dimness of his lights. I find that he failed to observe the outstretched hand of the defendant driver, and also the flashing on and off of the rear light of the defendant's truck and the fact that the said truck was starting to edge towards the centre of the road with a view to turning into the side-road to the coal-yards. This side-road was perfectly visible, being marked with signs.

As has been pointed out, the findings of negligence against the respondent were adopted by all the members of the Court of Appeal. The majority, however, considered that Kelso had not complied with section 39, subsection 1 (*d*) of *The Highway Traffic Act*, R.S.O., 1937, chapter 288:—

> (*d*) The driver or operator of a vehicle upon a highway before turning to the left from a direct line shall first see that such movement can be made in safety, and if the operation of any other vehicle may be affected by such movement shall give a signal plainly visible to the driver or operator of such other vehicle of the intention to make such movement.

They held that Kelso had not seen that his intended movement to the left could be made in safety and that his failure was one of the direct causes of the accident. The evidence indicates that Kelso looked in his rear view mirror and did not see the respondent's truck. Kelso

admitted that the view reflected in the mirror was that of the land to the north of the road and not of the roadway in the rear of his own truck. At the point where Kelso commenced to veer to his left, there is a down grade in the road and also a curve to the south from east to west.

The majority in the Court of Appeal also appear to have thought that the appellants had not complied with section 12 1 (*b*) of the Act:—

> Every motor vehicle other than a motorcycle shall be equipped with,—
>
> (*b*) a mirror securely attached to such vehicle and placed in such a position as to afford the chauffeur or operator a clearly reflected view of the roadway in the rear, or of any vehicle approaching from the rear.

I am rather inclined to agree, as I consider that the mirror required by this provision is one that may be tilted as required so "as to afford the chauffeur or operator a clearly reflected view of the roadway in the rear." It does not appear from the evidence that the mirror installed on the appellants' truck was of such a character but the proper inference would appear to be that even if it were so, it was not put in such a position as to fulfil the requirements.

The respondent also contended that Kelso had not complied with section 39 1 (*c*) of the Act:—

> 39. 1 (*c*) The driver or operator of the vehicle intending to turn to the left into an intersecting highway shall approach such intersection as closely as practicable to the centre line of the highway and the left turn shall be made by passing to the right of such centre line where it enters the intersection, and upon leaving the intersection by passing to the right of the centre line of the highway then entered.

Kelso intended to turn to the left into an intersecting highway. It is true that the front wheels of his truck had crossed the centre line of Highway No. 2 but, as found by the trial judge and all the members of the Court of Appeal, Marsh should have seen the veering to the left and Kelso's arm signal; and in any event Kelso had not yet entered the intersection of the two highways. In my view, Kelso did not commit any infraction of the last statutory provision.

Upon consideration, I am of opinion that even if Kelso had committed the other infractions referred to they had

1940

OTTAWA BRICK & TERRA COTTA CO. LTD. v. MARSH.

Kerwin J.

nothing to do with the accident. If his rear view mirror had reflected the roadway in the rear of his truck, or if he had put his head out of the cab window and looked back, upon the evidence, he would not have seen the respondent's truck. In my opinion, the trial judge and Mr. Justice Riddell were right in determining that the sole cause of the accident was the negligence of the respondent.

I would allow the appeal and restore the judgment at the trial, with costs throughout. The cross-appeal of the respondent asking that all the blame be placed on Kelso is, of course, hopeless and must be dismissed with costs.

HUDSON J.—This was a highway traffic accident tried before Mr. Justice Urquhart without a jury. He found for the defendant, holding that the plaintiff's negligence was the sole cause of the accident. On appeal to the Court of Appeal, Mr. Justice Riddell agreed with the trial judge, but the majority, composed of Mr. Justice Gillanders and Mr. Justice McTague, while agreeing with the trial judge that the plaintiff himself was guilty of gross negligence, held that the defendant too had been guilty of negligence which contributed to the accident and assessed him with 25% of the damages.

Mr. Justice Gillanders in giving the opinion of the majority of the Court stated:

> The learned trial judge has found the plaintiff's driver negligent and wholly responsible for the accident, and has exonerated Kelso, the driver of the defendant's truck, from all blame. He accepts the evidence of Kelso and Miss Douglas, a passenger in the defendant's truck, and, where the evidence of any other witness is in conflict with their testimony, he believes these two witnesses. He has also on conflicting evidence found the facts strongly in favour of the defendant, and it is the duty of this Court to accept his findings of fact supported by the evidence, his appraisal of the credibility of the witnesses, and the testimony of those witnesses whose evidence he accepts where there is a conflict.
>
> I fully accept and agree with his finding that the plaintiff's driver was negligent, amply supported as it is by the evidence; that the plaintiff's driver was not keeping a proper lookout; that he should have observed Kelso's hand and wrist as a signal; that the flashing on and off of the rear light of the defendant's truck caused by putting the brake on and off should have been seen, and that he should have seen the truck itself edging towards the centre of the road, and that his failure to keep a proper lookout was possibly largely caused by the beer he had consumed.

The learned trial judge held specifically that he believed the evidence that "no horn was sounded by the plaintiff and no warning given of his approach," and it is clear from the above quotation from the judgment of Mr. Justice Gillanders that the majority of the Court of Appeal accepted such finding. These are concurrent findings of fact.

It would then appear on the evidence, as I accept it, that the defendant's driver was travelling westward on a highway at a moderate rate of speed. For a distance of 100 feet or more he had veered slightly to the left and eventually reached a point where the left front fender of his car was about 2 feet from the left of the centre of the road. At this moment the side of his car was struck by the plaintiff's car which had approached from the rear at a high rate of speed and was attempting to pass without warning.

I do not think that the argument based on the *Highway Traffic Act* applies to the facts here. The defendant had not yet started to make the sort of turn contemplated by the statute.

The onus is heavily on the driver of a motor vehicle attempting to pass another from the rear to excuse himself from responsibility for a collision with a car ahead.

In my view, the negligence of the plaintiff's driver was the substantial cause of the accident: see *Swadling* v. *Cooper* (1). The appeal should be allowed, the cross-appeal dismissed, and the judgment at the trial restored with costs throughout.

Appeal allowed, cross-appeal dismissed, and judgment at trial restored, with costs throughout.

Solicitors for the appellants: *MacCracken, Fleming & Schroeder.*

Solicitors for the respondent: *Hughes, Agar & Thompson.*

(1) [1931] A.C. 1, at 10.

1939
*Nov. 13, 14.
1940
*May 21.

NATIONAL ELECTRIC PRODUCTS CORPORATION (PLAINTIFF) ..... APPELLANT;

AND

INDUSTRIAL ELECTRIC PRODUCTS, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Infringement.

An appeal from the judgment of Maclean J., [1939] Ex. C.R. 282, dismissing plaintiff's action for alleged infringement of its patent for an invention relating to armoured electric cables, was dismissed.

An essential element in the alleged invention was a clearance space, to be made by unwinding one or more coils of the fibrous material covering the insulated conductor or conductors, to receive a protecting bushing within the end portion of the cut-off metallic outer sheath of the cable. Defendant manufactured and sold armoured cables, and sold, for the purpose of preparing a piece of the cable for installation, bags of bushings purchased from a United States company which made them under a United States patent, which bushings were to be inserted over the fibrous material (paper) covering the insulated conductors.

Per the Chief Justice, Crocket, Davis and Hudson JJ.: Defendant did not infringe plaintiff's patent. Defendant's cable did not infringe, as every element in it was old and well known at the date of the patent and there was no invention in the combination found in that cable; and there could be no invention in merely inserting one of the bushings sold by defendant for the purpose of preparing a piece of the cable for installation; the use of a bushing in electrical installations for purposes the same or closely analogous to that for which the patented invention employed it was well known long before that invention; the bushings sold by defendant could be readily inserted over the fibrous material (paper) covering the insulated conductors in defendant's armoured cables; and in the article produced by so inserting the bushing there could be no infringement of plaintiff's patent, since the clearance space, an essential feature of plaintiff's patented invention, was left out.

Per Kerwin J.: Plaintiff's patent was invalid for want of invention.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the plaintiff's action for a declaration of infringement of patent, and for an injunction, damages, etc. The patent had been granted to plaintiff, as the assignee of O. A. Frederickson, the applicant, for an inven-

(1) [1939] Ex. C.R. 282; [1939] 3 D.L.R. 209.

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

tion relating to armoured electric cables. Maclean J. held that there was no subject-matter in the patent sued upon.

O. M. Biggar K.C. and *M. B. Gordon* for the appellant.

E. G. Gowling and *G. F. Henderson* for the respondent.

The judgment of the Chief Justice and Crocket, Davis and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—In the appellant's factum it is stated:

* * * in fact it is of the essence of Frederickson's invention that the paper should be capable of being readily unwound to expose the conductors, and that it should be adapted to be withdrawn from under the end of the armor for a short distance.

Indeed, the specification is very explicit on the point that the dominant purpose of having a paper "adapted to be withdrawn from the end of the armor" is to provide a clearance for the insertion of the bushing.

At page 113 of the Case it is said:

Before the bushing 18 may be inserted in the armored sheath it is necessary to provide a clearance space for the bushing, but this is readily done by drawing several coils of the fibrous material 15 out of the space between the covered conductors 12 and metal sheath 14 as will be apparent from Fig. 2, whereupon the expansion bushing may be readily inserted to its final position in which it is shown in Fig. 5.

At page 114 it is said:

In the armored cables employed heretofore it has been customary to provide a braided or woven jacket over the two or more covered insulated conductors and then apply the armored covering directly over the braided or woven jacket in relatively snug engagement with the bracket. There is therefore not sufficient room between the metal covering and outer jacket of the armored cables constructed heretofore to receive a bushing 18, and it is practically impossible to remove a sufficient amount of the braided or woven jacket from the interior of the armored covering to form a sufficient clearance space to receive the bushing 18.

At page 111, it is said:

Inasmuch as the insulating fibrous webbing is laid spirally about the conductor or conductors, it is readily unwound from the exposed portion or ends of the conductors when the metallic sheath has been cut, and such removal is readily accomplished by an unwinding action which may be extended down into the metallic sheath itself, thereby providing sufficient space for the ready insertion of the interior bushing or sleeve, as hereinbefore referred to. By this construction it will be evident at once that the sharp edges and burrs at the end of the cut off armored or metallic sheath are prevented from injuring the insulation on the conductor or conductors.

1940

NATIONAL ELECTRIC PRODUCTS CORPN. v. INDUSTRIAL ELECTRIC PRODUCTS, LTD.

Duff C.J.

In the preferred form of the invention in the respects above noted the bushing is formed of insulating material such as fibre, bakelite or the like, so that even should injury occur to the insulation of the conductor or conductors, the bushing will itself insulate the conductors from the metallic outer sheath.

Figure 5 of the drawings shows the bushing 18 and the clearance space adverted to in the first of the passages quoted. It is clear from all this, moreover, that this clearance space is an integral element in the combination and also that, as the patentee conceives it, it is an essential element in his invention.

The respondents manufacture and sell armoured cable which has two insulated wires side by side with a spirally wound paper cover. The whole is contained in a spirally wound metallic sheath. They also sell bags of insulating bushings which are purchased from the American Metal Moulding Co., a United States Corporation. That company makes these bushings under United States patent No. 1,793,697.

It is too clear for discussion, I think, that the cable of the respondents does not infringe the appellants' patent. Every element in the cable was old and well known at the date of the patent and there is no invention in the combination found in that cable.

I agree with the learned trial judge that there would be no invention in merely inserting one of the fibre bushings sold by the respondents for the purpose of preparing a piece of this cable for installation; but what seems to be contended on behalf of the appellants is that you have something more than the mere addition of the fibrous bushing. You have the clearance made by the removal of part of the paper covering.

Now, it cannot, I think, be seriously disputed that these fibrous bushings can be readily inserted over the paper covering. I do not think the suggestion need be taken too seriously that loose ends of paper which might be left might create a fire risk. Any competent workman would quickly remove these ends and it is not open to argument, I think, that in the article produced by so inserting the bushings you would have no infringement of the appellants' patent; since the clearance space, an essential feature, as the patentee plainly declares it to be, and as the argument insists it is, is left out.

I find it very difficult to accede to the contention which the appellants' argument seems to involve that you have invention if you pull out some of the paper and leave a clearance space and then insert the bushing; while you have no invention if you insert the bushing over the paper without making a clearance.

To put the thing more simply, it is very clear, in my opinion, that the respondents' cable in itself does not involve invention. At the date of the appellants' patent, you could not have obtained a patent for it because there would have been nothing new in it in the patent sense. I think also it is clear that you do not reach the level of invention by adding the element of the fibre ferrule, whether you insert the ferrule over the paper covering or after you have made a clearance space by taking away some of the paper covering.

The use of a bushing in electrical installations for purposes the same or closely analogous to that for which Frederickson employed it was well known long before 1927. There was ample evidence to justify the finding of the learned trial judge that each of the elements of the supposed combination was old and that they performed the same function in Frederickson's cable as in the old use.

As to infringement, it cannot be disputed that if a purchaser follows the directions as to the manner in which the bushings are to be used there is no infringement. There is no ground for holding that this direction is colourable or that it is given in the expectation that it will be disregarded. In these circumstances I think the proper conclusion of fact is that the appellants' invention has not been taken.

There is no evidence of agency or of partnership and on the facts one could not properly find, to borrow the language of Vaughan Williams L.J. in *Dunlop Pneumatic Tyre Co., Ltd.*, v. *David Moseley & Sons, Ltd.* (1), any relation between the parties of "principals in the first degree" or of "aider and abettor."

I must not be supposed to give any adherence to the argument that the existence of this latter relationship would be sufficient. The existence of any one of these

(1) (1904) 21 R.P.C. 274 at 279-280.

1940

NATIONAL ELECTRIC PRODUCTS, CORPN. v. INDUSTRIAL ELECTRIC PRODUCTS, LTD.

Duff C.J.

relationships is, of course, in every case a question of fact which must be determined upon the evidence in the particular case.

The appeal should be dismissed with costs.

KERWIN J.—I agree with the learned President of the Exchequer Court that there was no invention in Frederickson. Being of that opinion, I do not enter into the question as to whether, if there had been subject-matter, the respondents infringed.

I would dismiss the appeal with costs.

Appeal dismissed with costs

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Singer & Kert.*

1940

*Mar. 7, 8.
*May 21.

WILLIAM L. CHRISTIE, I. HUNTLY CHRISTIE, KATHERINE CHRISTIE AND EMMA L. CHRISTIE, SUING ON BEHALF OF THEMSELVES AND ALL OTHER SHAREHOLDERS OF ERWIK ESTATES LIMITED OF RECORD IN THE YEAR 1932 OTHER THAN THE DEFENDANT GEORGE EDWARDS (PLAINTIFFS) ..... } APPELLANTS;

AND

GEORGE EDWARDS (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Company wound up voluntarily—Resolution approving of reservation of sum for taxation, legal charges and other expenses to be used as liquidator with advice of certain persons might determine—Subsequent suit by shareholders for an accounting in respect of said sum reserved—Nature and form of the action—Right to relief—Companies Act, R.S.O. 1927, c. 218, ss. 229, 201.

The shareholders of a company incorporated by letters patent under the Ontario *Companies Act* resolved at a special general meeting on May 2, 1932, that the company be wound up voluntarily under the provisions of Part XIV of the *Companies Act*, R.S.O. 1927, c. 218, and that defendant be appointed liquidator. On December 6, 1932, at a special general meeting of the shareholders, at which all were represented, defendant presented a statement showing the assets

*PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

which had come into his hands as liquidator and other statements showing distribution among shareholders and accounting for receipts and disbursements; it was explained, among other things, "that there has been reserved for taxation, legal charges, and other expenses the sum of $25,000 to be used as the liquidator with the advice of [two named persons] may determine." By resolution the liquidator's report was adopted and the plan of distribution approved. On December 10, 1932, the liquidator's return as to such meeting was filed in the Provincial Secretary's office as required by s. 229 of said Act, which provides that "on the expiration of three months from the date of the filing the corporation shall *ipso facto* be dissolved."

The said sum of $25,000 consisted of bonds of the face value of $25,000. These bonds or proceeds thereof when received in 1933 by the liquidator from the company's custodian were of the value of $28,037.21. The liquidator paid thereout certain sums on account of taxation, legal and other expenses.

Plaintiffs, shareholders in the company, in 1935 demanded distribution of said sum of $25,000, and later, suing on behalf of themselves and all other shareholders of the company of record in the year 1932 other than defendant, brought action against the liquidator. The claim endorsed on the writ was for an accounting of said sum of $25,000, and payment thereof and of interest, less the amount, if any, that might be found to be due and owing to defendant for his fees and disbursements as liquidator; and to recover possession of books, documents, etc., of the company. In their pleadings the plaintiffs claimed a declaration that the company had not been fully wound up or dissolved, an order that the winding-up proceedings be continued under the court's supervision and that another liquidator be appointed in place of defendant, an accounting and payment of the amount with interest "that may be found to be due to [the company] or to the shareholders thereof," possession of books, documents, etc.

Held: (1) As against the plaintiffs, in the absence of fraud, the company was fully wound up and dissolved at the expiration of three months from the date of said filing of defendant's return with the Provincial Secretary.

(2) The minutes of said meeting of December 6, 1932, as to reservation of the sum of $25,000 could not be taken as an arrangement whereby defendant was to retain the moneys for himself in settlement of all matters, including protection against his liability for prospective claims for taxes, legal charges and expenses.

(3) (Reversing on this point the judgment of the Court of Appeal for Ontario, [1940] O.R. 28.) The relief of an accounting could be given to plaintiffs in the action as framed (even without calling in aid R. 183, Ontario Rules of Practice). Though plaintiffs sought a declaration (which could not be made) that the company had not been fully wound up or dissolved, yet their claim for an accounting was not subsidiary or consequential upon any declaration that might be so made. Sec. 201 (*a*) of said Act (providing that, upon a voluntary winding up, the property of the corporation shall, subject to satisfaction of its liabilities, and unless otherwise provided by its by-laws, be distributed rateably amongst the shareholders) referred to.

1940

CHRISTIE ET AL. v. EDWARDS.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Roach J. (2)) dismissed the action, without prejudice to any further proceedings that the plaintiffs might be advised to take. The material facts of the case and the questions in issue are sufficiently stated in the reasons for judgment in this Court now reported, and are also discussed in the reasons for judgment in the Courts below. The appeal to this Court was allowed but the relief granted in this Court differed in form from that granted by the trial judge, and is set out at the conclusion of the reasons for judgment of Kerwin J.

G. W. Mason K.C. and *C. B. Henderson K.C.* for the appellants.

D. L. McCarthy K.C. and *A. W. R. Sinclair K.C.* for the respondent.

The judgment of the Chief Justice and Kerwin, Hudson and Taschereau JJ. was delivered by

KERWIN J.—In this action the plaintiffs appeal from the judgment of the Court of Appeal for Ontario (1), which allowed an appeal by the defendant from the judgment of the trial judge (2). The plaintiffs are William L. Christie, I. Huntly Christie, Katharine Christie and Emma L. Christie, suing on behalf of themselves and all other shareholders of Erwik Estates Limited of record in the year 1932, other than the defendant George Edwards, and the said George Edwards is the sole defendant. The issues involved may be appreciated after a statement of certain events and a reference to the pleadings.

By letters patent under the Ontario *Companies Act*, a company was incorporated, the name of which was subsequently changed to Erwik Estates Limited. The principal shareholder, Robert J. Christie, by his will, appointed as executors National Trust Company Limited, Charles E. Edmonds, and the defendant George Edwards. At all relevant times the shareholders of the Company and the number of shares held by them, respectively, were:

(1) [1940] O.R. 28; [1939] 4 D.L.R. 139.

(2) [1939] O.R. 48; [1939] 1 D.L.R. 158.

Executors of Robert J. Christie, deceased, 3,498 shares; the plaintiff, William L. Christie, 300 shares; the plaintiff, I. Huntly Christie, 300 shares; the plaintiff, Katharine Christie, 300 shares; the plaintiff, Emma L. Christie, 600 shares; the said Charles E. Edmonds, 1 share; the defendant, 1 share; making a total of 5,000 shares, being the total authorized and issued capital stock of the Company.

On May 2, 1932, there was held a special general meeting of the shareholders, at which it was resolved that the Company be wound up voluntarily under the provisions of Part XIV of the Ontario *Companies Act*, R.S.O. 1927, chapter 218, and that the defendant be appointed liquidator. On December 6, 1932, at a special general meeting of the shareholders, at which all were represented, the defendant presented a statement showing the assets which had come into his hands as liquidator and other statements showing the distribution, as of April 30, 1932, of those assets among the shareholders, and accounting for the receipts and disbursements since that date to the end of November. The minutes of this meeting conclude:

> It was explained that the distribution of the assets had been effected partly in cash and partly in specie, as shown by the separate accounts prepared for each shareholder; and that to the extent that the distribution had been made in specie due account had been taken of accrued interest; and that to ensure a fair and equitable distribution regard was had to both the cost price, and also the market price of each security as determined by independent and competent opinion; and that there has been reserved for taxation, legal charges, and other expenses the sum of $25,000 to be used as the Liquidator with the advice of Messrs. Laughton and Edmonds may determine.
>
> The Liquidator produced the bank statements for inspection as required by statute.
>
> After discussion it was upon motion duly seconded,
>
> Resolved, that the report of the Liquidator be adopted, and the plan of distribution approved.
>
> The motion was adopted without dissent.
>
> The meeting then adjourned.

The Messrs. Laughton and Edmonds referred to are respectively the Assistant Estates Manager of National Trust Company, Limited, one of the executors of Robert J. Christie, and Charles E. Edmonds, also an executor and the holder of one share in the Company.

On December 9, 1932, the defendant notified the Provincial Secretary for Ontario of the meeting of December 6, reported that the affairs of the Company had been fully

1940

CHRISTIE ET AL. v. EDWARDS.

Kerwin J.

wound up and returned the original letters patent and the supplementary letters patent by which the name of the incorporated Company had been changed. This report was filed in the Provincial Secretary's office on December 10. These steps were taken under section 229 of the *Companies Act,* which reads as follows:

> 229. (1) Where the affairs of the corporation have been fully wound up, the liquidator shall make up an account showing the manner in which the winding up has been conducted, and the property of the corporation disposed of, and thereupon shall call a general meeting of the shareholders or members of the corporation for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidator, and the meeting shall be called in the manner provided by the by-laws for calling general meetings.
>
> (2) The liquidator shall make a return to the Provincial Secretary of such meeting having been held, and of the date at which the same was held, and the return shall be filed in the office of the Provincial Secretary; and on the expiration of three months from the date of the filing the corporation shall *ipso facto* be dissolved.

In July, 1935, the then solicitors for the plaintiffs, on three occasions, wrote the defendant asking for the distribution of the twenty-five thousand dollars fund referred to in the minutes of the meeting of December 6, 1932, but no reply was sent to these communications. A motion was launched by the plaintiffs in the Supreme Court of Ontario for an order under section 222 of the Act. This motion was dismissed by the Chief Justice of the High Court, before whom it was argued, but without prejudice to any claim the applicants might have otherwise.

The present action was then instituted and in view of the manner in which it presented itself to the trial judge and to the members of the Court of Appeal, it appears desirable to state what is claimed. The endorsement on the writ of summons reads:

> The Plaintiffs' claim is for an accounting of the sum of $25,000 which was reserved for the liquidator's expenses at the time of the voluntary winding up of Erwik Estates Limited and which sum together with interest thereon is unlawfully in the possession of the Defendant and for payment to the Plaintiffs of the said amount of money and accrued interest thereon to date of judgment herein less the amount, if any, that may be found to be due and owing to the Defendant for his fees and disbursements as liquidator of Erwik Estates Limited.
>
> And the Plaintiffs' further claim is to recover possession of all books, documents and other writings of Erwik Estates Limited, and its predecessor Christie Brown & Co. Limited.

The statement of claim, after setting forth a number of the details already mentioned and referring specifically to the fund of twenty-five thousand dollars, contains the following allegation in paragraph 16:

16. The sum of $25,000 referred to in paragraph 15 consisted of Province of Ontario bonds of the face value of $25,000 bearing interest at 5½ per cent. and maturing on February 1, 1947.

Paragraph 17 and part of paragraph 21 are as follows:

17. The said bonds and/or the proceeds thereof have subsequently come into the control and possession of the Defendant Edwards and the Defendant Edwards has refused at all times to give to the Plaintiffs any account of his dealings with the same other than his suggestion that he is entitled to the same as his fee as liquidator.

21. The Plaintiffs were unaware that the Defendant had personally secured possession of the $25,000 bonds aforesaid or the proceeds thereof until June, 1935, whereupon the Plaintiff I. Huntley Christie consulted his solicitor who made three written demands upon the Defendant Edwards under date of July 9, July 20 and July 31, 1935, for an accounting of the said money but did not receive any reply. * * *

The statement of claim concludes:

The Plaintiffs therefore claim on behalf of themselves and all other shareholders of Erwik Estates Limited other than the Defendant:

(*a*) A declaration that Erwik Estates Limited has not been fully wound up or dissolved.

(*b*) An order that the winding-up proceedings be continued under the supervision of this Honourable Court and/or the Defendant be removed as liquidator of Erwik Estates Limited, and that this Honourable Court doth appoint another liquidator in his place and stead.

(*c*) An accounting from the Defendant of the said bonds of $25,000 and for payment of the amount with interest at 5 per cent. that may be found to be due to Erwik Estates Limited or to the shareholders thereof.

(*d*) For payment or refund to Erwik Estates Limited or to the shareholders thereof of the sum of $950 being the proportionate part of the monies received by the Defendant in 1932 from Erwik Estates Limited as mentioned in paragraph Number 10 for the period subsequent to the 30th day of April, 1932.

(*e*) To recover possession of all books, documents and other papers of Erwik Estates Limited and Christie, Brown & Company Limited.

(*f*) Their costs of this action.

(*g*) Such further or other relief as to this Honourable Court may seem meet and proper.

By his statement of defence, the defendant admits paragraph 16 of the statement of claim, and paragraph 9 of his own pleading is as follows:

9. The Defendant alleges that between the 18th day of March, 1933, and the 31st day of July, 1933, he received from National Trust Company Limited, which had been the custodian of the securities of the

1940

CHRISTIE ET AL. v. EDWARDS.

Kerwin J.

Company, the said bonds and proceeds thereof amounting to the sum of $28,037.21, and with the knowledge and advice of Messrs. Laughton and Edmonds previously obtained, he paid out on account of taxation, legal and other expenses, the sum of $5,799.63.

At the trial, certain extracts from the defendant's examination for discovery were put in evidence, from which it appears that the defendant treated the matter as if the shareholders had no interest in the disposition of the fund. It also appears that while the defendant stated he had paid out $5,799.63 (the sum mentioned in paragraph 9 of his statement of defence), $1,275 of that amount had been paid to National Trust Company Limited as an annual fee for the year 1932 for the safe keeping of securities comprising the assets of the Company; that upon the Trust Company discovering that Erwik Estates Limited was really not operating as from about May 1 of that year, it returned to the defendant $850 as being the proportion of the fee which it considered it had not earned. It further appears that included in the $5,799.63 was the annual fee for 1932 ($1,500) to the defendant as one of the executors of the R. J. Christie Estate,—the practice apparently having been for the executors, as the holders of the great majority of the shares of Erwik Estates Limited, to transact a great part of the Company's affairs. None of the parties to the action testified.

The trial judge took the view that it was a condition precedent to the operation of section 229 of the Act that the affairs of the Company should have been fully wound up, and that in view of the reservation of the twenty-five thousand dollars fund, this had not happened. The judgment declared that the Company had not been fully wound up or dissolved, removed the defendant as liquidator and directed a reference to the Master to appoint a new liquidator and to take an account as between the defendant and the new liquidator. The Court of Appeal were of the opinion that as against the plaintiffs, in the absence of fraud, the Company was fully wound up and dissolved at the expiration of three months from the date of the filing of the defendant's report with the Provincial Secretary. With that view I agree and, as pointed out in the reasons for judgment of McTague J.A. (Gillanders

J.A. agreeing and Riddell J.A. agreeing in the result), the same conclusion had been reached in the Court of Appeal in England in two cases, *In Re Pinto Silver Mining Company* (1) and *In Re London and Caledonian Marine Insurance Company* (2).

At the end of his reasons for judgment, Mr. Justice McTague states:

> While it is the view of the Court that the defendant should be made to account, we feel we cannot give this relief in the action as framed. If we are right in our views then there is no such company as Erwik Estates Limited, no shareholders thereof, and the liquidator as such is *functus officio*. While technical justice is to be avoided where possible, we do not think that the application of Rule 183 can go so far as to justify us reconstituting the whole action, particularly when it is a matter of conjecture as to how far the defendant would be prejudiced by such action at this stage of the proceedings.

Upon this branch of the case I feel constrained to differ from the Court of Appeal. It is true there is now no such company as Erwik Estates Limited and there can, therefore, be no shareholders, but this action is brought by several people who were shareholders and who sue on behalf of themselves and all others, except the defendant, who were shareholders of record in the year 1932. Section 201 of the Act provides in part:

> Upon a voluntary winding up:
>
> (*a*) the property of the corporation shall be applied in satisfaction of all its liabilities *pari passu*, and, subject thereto, shall, unless it is otherwise provided by the by-laws of the corporation, be distributed rateably amongst the shareholders or members according to their rights and interests in the corporation;

From the outset the plaintiffs demanded an accounting—by the three letters of the solicitors to the defendant, by the endorsement on the writ of summons, and by the statement of claim. It is true that they also sought a declaration that Erwik Estates Limited had not been fully wound up or dissolved but the claim for an accounting was not subsidiary or consequential upon any declaration that might be so made.

The defendant's contention is that the sum of twenty-five thousand dollars referred to in the minutes of the meeting of December 6, 1932, was handed over to him and

(1) (1878) L.R. 8 Ch. 273. (2) (1879) L.R. 11 Ch. 140.

1940

CHRISTIE ET AL. v. EDWARDS.

Kerwin J.

that the shareholders have no concern with the disposition of the fund. In his statement of defence he alleged that before the date of that meeting he informed the plaintiffs William L. Christie and I. Huntly Christie of his opinion that, if the Company were wound up, its assets distributed among the shareholders, and the Company dissolved, all prospective claims for taxes and for all legal fees and expenses in connection with the winding up, distribution of assets, and dissolution of the Company could be settled for the sum of twenty-five thousand dollars, and that on that basis the plaintiffs William L. Christie and I. Huntly Christie approved of such winding up, distribution and dissolution, and agreed to recommend the same to the plaintiffs Katharine Christie and Emma L. Christie. No proof was made, or attempted to be made, of this allegation. It is further to be remarked that to establish the fund, the defendant retained or secured control of 5½ per cent. bonds of the Province of Ontario maturing February 1, 1947, which, because of the premium at which they were sold (and possibly because of some accrued interest), produced the sum of $28,037.21. The minutes of the meeting of December 6, 1932, which the defendant sets up as an agreement between himself and the shareholders, whereby he might retain " the sum of twenty-five thousand dollars " cannot be taken to mean what he suggests; and certainly it could not be taken to include bonds which realized the sum mentioned.

Even without calling in aid the provisions of Rule 183 of the Ontario Rules of Practice, I do not find any difficulty in granting to the plaintiffs in this action the accounting relief which they claim. The defendant secured the bonds or the proceeds thereof and, on his own admission, still has those proceeds, less certain disbursements. The plaintiffs are the only persons beneficially entitled to the estate of Robert J. Christie and, in any event, sue on behalf of themselves and all other shareholders of record in 1932. If the proper construction of the minutes of the meeting of December 6, 1932, be as I have indicated, it would be strange indeed, in view of the

provisions of section 201 of the Act, if this action as framed is not sufficient to call upon the defendant, under the circumstances, to account.

The appeal should be allowed but in lieu of the judgment directed to be entered by the trial judge, there should be judgment directing a reference to the Master of the Supreme Court of Ontario to take an account of the $25,000 in bonds received by the defendant (or the proceeds thereof) and to determine what sums have been properly expended by the defendant out of the said bonds, or the proceeds of the same, and to determine the balance of the said bonds and the proceeds of the same unexpended by the defendant, and interest on so much thereof as has remained or should have remained in the hands of the defendant from time to time. In determining such balance, the Master shall not have regard to any claim which the defendant may put forward for remuneration as liquidator (see clause (*c*) of section 201 of the Act). Any sum found to be due from the defendant is to be paid into the Supreme Court of Ontario to the credit of this cause, subject to the further order of the Court. The plaintiffs are entitled to their costs throughout. The costs of the reference are reserved to be disposed of by a Judge of the Supreme Court of Ontario after the Master shall have made his report.

RINFRET J.—The appeal should be allowed and there should be judgment directing a reference to the Master of the Supreme Court of Ontario to take an account of the $25,000, as stated in my brother Kerwin's reasons. The plaintiffs are entitled to their costs throughout, the costs of the reference to be disposed of by a Judge of the Supreme Court of Ontario, after the Master shall have made his report.

Appeal allowed with costs.

Solicitor for the appellants: *C. B. Henderson.*

Solicitors for the respondent: *Armstrong & Sinclair.*

1940
*March 15.
*May 21.

COMMERCIAL CREDIT CORPORATION OF CANADA, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

NIAGARA FINANCE COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conditional sales—Conditional sale agreement not registered—Conditional Sales Act, R.S.O. 1937, c. 182, s. 2 (1)—Bailiff's sale under executions against conditional purchaser—Purchaser at such sale not "a subsequent purchaser claiming from or under" the conditional purchaser.

T. purchased and took possession of a motor car under a conditional sale agreement, which was not registered as provided by s. 2 (1) of the *Conditional Sales Act*, R.S.O. 1937, c. 182. T. defaulted in payments and appellant, assignee of the conditional vendor, became entitled under the agreement to re-take from T. possession of the car, but did not do so. A bailiff, acting under executions against T., seized the car and, at bailiff's sale, sold it to respondent who took possession. Appellant sued respondent for the amount unpaid under the conditional sale agreement, or possession of the car. Respondent claimed that it was a purchaser for valuable consideration in good faith and without notice of appellant's claim and that the conditional sale agreement, for want of registration, was invalid as against it.

Held (reversing judgment of the Court of Appeal for Ontario, [1940] O.R. 115): Appellant was entitled to judgment. Respondent, as purchaser from the bailiff, was not a subsequent purchaser claiming "from or under" T. within the meaning of s. 2 (1) of said Act, and therefore could not invoke that enactment; therefore respondent acquired only the interest in the car which the bailiff had the right to sell, that is, only the execution debtor's (T.'s) interest or equity in it.

APPEAL by the plaintiff (by special leave granted by the Court of Appeal for Ontario) from the judgment of the Court of Appeal for Ontario (1) which court (Robertson C.J.O. dissenting) dismissed the plaintiff's appeal from the judgment of His Honour Judge Livingstone, of the County Court of the County of Welland, dismissing the action. The action was brought to recover the sum of $245.25 (as damages for conversion) and interest thereon, as being the unpaid balance of purchase price of a motor car, or in the alternative a declaration that the plaintiff was entitled to possession of the car and an order directing

(1) [1940] O.R. 115; [1939] 4 D.L.R. 311.

*Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1940

COMMERCIAL CREDIT CORPN. OF CANADA LTD. v. NIAGARA FINANCE CO. LTD.

defendant to deliver up possession. The car had been purchased by defendant at a bailiff's sale under executions against one Teakle, who had purchased the car under a conditional sale agreement, which was not registered, and under which Teakle had made default in payment. Plaintiff, who was assignee of the conditional vendor, claimed the right to possession of the car. Defendant claimed that it was a purchaser of the car in good faith for valuable consideration and without notice of the claim of the plaintiff or any other person through whom plaintiff claimed title, and pleaded s. 2 (1) of the *Conditional Sales Act,* R.S.O. 1937, c. 182.

H. F. Parkinson K.C. for the appellant.

A. L. Brooks K.C. and *J. D. Cromarty* for the respondent.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—A bailiff of the First Division Court of the County of Welland in the Province of Ontario, acting under executions issued pursuant to judgments of the said Court, seized the motor car in question in these proceedings and purported to sell the same under the executions to the respondent. The purported sale between the bailiff and the respondent was carried out and possession of the car delivered by the bailiff to the respondent. The car some six months prior to the seizure and sale had been purchased by Robert Teakle, the execution debtor, from Mills Motor Sales under a conditional sale agreement. Mills Motor Sales, on its part, assigned the conditional sale agreement to the appellant. Teakle took possession of the motor car at the time of the making of the conditional sale agreement and continued in possession until the time of the bailiff's seizure. In the interval, however, he had made default in payments called for under the agreement and by the terms of the agreement the appellant (as assignee of the conditional vendor) had become entitled to re-take possession of the car, though it had not in fact done so. It is plain that the property in the car never passed from the conditional vendor to the conditional purchaser. Subsequent to the

1940

COMMERCIAL CREDIT CORPN. OF CANADA LTD. v. NIAGARA FINANCE CO. LTD.

Davis J.

bailiff's sale and delivery of the car to the respondent, the appellant made demand upon the respondent for possession of the car and, upon refusal to deliver or to pay the balance owing under the conditional sale agreement, the appellant commenced this action in the County Court of the County of Welland against the respondent, claiming damages for detention or conversion of the car. The amount of the purchase price unpaid under the conditional sale agreement at the time amounted to $245.25, together with arrears of interest.

The respondent defended the action upon the ground that it became a purchaser for value in good faith for valuable consideration without any notice of the appellant's claim and took the position that the conditional sale agreement, not having been filed, was invalid as against the respondent. It is admitted that a copy of the conditional sale agreement had not been filed in the office of the Clerk of the County Court as provided by subsec. (1) (*b*) of sec. 2 of the Ontario *Conditional Sales Act,* R.S.O. 1937, ch. 182. The County Court Judge dismissed the appellant's action and the Court of Appeal for Ontario affirmed the judgment, Robertson, C.J.O., dissenting. By special leave of the Court of Appeal, a further appeal was taken to this Court.

A bailiff or sheriff to whom an execution is directed has authority only to seize and sell the property of the execution debtor. While the execution debtor here may have been in possession of the motor car, he had never acquired the property in the car. But by the combined force of sec. 165 of the *Division Courts Act,* R.S.O. 1937, ch. 107, and sec. 18 of the *Execution Act,* R.S.O. 1937, ch. 125, the bailiff had authority to sell the interest or equity of the execution debtor in the chattel and the sale by the bailiff, being under executions against goods issued out of a division court, would convey whatever equitable or other interest the execution debtor had or was entitled to in or in respect of the chattel at the time of the seizure.

It is not disputed that the bailiff seized and sold the motor car as if it had been the property of the execution debtor and no doubt the respondent purchased the car from the bailiff thinking it was acquiring the ownership

of the car. But a purchaser from a sheriff or bailiff acquires only the interest in the goods which the sheriff or bailiff had the right to sell.

As Middleton J. (as he then was) said in *Re Phillips and La Paloma Sweets Ltd.* (1):

> It is elementary law that an execution creditor, apart from some statutory provision, has no greater right than the execution debtor, and that the sheriff's sale can only give to the purchaser the right and title of the debtor; so here the applicant has no greater or other right than the execution debtor unless he can point to some statute assisting him.

And as was said in *Overn* v. *Strand* (2):

> A purchaser, therefore, at a sale under execution is under no obligation to go behind the writ, but, in order to make sure that he will acquire title to the goods he buys, he must see that the court issuing the writ had jurisdiction to do so; that the writ is regular on its face, and that the goods sold by the sheriff are the goods of the execution debtor.

Apart, then, from any statutory provision which may be invoked by the respondent in the circumstances of the case to defeat the appellant's claim to the property in the car, the respondent purchased from the bailiff nothing more than the execution debtor's interest or equity in the car.

But there is really no controversy about the position of the bailiff and his sale. The real controversy turns upon the provisions of the *Conditional Sales Act*, R.S.O. 1937, ch. 182. What the respondent has said throughout is that by virtue of sec. 2 the appellant was not entitled to set up the conditional sale as against the respondent because a copy of the agreement had not been filed in the office of the Clerk of the County Court of the county in which the conditional purchaser resided at the time of the agreement to sell and that it, the respondent, had purchased from the bailiff without notice, in good faith, and for valuable consideration. But the respondent, to gain advantage under said sec. 2, must be a subsequent purchaser "claiming from or under" the original conditional purchaser. That is exactly what the respondent claims to be and if it is, then the conditional sale agreement which provided that the ownership was to remain in the conditional vendor until payment, is invalid as against the respondent.

(1) (1921) 51 Ont. L.R. 125, at 127.

(2) [1931] S.C.R. 720, at 733-4.

1940

COMMERCIAL CREDIT CORPN. OF CANADA LTD. v. NIAGARA FINANCE CO. LTD.

Davis J.

The determination of the appeal turns solely upon the question of the proper construction of sec. 2 of the *Conditional Sales Act*, that is, whether or not the respondent as purchaser from the bailiff became "a subsequent purchaser * * * claiming from or under" the original conditional purchaser. In my opinion the respondent did not; it purchased whatever it did purchase from the bailiff and it got only what the bailiff had to sell. We are not entitled to strain the plain language of the section so as to bring the respondent within its reach as a subsequent purchaser "from or under" the original conditional purchaser. It is to be observed that subsec. (1) of sec. 2 is for the protection of "a subsequent purchaser or mortgagee claiming from or under the purchaser, proposed purchaser or hirer, without notice in good faith and for valuable consideration." Subsec. (3) of the same section specifically provides that where the possession of goods is delivered "to any person for the purpose of resale by him in the course of business" such provision (i.e., subsec. (1)) "shall also, as against his creditors, be invalid and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with." As Meredith, C.J. C.P., said in *Re Alcock Ingram & Co. Ltd.* (1) in considering the statute:

> In short, subsec. (1) is for the benefit of "subsequent purchasers or mortgagees"; subsec. (3) is for the benefit of creditors.

It may be observed that the *Bills of Sale and Chattel Mortgage Act*, R.S.O. 1937, ch. 181, which is a statute *in pari materia*, provides by sec. 4 that

> Every mortgage of goods and chattels in Ontario, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, shall be registered * * *

as stipulated in the statute; and by sec. 7,

> If the mortgage and affidavits are not registered as by this Act provided, the mortgage shall be absolutely null and void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith for valuable consideration.

The word "creditors" as defined by sec. 1 (*b*) of that Act includes creditors having executions against the goods and chattels of a mortgagor in the hands of a sheriff or other officer.

(1) (1923) 53 Ont. L.R. 422, at 430.

While I do not find it necessary to resort to the history of the Ontario legislation under the *Conditional Sales Act* to determine the question in issue, it is reassuring to the view I take of the particular section of the statute involved in this appeal to follow through the course of the legislation. The statute was originally enacted in 1888 by 51 Vict., ch. 19, to come into force on the 1st of January, 1889. The statute only applied to manufactured goods and chattels, and conditional sales were only to be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of such goods which at the time possession was given had the name and address of the manufacturer, bailor or vendor of same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto and unless the bailment was evidenced in writing signed by the bailee or his agent; or, alternatively, where there was registration of the conditional agreement with the Clerk of the County Court of the county in which the bailee or conditional purchaser resided at the time the bailment or conditional purchase was made. The original statute, with slight amendments made by 53 Vict., ch. 36, and by 60 Vict., ch. 14, sec. 80, was carried into the Revised Statutes of Ontario 1897 as ch. 149. Then in 1911 (by 1 Geo. V, ch. 30), the Act was substantially changed into somewhat its present form and as such was carried into the Revised Statutes of 1914 as ch. 136. In the 1911 statute the word "goods" was defined so as to include "wares and merchandise" and the statute was made more comprehensive in its scope in that it was no longer limited to manufactured goods. The invalidity of a conditional sale accompanied by delivery of possession as against a subsequent purchaser or mortgagee where a copy of the agreement was not filed in the office of the Clerk of the County or District Court, remained. But the special provision (now found in amended form as subsec. (3) of sec. 2 of the present Act) that where the delivery is made to a trader or other person for the purpose of resale by him in the course of business, the agreement "shall also, as against his creditors, be invalid and he (the conditional purchaser) shall be deemed the owner of the goods," which appeared for the first time in the 1911 *Conditional Sales Act*, had

1940

COMMERCIAL CREDIT CORPN. OF CANADA LTD. v. NIAGARA FINANCE CO. LTD.

Davis J.

been introduced originally into the *Bills of Sale and Chattel Mortgage Act* in 1892 (by 55 Vict., ch. 26, secs. 5 and 6) whereby it was provided that if possession of goods was to pass to a trader or other person for the purpose of resale by him in the course of business, but not the absolute ownership until certain payments were made or other considerations satisfied, " any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale or transfer be deemed to have been absolute," unless the agreement was in writing signed by the parties to the agreement, or their agents, and unless such writing was filed in the office of the County Court Clerk of the county in which the goods were situate at the time of making the agreement. Subsecs. (3) and (4) of sec. 3 of the 1911 statute, 1 Geo. V, ch. 30, produced into the *Conditional Sales Act* the provision as to delivery to a trader or other person for the purpose of resale in the course of business, and sec. 10 repealed the old provision that had been sec. 41 of the *Bills of Sale and Chattel Mortgage Act,* R.S.O. 1897, ch. 148. In the 1927 revision of the Ontario statutes the *Conditional Sales Act* as it then stood became ch. 165 and remained substantially unchanged. The present statute, R.S.O. 1937, ch. 182, has remained practically unaltered from 1927.

It may not be without interest that the draft Conditional Sales Act, revised and approved by the Conference of Commissioners on Uniformity of Legislation in Canada in 1922 (See Falconbridge: Cases on the Sale of Goods (1927), pp. 682-88), provided (at p. 683) that:

> After possession of goods has been delivered to a buyer under a conditional sale, every provision contained therein whereby the property in the goods remains in the seller shall be void as against subsequent purchasers or mortgagees claiming from or under the buyer in good faith, for valuable consideration and without notice, and as against creditors of the buyer who at the time of becoming creditors have no notice of the provision and who subsequently obtained judgment, execution, or an attaching order, under which the goods, if the property of the buyer, might have been seized, and the buyer shall, notwithstanding such provision, be deemed the owner of the goods, unless the requirements of this Act are complied with.

The subsequent revision of the Ontario statute in 1927 did not adopt the draft by giving protection, where the conditional sale agreement was not filed, not only to sub-

sequent purchasers or mortgagees but to "creditors of the buyer who at the time of becoming creditors have no notice of the provision and who subsequently obtained judgment," etc. The Legislature adhered to the provision as it had stood in the statute whereby the invalidity was limited to "subsequent purchasers or mortgagees claiming from or under" the original purchaser, except in the case where the goods were delivered "to any person for the purpose of resale by him in the course of business," in which latter case the invalidity was extended to creditors.

It is plain that the Legislature in enacting the provisions of the *Conditional Sales Act* did not, except in the case of the delivery of possession to a person for resale in the course of business, intend the protection to extend to creditors. Of course the respondent is not a creditor. It is a purchaser, but a purchaser from a bailiff who had no higher title to pass than that of the execution debtor. The bailiff in enforcing the creditors' judgments under the executions never acquired the property in the motor car. The respondent cannot be said to be a subsequent purchaser "from or under" the conditional purchaser, within the meaning of subsec. (1) of sec. 2; it bought in the execution creditors' rights against the car. It is contended, in effect, by counsel for the respondent that the statutory provision in favour of "subsequent purchasers or mortgagees" ought to be interpreted so as to give to it what is called a convenient and practical application. But in *Rex* v. *Commissioners of Customs and Excise* (1), Viscount Dunedin in the House of Lords referred to the "stern warnings" that had been given in the cases

> to those who in order to read in words into a statute which are not there, or to divert words used from their ordinary and natural meaning, permitted themselves to speculate as to what the aim and attainment of the Act was likely to be.

I would allow the appeal and direct judgment to be entered for the appellant in the sum of $250 with costs of the action and of the appeal to the Court of Appeal for Ontario. It was a condition of the leave to appeal granted by the Court of Appeal that the appellant should not ask for costs of its appeal to this Court.

(1) [1928] A.C. 402, at 409.

1940

COMMERCIAL CREDIT CORPN. OF CANADA LTD. v. NIAGARA FINANCE CO. LTD.

Crocket J.

CROCKET, J.—This appeal turns entirely upon the question whether the conditional sale agreement, upon which the appellant plaintiff relied as the basis of its action, was invalidated as against the respondent defendant, which purchased the automobile described therein at a public bailiff's sale, by the appellant's failure to file a true copy of the agreement within ten days after its execution in the office of the Clerk of the District Court of the county or district in which the original purchaser resided, as provided by sec. 2 (1) of the *Conditional Sales Act,* R.S.O. 1937, ch. 182.

The bailiff seized and sold the automobile as the property of one Teakle under two executions issued upon judgments recovered against the latter in a Division Court, one of them at the suit of the respondent company. Teakle, the judgment debtor, was the purchaser or hirer under the conditional sale agreement. The trial judge found that the respondent defendant purchased the automobile at the bailiff's sale in good faith and without notice of the appellant plaintiff's lien and that the respondent defendant was a subsequent purchaser from or under the judgment debtor within the meaning of sec. 2 (1) of the *Conditional Sales Act,* and therefore dismissed the plaintiff's action with costs. His judgment was maintained by the Court of Appeal *per* Masten and McTague, JJ.A.; Robertson, C.J.O., dissenting.

It is not doubted that failure to file a copy of the conditional sale agreement within the prescribed time would invalidate the plaintiff's title to the automobile under sec. 2 (1) if the defendant were a subsequent purchaser *claiming from or under* Teakle, within the meaning of that section, or that, if the respondent defendant, by reason of his purchase of the automobile at the bailiff's sale under the Divisional Court executions, did *not* become a purchaser *from or under* Teakle as the conditional sale purchaser or hirer, the bailiff's sale would not avail to pass the property therein.

The bailiff had no authority to sell the automobile as the property of the judgment debtor. He might have offered for sale, in virtue of the provisions of the *Execution Act,* R.S.O., 1937, ch. 125, the judgment debtor's equitable

interest in the automobile, but nothing more. In doing so, the bailiff obviously was not acting either within the authority or in the interest of the judgment debtor but solely under the direction of adverse writs of execution, which were issued at the suit of the judgment creditors, one of whom, as appears, was the respondent company itself.

Sec. 2 (1) of the *Conditional Sales Act* expressly limits the protection provided thereby to " subsequent purchasers or mortgagees claiming from or under the purchaser, proposed purchaser or hirer," etc., and, though one can readily understand a court's inclination to give these words as large and liberal a construction as possible and thus extend the protection to all *bona fide* subsequent purchasers without notice, I can find nothing in any part of sec. 2 which can safely be relied upon as necessarily implying any such intention on the part of the Legislature. Had the intention been that all unregistered conditional sales agreements should be deemed null and void against all subsequent purchasers or judgment creditors, I cannot think that the enactment would have been framed, as it has been, with such a definite limitation as that indicated, or that the Legislature would have made the special provision it did in subsec. (3) with respect to creditors, viz: that

> where the delivery is made to any person for the purpose of resale by him in the course of business, such provision [the clause of the conditional sale agreement, which provides that the ownership of the specified goods shall remain in the seller or lender for hire until full payment of the purchase price] shall *also, as against his creditors,* be invalid, and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with.

For these reasons I agree with the conclusion arrived at by the learned Chief Justice in his dissenting judgment, would allow the appeal and direct the entry of judgment for the appellant for $250, the proved value of the automobile, with costs of the action and of the appeal to the Appeal Court. The order granting special leave to appeal having been granted to the appellant by the Appeal Court on the understanding that it should have no costs of the appeal to this Court in any event, I agree that there should be no costs on this appeal.

1940

COMMERCIAL CREDIT CORPN. OF CANADA LTD. v. NIAGARA FINANCE CO. LTD.

Kerwin J.

KERWIN J.—The particular point arising for determination in this appeal depends upon the proper construction of subsection 1 of section 2 of *The Conditional Sales Act*, Revised Statutes of Ontario, 1937, chapter 182. That subsection is as follows:

> 2. (1) Where possession of goods is delivered to a purchaser, or a proposed purchaser or a hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration money or part of it, as against a subsequent purchaser or mortgagee claiming from or under the purchaser, proposed purchaser or hirer, without notice in good faith and for valuable consideration, such provision shall be invalid, and such purchaser, or proposed purchaser or hirer, shall be deemed the owner of the goods, unless
>
> (*a*) the contract is evidenced by a writing signed by the purchaser, proposed purchaser or hirer or his agent, stating the terms and conditions of the sale or hiring and describing the goods sold or lent for hire; and,
>
> (*b*) within ten days after the execution of the contract a true copy of it is filed in the office of the clerk of the county or district court of the county or district in which the purchaser, proposed purchaser or hirer resided at the time of the sale or hiring.

At the trial, the Judge of the County Court of the County of Welland, and upon appeal, the majority of the Court of Appeal for Ontario, decided that the defendant respondent, Niagara Finance Company, Limited, fell within the expression "subsequent purchaser or mortgagee claiming from or under the purchaser." The Chief Justice of Ontario dissented. The plaintiff, Commercial Credit Corporation of Canada, Limited, now appeals pursuant to leave granted by the Court of Appeal.

Possession of a motor car had been delivered to one Teakle under such a contract as is mentioned in the subsection but a copy of the agreement was not filed in the office of the clerk of the county court. The ownership of the motor car and all rights under the contract of the other party thereto became vested in the appellant. Judgments were recovered against Teakle in two Division Court actions by creditors of his, and at a bailiff's sale, held in pursuance of executions issued on such judgments, the respondent claims to have become the purchaser of the motor car. The finding of the trial judge, that the respondent was a purchaser for value and without notice of the conditional sale agreement, has not been impugned.

It is clear from the provisions of *The Conditional Sales Act* that in default of filing a conditional sale agreement, a conditional purchaser is not deemed to be the owner of the goods as against his creditors, except "where the delivery [of the goods] is made to any person for the purpose of resale by him in the course of business" (subsection 3 of section 2). The bailiff, therefore, had no power to seize and sell the automobile, although under section 18 of *The Execution Act*, R.S.O. 1937, chapter 125, he could seize and sell Teakle's interest in the car. It is argued that, the bailiff's possession being referable to his right so to seize Teakle's interest in the car, the subsequent purported sale by him of the car itself to the respondent, who gave value for the car without notice of the conditional sale agreement, thereby entitled the respondent to hold the car free from any claim of the appellant.

This conclusion, in my view, is unsound. The respondent is certainly not a purchaser *from* Teakle, and a fair reading of all the provisions of the Act impels me to the conclusion that it is not purchaser *under* him. That expression might envisage circumstances where Teakle would sell the car to A, who in turn would sell to C, but not a case where a sale is made under process of law. In such a case only Teakle's interest in the car could be sold and not the article itself.

The order appealed from should be set aside and there should be substituted therefor a judgment for the appellant against the respondent for the value of the car, $250. The appellant is entitled to its costs of the action and of the appeal to the Court of Appeal. In accordance with the condition attached to the order granting leave to appeal, there will be no costs of the appeal to this Court.

HUDSON, J.—I agree that the right of the defendant, if any, to retain the automobile in question must arise under the provisions of the *Conditional Sales Act*.

I also agree that this Act does not and was not intended to protect creditors, but the claim of the defendant, with which we have to deal here, is in its capacity as a purchaser and not as a creditor.

1940

COMMERCIAL CREDIT CORPN. OF CANADA LTD. v. NIAGARA FINANCE CO. LTD.

Hudson J.

The *Conditional Sales Act* was intended to and does in its terms protect purchasers of a defined class, namely, purchasers in good faith for value without notice "from or under" the original purchaser. The defendant did buy in good faith for value without notice; so in my view the case must be determined by the construction which should be placed upon the words "from or under."

It is clear that the defendant did not buy from the original purchaser, nor could the bailiff be considered as the agent of the original purchaser in making the sale.

The last and more difficult question is whether or not the sale was made "under" the original purchaser. I was impressed by the views expressed by Mr. Justice Masten in the Court of Appeal, that the word "under" meant "through" and that anyone who derived title because of the existence of the original purchaser's conditional right should be considered as a purchaser entitled to the benefit of this Act. However, on consideration I have come to a contrary opinion. The legislature may have intended the Act to extend to purchasers such as the defendant but, if so, I think the intention should have been more clearly expressed, where an important change in the common law was contemplated.

The meaning of the word "under" must, of course, largely be determined by the context of the statute in which it is used. This has been discussed by my brothers Davis and Kerwin and I shall add no more than a reference to two old cases illustrating the ways in which the word was interpreted by the courts.

The first is *Stanley* v. *Hayes* (1). In that case a lease contained a covenant by the lessor for quiet enjoyment, providing that the lessee should and lawfully might peaceably and quietly have, hold, use, occupy, possess and enjoy the demised premises for and during the term, without any let, suit, trouble, denial, disturbance, eviction or interruption whatsoever, of or by the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, "from or under" him, them, or any of them. It appeared that the lessor was at that time liable for land taxes and the collector of land taxes entered upon the premises and seized certain goods and chattels there

(1) (1842) 3 Q.B. 105.

as a distress for the amount of the rent which was due before the making of the indenture. It was held by the Court of Queen's Bench that this was not a breach of the covenant for quiet enjoyment. It was stated by Lord Denman, Chief Justice, at page 108:

> We cannot extend the remedy provided by the indenture. Let, suit, disturbance or interruption by the defendant, or others claiming by, from, or under him, are different things from the injury here complained of, those words implying a claim by title from the lessor. Here the claim was against him.

The second is the case of *Pennell* v. *Walker* (1), where it was held that a provision of the Common Law Procedure Act giving a remedy to persons claiming land "through or under" a deed did not extend to assignees in bankruptcy.

Under the circumstances, I think that the appeal should be allowed with costs of the action and in the Court of Appeal but without costs in this Court.

Appeal allowed.

Solicitors for the appellant: *Parkinson, Gardiner & Willis.*

Solicitor for the respondent: *J. H. Flett.*

ELIZA DAY (PLAINTIFF) ..... APPELLANT;

AND

TORONTO TRANSPORTATION COMMISSION AND ERNEST R. CLARKSON (DEFENDANTS) ..... RESPONDENTS.

1940
*Mar. 11, 12.
*May 21.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Street railways—Passenger in street car injured by sudden application of emergency brake—Brake applied because of alleged negligent conduct of an automobile driver—Claim for damages against street car company—Judgment at trial on jury's findings—Reversal by appellate court—Want of justification for reversal.

Plaintiff, a passenger in a street car of defendant corporation, while standing and picking up a parcel preparatory to disembarking, was thrown to the floor and injured by the sudden application of the emergency brake, and claimed damages. Defendant corporation con-

(1) (1856) 18 Common Bench 651.

*PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

1940

DAY
v.
TORONTO TRANSPORTATION COMMISSION.

tended that the application of the brake was made necessary by the negligent conduct of the driver of an automobile with which the street car collided. The jury found that plaintiff's injuries were due solely to negligence of the corporation's motorman, in that he was "negligent in not looking or observing the road ahead of him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff"; and judgment was given for plaintiff against the corporation. That judgment was reversed by the Court of Appeal for Ontario, on the ground that, on the evidence, the jury's finding was such that no twelve men with a proper appreciation of their obligations and duties could arrive at. Plaintiff appealed.

Held: The appeal should be allowed and the judgment at trial restored. There was evidence on which the jury were entitled to find as they did.

Per Crocket J.: A study of the printed record might very well produce upon the mind of a trained judge sitting on appeal an impression contrary to the jury's finding, but that would not warrant him in substituting his own opinion upon a pure question of credibility for that of the jury, who heard the evidence and had the advantage of observing the witnesses' demeanour, unless he were convinced that the finding was one which was so manifestly wrong that no jury, which fully appreciated its duty as a sworn body, could have conscientiously made it; and, on the evidence, the reversal of the jury's finding was not warranted.

Per Hudson J.: Although the carrier of passengers is not an insurer, yet if an accident occurs and a passenger is injured, there is a heavy burden on the carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario reversing the judgment of MacKay J. at trial, on the findings of the jury, in favour of the plaintiff against the defendant Toronto Transportation Commission. The plaintiff, a passenger in a street car of the defendant Commission, while standing and picking up a parcel preparatory to disembarking, was thrown to the floor and injured by the sudden application of the emergency brake. It was contended by the defendant Commission that the application of the brake was caused entirely by the negligent conduct of one Clarkson, the driver of an automobile with which the street car collided, who was added as a party defendant. The jury found that the plaintiff's injuries were due to negligence on the part of the Commission's motorman in that he was "negligent in not looking or observing the road ahead of

him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff"; that defendant Clarkson had satisfied the jury that the injuries of the plaintiff did not arise through any fault or negligence on his part. The jury assessed the plaintiff's damages at $1,800, for which amount judgment was given for the plaintiff against the defendant Commission (the action being dismissed as against Clarkson). The Court of Appeal for Ontario (*per* Fisher and Henderson JJ.A.; Middleton J.A. dissenting) allowed the defendant Commission's appeal and dismissed the action as against it, and gave judgment for the plaintiff against the defendant Clarkson. Henderson J.A., in the course of his reasons, stated that he was of opinion that the jury's answers (to the questions put to them by the trial judge) were "such that no twelve men with a proper appreciation of their obligations and duties could arrive at" and "I can find no evidence on the record on which the jury could make the finding they did." Fisher J.A. agreed with the reasoning and conclusions of Henderson J.A. and at the conclusion of his reasons stated: "Clarkson's conduct threw the motorman into an emergency at a time, according to the evidence, when it was impossible for him to avoid an impact. The jury's finding that the driver of the street car was solely to blame is a perverse finding, and I can find no evidence to support it." Middleton J.A., dissenting, held that there was evidence from which the jury might properly find the motorman at fault; that "if the motorman had been alert, he would have seen [Clarkson] sufficiently far away to have avoided the stringent application of his brakes followed by the throwing of the plaintiff to the floor of the car." Special leave to appeal to the Supreme Court of Canada was granted to the plaintiff by the Court of Appeal for Ontario.

D. H. Porter and *T. R. Deacon* for the appellant.

I. S. Fairty K.C. and *G. A. McGillivray* for the respondent Toronto Transportation Commission.

RINFRET J.—I would allow the appeal and restore the judgment at the trial with costs throughout.

1940

DAY
v.
TORONTO TRANSPORTATION COMMISSION.

Crocket J.

CROCKET J.—This action was originally brought by the appellant plaintiff against the respondent Transportation Commission to recover damages from it for injuries sustained by her while travelling as a passenger on one of the Commission's street cars in the City of Toronto. In her statement of claim the plaintiff alleged that the street car collided violently with a motor car, which was proceeding in the same direction, and that that collision was caused solely by the negligence of the respondent Commission, its servants or agents, as a result of which negligence she, while standing in the street car in the act of picking up a parcel preparatory to disembarking from the car, was thrown violently to the floor and seriously injured. The respondent in its statement of defence alleged that the motor car, with which the street car collided, was owned and operated by one, Ernest R. Clarkson, and that the collision in question was entirely caused by the latter's negligence. The appellant joined issue upon this defence and subsequently the respondent applied for and obtained from a Master of the Supreme Court of Ontario, under the *Negligence Act*, R.S.O., 1937, ch. 115, an order adding Clarkson as a party defendant to the action. The respondent defendant's solicitor thereupon consented to the plaintiff amending the statement of claim so as to claim damages (in the alternative) against Clarkson. Clarkson, having been served with a writ and amended statement of claim in pursuance of the Master's order, entered a statement of defence, in which he denied all negligence on his part and alleged that the accident was the result of the negligence of the Commission's motorman in (*a*) driving the street car at an excessive rate of speed; (*b*) not keeping a proper lookout; (*c*) failing to apply his brakes; and (*d*) failing to give adequate warning when he saw or should have seen him making a turn. When the trial came on before Mr. Justice MacKay, sitting with a jury, the Commission's statement of defence seems to have been amended with the consent of counsel, so as to open the question as to whether the plaintiff's injuries were or were not entirely attributable to the negligence of Clarkson in making it necessary for the motorman in his attempt to avoid the collision with the motor car to suddenly apply the emer-

gency brake of the street car, which obviously was the immediate cause of the appellant's injuries. This, apart from the quantum of damages, was the real issue to which the evidence adduced at the trial was directed, as is so clearly shown by the questions submitted to the jury by the learned trial judge and their answers thereto. These questions and answers were as follows:

1. Were the plaintiff's injuries due to any negligence on the part of the motorman of the Transportation Commission?

A. Yes.

If your answer is "yes" in what did such negligence consist?

A. The motorman was negligent in not looking or observing the road ahead of him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff.

2. Has the defendant Clarkson satisfied you that the injuries of the plaintiff did not arise through any fault or negligence on his part?

A. Yes.

The jury assessed the damages at $1,800, for which judgment was entered against the Commission with costs, while the action was dismissed as against Clarkson and the Commission ordered to pay Clarkson his costs of the action.

An appeal having been taken from this judgment by the Transportation Commission, the Court of Appeal, *per* Fisher and Henderson, JJ.A., Middleton, J.A., dissenting, allowed the appeal with costs and directed the dismissal of the action against the respondent Commission with costs and the entry of judgment against Clarkson for the sum of $1,800 with costs, and further ordered that the appellant plaintiff recover from Clarkson any costs which she may have paid under the trial judgment to the respondent Commission as well as her costs on that appeal.

The present appeal, to which Clarkson is not a party, is from the latter judgment, which obviously is founded upon the complete reversal of the findings of the jury upon the principal issue tried before them.

With all respect, I am of opinion that the Appeal Court was not warranted in thus interfering with the jury's findings upon essential questions of fact, which the record shows depended entirely upon the credibility of witnesses examined before them. Although the evidence was such that the jury, if it chose, might well have found the other

1940

DAY
v.
TORONTO TRANSPORTATION COMMISSION.

Crocket J.

way, I agree with Middleton, J.A., who says in his dissenting judgment that there was evidence from which the jury might properly find that the motorman was at fault. His Lordship says that he does not himself accept Clarkson's evidence, because he thought he was so confused as to be unable to tell exactly what did happen, but adds that if the motorman had been alert he would have seen him (Clarkson) sufficiently far away to have avoided the stringent application of his brakes followed by the throwing of the plaintiff to the floor of the car. This is precisely what the jury found—a clear finding of ultimate negligence against the respondent's motorman, and can only mean that the jury, whether they fully accepted Clarkson's evidence or not, did not wholly credit that of the motorman. It must be borne in mind that there were other witnesses than Clarkson and the motorman and that, as my brother Kerwin points out, there was a conflict of testimony as to the operation of the motor car by Clarkson, which might very well have influenced the jury in its decision upon the whole evidence to reject the motorman's explanation of his sudden application of the emergency brake. This was really the crucial issue in the case, as appears from the whole conduct and course of the trial—an issue which it was the sole right and duty of the jury to determine according to the convictions produced upon the minds of its individual members by the whole evidence bearing thereon without reference to what they may have gathered from the learned trial judge's charge he personally may have believed, as the latter so fairly and clearly pointed out to them. A study of the printed record might very well produce a contrary impression upon the mind of a trained judge sitting on appeal, but that, of course, would not warrant him in substituting his own opinion upon a pure question of credibility for that of the jury, which heard the evidence of all the witnesses and had the advantage of observing their demeanour on the witness stand, unless he were convinced that the finding was one which was so manifestly wrong that no jury, which fully appreciated its duty as a sworn body, could have conscientiously made. That the jury fully comprehended the issue it was its duty to decide is shown by the preciseness of its statement of the particulars of the motorman's

negligence in answering question 1. For my part, I cannot think that a jury, which so comprehended the issue with which it was charged, did not equally appreciate the obligation which rested upon it to conscientiously find the true facts according to the evidence. The Court of Appeal was, therefore, to my mind not warranted in completely reversing the judgment of the trial court by directing the dismissal of the appellant's action against the respondent and the entry of judgment against its co-defendant in lieu thereof.

As to the respondent's contention that if this Court should come to the conclusion just stated we should order a new trial, I am of opinion that the whole case was fully and fairly tried; that there was no such misdirection, non-direction or improper admission of evidence as could well be held to warrant a new trial.

My conclusion, therefore, is that the appeal should be allowed and the trial judgment restored as originally entered, with costs throughout.

DAVIS J.—The appellant sustained personal injuries while a passenger in one of the respondent's street cars. No blame was suggested against the appellant herself. The street car was suddenly stopped by the application of its emergency brakes. What the respondent said was that the improper conduct of its co-defendant, Clarkson, who was driving a motor vehicle, was the real cause of the injury to the appellant.

The duty of the respondent to the appellant, its passenger, was to carry her safely as far as reasonable care and forethought could attain that end. I feel bound to hold that the evidence given entitled the jury to find, as they did, that the operator of the street car failed to exercise that reasonable care and forethought and that his negligence was the cause of the appellant's injuries.

The appeal should be allowed and the judgment entered at the trial against the respondent upon the jury's answers should be restored, with costs throughout.

KERWIN J.—By special leave of the Court of Appeal for Ontario, the plaintiff, Eliza Day, appeals from an order of that Court which set aside the judgment at the trial

1940

DAY
v.
TORONTO TRANSPORTATION COMMISSION.

Kerwin J.

(following a jury's verdict), in favour of the appellant against the Toronto Transportation Commission, and directed judgment to be entered for the appellant against one Clarkson.

The appellant was a passenger on a street car of the Commission and as a result of a sudden application of the brakes by the motorman, was thrown to the floor of the car and injured. The motorman testified that he was obliged to apply the brakes in this manner because Clarkson had started his automobile from the position where it was parked and suddenly darted in front of the oncoming street car. Clarkson's story was that he had, before starting his automobile, looked back and observed the street car some distance away; that, considering that he had ample time he started to make a gradual U turn, first signalling with his arm, and that the motorman should have seen him and that, if he had done so, there would have been no necessity for the application of the brakes at all.

So far as Clarkson was concerned, the case went to the jury upon the basis that, under the Ontario *Highway Traffic Act,* the onus was upon him, Clarkson, to establish that the appellant's injuries had not been caused through any negligence or improper conduct on his part; so far as the Commission was concerned the case was left to the jury as an ordinary one in which the onus of establishing negligence would be upon the appellant. The jury determined that Clarkson had satisfied the onus cast upon him and that the appellant's injuries were due to negligence on the part of the motorman, such negligence being, according to the verdict:

> The motorman was negligent in not looking or observing the road ahead of him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff.

There was conflicting testimony as to the operation of the automobile by Clarkson. The witness Wright did not see the automobile or street car until the collision that subsequently ensued was imminent. The witness McDonald first saw the automobile, then noticed the street car, and when he next saw the automobile it was making a turn on to the street car tracks. It is clear, I think, from a

perusal of his evidence that there was a period of time during which he was not looking at the automobile and at what Clarkson in it was doing. The testimony of the motorman, as to the left front window of the motor car being down, was contradicted, and it may well be that that contradiction was weighed in the balance by the jury and finally determined their conclusion that Clarkson's story should be believed.

I find it impossible to say that there is no evidence upon which a jury doing their duty could find as they did. We were invited, in case we came to this conclusion, to direct a new trial but I can find no basis for such an order. I would allow the appeal and restore the judgment at the trial against the Toronto Transportation Commission, with costs throughout.

HUDSON J.—The appellant was a passenger on a street car of the defendant Commission and, as a result of the sudden application of the brakes by the motorman, she was thrown to the floor of the car and injured. The motorman gave evidence that he applied the brakes in the manner in which he did because a man named Clarkson had started his automobile from where it was parked, on the side of the street, and suddenly turned in front of the street car.

There was conflicting evidence and in the end the jury brought in a verdict holding the defendant guilty of negligence because

> the motorman was negligent in not looking or observing the road ahead of him; that if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff.

Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree: 4 Hals., p. 60, paras. 92 and 95. In an old case of *Jackson* v. *Tollett* (1), the rule was stated by Lord Ellenborough, at p. 38, as follows:

> Every person who contracts for the conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences.

(1) (1817) 2 Starkie 37.

1940

DAY v. TORONTO TRANSPORTATION COMMISSION.

Hudson J.

The question, then, for the jury was whether the motorman had used in a high degree all due, proper and reasonable care and skill under the circumstances. On conflicting evidence the jury chose to accept that part which was favourable to the plaintiff. I am of opinion that there was some evidence on which they could properly decide that the motorman had failed in his duty. I would, therefore, allow the appeal and restore the judgment at the trial, with costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Deacon & Howell.*

Solicitor for the respondent Toronto Transportation Commission: *Irving S. Fairty.*

1940

COUSINS v. HARDING

ERNEST A. COUSINS AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

JACK HARDING AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Appeal—Jurisdiction—Wages—Claims of several employees against same employer cumulated in a single action—Each claim amounting to less than $2,000—Claims mentioned in the original action, added together, exceeding $2,000—Total amount of claims in the appeal before Supreme Court of Canada less than $2,000—Fair Wages Act, Quebec 1 Geo. VI, c. 50.

When several plaintiffs cumulate in a single action their respective claims for wages, amounting each to less than $2,000, against a same employer, as permitted by the provisions of a provincial statute and judgment is rendered accordingly, no appeal lies to this Court from that judgment, even if the total amount of all the claims exceeds $2,000. L'Autorité Limitée v. Ibbotson (57 S.C.R. 340) followed.

MOTION on behalf of the respondents for an order quashing the appeal, which was brought from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), which had itself quashed the appellants'

(1) (1940) Q.R. 68 K.B. 226.

*PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson.

appeal to that Court from a judgment of the Superior Court maintaining the respondents' action.

Fourteen plaintiffs, formerly in the employ of Krauss-man's Lorraine Café Limited (insolvent at the time of the action), sued the appellants as directors of that company for unpaid wages. The plaintiffs joined their claims in a single action, as permitted by section 22 of the *Fair Wages Act* of Quebec. The total amount of the claims was then exceeding $2,000; but, by the conclusions of their declaration, the plaintiffs were asking not for the total amount to be divided between them according to their respective claims, but for a separate award to each of them of the specific sum due to each. The judgment in the Superior Court was rendered accordingly. Eleven of the claims awarded were below $200.

The appellants appealed, but their appeal was dismissed for want of jurisdiction by the appellate court, except as to the three claims exceeding $200.

The appellants were now appealing from the judgment quashing their appeal against the eleven other respondents, none of whose claims was for a sum above $200 and the total amount of their claims being only $1,783.93.

The respondents moved to quash.

Paul L. Belcourt for motion.

Frank B. Chauvin contra.

The judgment of the Court was delivered by

RINFRET, J. (oral): We do not require to hear you in reply, Mr. Belcourt.

We think the motion ought to be granted and the appeal quashed.

There is really no possible distinction between this case and the case of *L'Autorité Limitée* v. *Ibbotson* (1), where, curiously enough, the respondents were the same number as in the present case.

Under s. 22 of the *Fair Wages Act* the claims of several employees against the same employer may be cumulated in a single action. But the statute is only permissive,

(1) (1918) 57 Can. S.C.R. 340.

1940

COUSINS v. HARDING

Rinfret J.

not compulsory, and the mere fact that several plaintiffs have joined their claims in a single action does not affect our jurisdiction. So far as this Court is concerned, each claim by itself must be considered as separate for purposes of jurisdiction.

Moreover, even the aggregate amount involved in this appeal does not reach the sum of $2,000. For that additional reason also the motion must be granted.

The appeal will be quashed with costs.

Motion granted with costs and appeal quashed.

Solicitors for the appellants: *Chauvin, Walker, Stewart & Martineau.*

Solicitor for the respondents: *Georges Antoine Fusey.*

1939

*Oct. 3, 4, 5, 6, 10, 11.

1940

Apr. 23.

HOME OIL DISTRIBUTORS, LIMITED, AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

ATTORNEY-GENERAL OF BRITISH COLUMBIA, THE COAL AND PETROLEUM BOARD AND ANOTHER (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Provincial Act constituting board to regulate "coal and petroleum industries" within the province—Price-fixing powers given to the board—Whether legislation intra vires of the legislature—The Coal and Petroleum Products Control Board Act, B.C. 1937, c. 8—B.N.A. Act, section 92.

The *Coal and Petroleum Products Control Board Act*, B.C. 1937, c. 8, which provides for the appointment of a board to regulate and control within the province the "coal and petroleum industries" and which more particularly empowers the board, by sections 14 and 15, to fix the prices "at which coal or petroleum products may be sold in the province either at wholesale or retail or otherwise for use in the province," is *intra vires* of the legislature, since the pith and substance of the Act is to regulate particular businesses entirely within the province and such legislation is within the sovereign powers granted to the legislature in that respect by section 92 of the

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

B.N.A. Act. *Shannon* v. *Lower Mainland Dairy Products Board* [1938] A.C. 708, followed.

Comments as to when and in what manner a court has the right to interpret legislation by reference to extraneous material; in this case, such material being the evidence taken before, and the report of, a public enquiry under a Royal commission relating to the subject matter of such legislation.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of the trial judge, Manson J. (2), and dismissing the appellants' action.

The action was for a declaration that the *Coal and Petroleum Products Control Board Act,* B.C. 1937, c. 8, was *ultra vires* of the legislature, or, alternatively, that each of 19 specified sections thereof was *ultra vires,* and for an injunction restraining the respondent board from fixing sale prices for petroleum products.

J. W. de B. Farris K.C., Reginald Symes and *Thos. Ellis* for the appellants.

G. S. Wismer K.C. (Attorney-General) and *J. P. Hogg* for British Columbia.

F. P. Varcoe K.C. for Attorney-General for Canada.

THE CHIEF JUSTICE.—After a most attentive consideration of the able argument of Mr. Farris, I think our decision in this appeal is governed by the judgment of the Judicial Committee in *Shannon's* case (3).

The appeal should be dismissed with costs.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—The plaintiffs (appellants) brought action against the Attorney-General of British Columbia, Coal and Petroleum Control Board, and Dr. William Alexander Carrothers (the sole member of the Board), for a declaration that the *Coal and Petroleum Products Control Board Act* of British Columbia (chapter 8 of the statutes of 1937), or that certain sections of it, were *ultra vires* the legislature of the province. The plaintiffs also asked a

(1) (1939) 54 B.C.R. 48; [1939] 2 W.W.R. 418.
(2) (1939) 53 B.C.R. 355; [1939] 1 W.W.R. 666.
(3) [1938] A.C. 708.

1940

HOME OIL DISTRIBUTORS LTD. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Kerwin J.

declaration that an amending Act of 1938 was *ultra vires* the legislature, and that a certain regulation was *ultra vires* the Board. The trial judge declared sections 14 and 15 of the principal Act to be *ultra vires* the legislature, and certain words in section 42 of the principal Act, as enacted by the amending Act, in so far as they purported to limit the powers of the courts of the province to determine the constitutional validity of the principal Act, to be *ultra vires* the legislature. The defendant Board and the defendant Carrothers were restrained from fixing the price, prices, maximum price or prices, minimum price or prices, at which gasoline or other petroleum products may be sold in British Columbia, either wholesale or retail or otherwise for use in the province, and from making any orders, rules or regulations in respect of such price or prices, and from taking any steps or proceedings to compel the plaintiffs to comply with the provisions of sections 14 and 15 of the principal Act or of any orders, rules or regulations made thereunder with respect to the prices aforesaid.

The defendants appealed to the Court of Appeal for British Columbia and their appeal was allowed and the action dismissed. There was no cross-appeal by the plaintiffs. By special leave of the Court of Appeal the plaintiffs now appeal to this Court.

The principal Act provides for the appointment of a Board with power to regulate and control within the province the "coal and petroleum industries." That expression is stated to include:—

> the carrying-on within the Province of any of the following industries or businesses: The mining of coal; the preparation of coal for the market; the storage of coal; the wholesale and retail distribution and selling of coal; the distillation, refining, and blending of petroleum; the manufacture, refining, preparation, and blending of all products obtained from petroleum; the storage of petroleum and petroleum products; and the wholesale and retail distribution and selling of petroleum products.

Sections 14 and 15, which are the ones declared *ultra vires* the provincial legislature by the trial judge, are as follows:—

> 14. (1) The Board may from time to time, with the approval of the Lieutenant-Governor in Council, fix the price or prices, maximum price or prices, minimum price or prices at which coal or petroleum products may be sold in the Province either at wholesale or retail or otherwise for use in the Province.
>
> (2) Without limiting the generality of the powers conferred by subsection (1), the Board may:—
>
> (*a*) Fix different prices for different parts of the Province;

(b) Fix different prices for licensees notwithstanding that they are in the same class of occupation:

(c) Fix schedules of prices for different qualities, quantities, standards, grades, and kinds of coal and petroleum products.

15. Where the Board has fixed a price for coal or for petroleum or for any petroleum product, it may, with the approval of the Lieutenant-Governor in Council, declare that any covenant or agreement for the purchase or sale within the Province of coal or petroleum or a petroleum product for use in the Province contained in any agreement in existence at the time of fixing such price shall be varied so that the price shall conform to the price fixed by the Board, and the agreement, subject only to the variation declared by the Board, shall in all other respects remain in full force and effect.

By section 2 of the Act:—

"Petroleum products" includes petroleum, gasoline, naphtha, benzene, kerosene, lubricating-oils, stove oil, fuel oil, furnace-oil, paraffin, and all derivatives of petroleum and all products obtained from petroleum, whether blended with or added to other things or not.

Reading these sections in the light of all the other provisions of the Act, I am of opinion that, to quote the judgment of the Judicial Committee in *Shannon* v. *Lower Mainland Dairy Products Board* (1):—

the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers granted to the Legislature in that respect by s. 92 of the *British North America Act;*

or to quote again from the same judgment, at page 720:—

The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province and it is therefore *intra vires* of the Province.

In coming to this conclusion I have taken the report of a commissioner appointed by the Lieutenant-Governor in Council as being a recital of what was present to the mind of the legislature, in enacting the principal Act, as to what was the existing law, the evil to be abated and the suggested remedy (*Heydon's Case*) (2). There can, I think, be no objection in principle to the use of the report for that purpose, and Lord Halsbury's dictum in *Eastern Photographic Machine Company* v. *Comptroller General of Patents* (3) is to the same effect. It was argued by counsel for the appellants that the statements in the report were to be taken as facts admitted or proved, but that this cannot be done is quite clear from the authorities, the most recent of which is *Assam Railways and Traders Company* v. *The Commissioners of Inland Revenue* (4).

(1) [1938] A.C. 708, at 718.
(2) (1584) 2 Coke's Rep. 18.
(3) [1898] A.C. 517, at 575.
(4) [1935] A.C. 445.

1940

HOME OIL DISTRIBUTORS LTD. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Crocket J.

I have not considered the provisions of the amending Act which are objected to, and make no comment as to those provisions. The appeal should be dismissed with costs.

CROCKET, J.—Notwithstanding Mr. Farris's ingenious and able argument regarding the integrated character of the oil production, refining and sales industry and the apprehended effect of the impugned legislation upon the profits of that industry as an integrated whole outside the limits of British Columbia, I am unable to discover any substantial or satisfactory reason for holding that the legislation is anything else than what it plainly purports to be, namely, an enactment constituting a board with power to fix maximum and minimum wholesale and retail prices of all coal and petroleum products sold in the Province of British Columbia or for use in that Province. This, in my judgment, the Provincial Legislature clearly had the right to do under the exclusive legislative powers assigned to it by s. 92 of the B.N.A. Act.

The fact that the motive of the Legislature may have been, as was suggested, to empower the Coal and Petroleum Products Board, by fixing an arbitrary maximum price for the sale of gasoline and a minimum price for the sale of crude fuel oil within the Province, to afford some needed protection for the important coal mining industry of the Province against the menacing competition of the sale of the latter product at the then current prices, cannot in my opinion alter the character of the legislation as legislation for purely provincial purposes. Neither can the fact that the legislation was calculated to compel all international or external corporations desiring and authorized to do business within the limits of the Province to alter their methods and policy regarding the allocation of profits as between the gasoline and fuel oil branches of their so-called integrated industry. If they desire to carry on their business in the Province of British Columbia, they must comply with provincial laws in common with all provincial and independent dealers in the same commodities. In my opinion the judgment of the Judicial Committee in *Shannon* v. *Lower Mainland Dairy Products Board* (1) is in all essential points indistinguishable from and decisive of the present appeal.

I think the appeal should be dismissed with costs.

(1) [1938] A.C. 708.

DAVIS J.—This appeal arises out of an action in which the validity of certain legislation of the province of British Columbia, aimed at fixing prices for the sale of gasoline in the province, is sought to be determined.

The statute in question is the *Coal and Petroleum Products Control Board Act,* ch. 8 of the British Columbia statutes of 1937. It is not a revenue Act and there is no compulsion to sell; the impugned legislation provides for fixing prices for sale of coal or petroleum products to the public in the province from time to time by a Board set up by the legislature whose orders are, however, to be subject to approval by the Lieutenant-Governor in Council. The several appellants (plaintiffs) are vendors in the province of petroleum products and the respondents (defendants) are the Attorney-General of the Province, the Board, and Dr. Carrothers, its sole member.

While the appellants claimed in the action a declaration that the whole Act was *ultra vires* the legislature of the province, the trial judge, Manson J., merely declared secs. 14 and 15 to be *ultra vires* and granted an injunction against the Board and Dr. Carrothers restraining them from fixing the price at which gasoline or other petroleum products may be sold in the Province, either wholesale or retail or otherwise, for use in the Province, and from making any orders, rules and regulations in respect of such price or prices and from taking any steps or proceedings to compel the appellants to comply with the provisions of said secs. 14 and 15 of the said Act, or of any orders, rules or regulations made thereunder with respect to the prices aforesaid. From that judgment the Attorney-General for British Columbia and the other defendants, the Board and Dr. Carrothers, appealed to the Court of Appeal for that province. There was no cross appeal by the appellants and therefore only secs. 14 and 15 remained in controversy. The Court of Appeal by a majority allowed the appeal, set aside the judgment at the trial and dismissed the appellants' action. From that judgment, by special leave of the Court of Appeal, the appellants appealed to this Court.

Sections 14 and 15 of the statute are as follows:—

14. (1) The Board may from time to time, with the approval of the Lieutenant-Governor in Council, fix the price or prices, maximum price or prices, minimum price or prices at which coal or petroleum products may be sold in the province either at wholesale or retail or otherwise for use in the province.

(2) Without limiting the generality of the powers conferred by subsection (1), the Board may:—

1940

HOME OIL DISTRIBUTORS LTD. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Davis J.

(a) Fix different prices for different parts of the province:
(b) Fix different prices for licensees notwithstanding that they are in the same class of occupation:
(c) Fix schedules of prices for different qualities, quantities, standards, grades, and kinds of coal and petroleum products.

15. Where the Board has fixed a price for coal or for petroleum or for any petroleum product, it may, with the approval of the Lieutenant-Governor in Council, declare that any covenant or agreement for the purchase or sale within the province of coal or petroleum or a petroleum product for use in the province contained in any agreement in existence at the time of fixing such price shall be varied so that the price shall conform to the price fixed by the Board, and the agreement, subject only to the variation declared by the Board, shall in all other respects remain in full force and effect.

The appellants' case rests in substance upon the basis that the report of a commissioner appointed November 29th, 1934, by the Lieutenant-Governor in Council of the Province of British Columbia under its *Public Inquiries Act* to inquire (*a*) into matters respecting coal mined in or imported into the province and used for fuel purposes in the province, and (*b*) into matters respecting petroleum products imported into or refined or produced in the province and used or designed for use therein for fuel, lighting and motor vehicles' operation, discloses the true intent and purpose of the subsequent legislation now in question and that the report with all the evidence contained in its three volumes was open to the Court and should be accepted as *prima facie* evidence of the facts for the purpose of a proper understanding of the legislation. Mr. Farris in an unusually powerful argument attacking the legislation made it abundantly plain that his contention was based upon the industry affected by the legislation being what he called " an integrated industry, interprovincial and international " and the legislation an invasion of the Dominion's power to regulate trade and commerce. His contention was that the subject-matter of the impeached legislation was not local or provincial within the competence of the legislature.

Leaving aside any reference to the report of the commissioner and assuming for the moment that it must be excluded, the language of the statutory provisions is itself plain and unambiguous. The Board appointed under the provisions of the Act is empowered from time to time "with the approval of the Lieutenant-Governor in Council" to fix the prices at which petroleum products may be sold—and then follow the limiting words, " in the province " and

"for use in the province"—and where the Board fixes a price it may, with the approval of the Lieutenant-Governor in Council, declare that any covenant or agreement for the purchase or sale—and again the limiting words, "within the province" and "for use in the province"—contained in any agreement in existence at the time of fixing such price shall be varied so that the price shall conform to the price fixed by the Board.

On the face of the legislation it appears that the legislature is dealing solely with the sale within the province for use in the province of petroleum products; legislation in relation to the petroleum industry in its local aspects within the province. There is nothing in the language of the statute which necessarily gives to its enactments an extra-territorial effect.

There is no necessity to refer at any length to the long line of authorities on the constitutional validity or invalidity under the *British North America Act* of this sort of legislation and we are not concerned with whether the legislation appears to us to be commercially fair and reasonable or not. The sole question is whether the provincial legislature had authority to enact such legislation. It is sufficient, I think, to say that the principle to be applied is that so plainly laid down by the Privy Council in the *Board of Commerce* case, (1); the *Fort Frances case* (2); the *Snider* case (3), and in the *Shannon* case (4). Taking the legislation as it stands, alone, secs. 14 and 15 are within the competence of the provincial legislature.

But it is said that if we examine the commissioner's report and the evidence (a part of which only was issued and before the legislature at the time the enactment was made) we shall discover the mischief at which the legislation was aimed and that the real purpose and intent of the legislation was to control the petroleum industry at large and in the State of California particularly, and that the legislation is directed to the control of the industry in its interprovincial and international aspects. Briefly, what is said is that the legislature, with the commissioner's report before it, thought that the large California oil companies having a very limited market in California for their

(1) [1922] 1 A.C. 191.
(2) [1923] A.C. 696.
(3) [1925] A.C. 396.
(4) [1938] A.C. 708.

1940

HOME OIL DISTRIBUTORS LTD. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Davis J.

fuel oil, due to the warm climatic conditions there, sought a market for their fuel oil in the province of British Columbia and in order to gain that market adopted the policy of dumping their fuel oil into British Columbia for sale at very low prices, with great mischief to the coal industry in British Columbia; but of selling their gasoline, with which there was no natural resource in British Columbia to enter into competition, at exorbitant prices. Upon an examination of the evidence in the elaborate inquiry by the commissioner and of his report it is said that it plainly appears that the hand of the legislature was reaching out far beyond the limits of its own province in an effort to control an integrated industry with wide interprovincial and international activities.

Generally speaking, the Court has no right to interpret legislation by reference to such extraneous material as the evidence taken before and the report of a public inquiry under a Royal Commission. It would be a dangerous course to adopt. The principle was stated by Lord Wright in the *Assam* case, in the House of Lords (1), where, with reference to an attempt to introduce certain recommendations from a report of a Royal Commission to show that the words of the section of a statute there in question were intended to give effect to them, he said:

> But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible;

and distinguished the dictum of Lord Halsbury in the *Eastman Photographic* case (2). The statement of Lord Langdale in the *Gorham* case in Moore, 1852 edition, p. 462, was accepted. That statement was this:

> We must endeavour to attain for ourselves the true meaning of the language employed—in the Articles and Liturgy—assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed.

The furthest the courts have gone recently, I think, is in the case of *Ladore* v. *Bennett* in the Privy Council (3), where Lord Atkin (who had agreed in the House of Lords with the opinion of Lord Wright in the *Assam* case (1)) said:

(1) [1935] A.C. 445, at 458. (2) [1898] A.C. 571.
(3) [1939] A.C. 468.

Their Lordships do not cite this report as evidence of the facts there found, but as indicating the materials which the Government of the Province had before them before promoting in the Legislature the statute now impugned.

That was an action raising a constitutional issue on certain Ontario statutes. There was a complicated piece of municipal legislation whereby the city of Windsor in the province of Ontario and three adjoining municipalities were, on account of their financial difficulties, put into one amalgamated whole. Not only did the parties consent before the Judicial Committee to the report being before their Lordships, but it would be useful, to readily understand the framework of the particular legislation, to have a convenient reference to the problems involved and disclosed by the report.

A rule somewhat wider than the general rule may well be necessary in considering the constitutionality of legislation under a federal system where legislative authority is divided between the central and the local legislative bodies. But even if that be so, the legislation here in question is expressly confined and limited to the sale of the products of the particular industry in, and for use in, the province and must, upon the well settled authorities, be held to be valid legislation.

I have refrained from any mention of an amendment to the statute because I think the above conclusion is inevitable without regard to the amendment. The action did not go to trial until January 16th, 1939. Prior to that, on December 9th, 1938, the legislature amended the statute in question by adding thereto the following as sec. 42:

42. This Act is not intended to implement or carry into effect the recommendations or findings of any report made or to be made by the Commissioner appointed by the Lieutenant-Governor in Council under the "Public Inquiries Act" on the twenty-ninth day of November, 1934; and in construing this Act and in ascertaining its purpose, intention, scope, and effect, no reference shall be made to any such reports; and the Board shall regulate and control the coal and petroleum industries in their Provincial aspects only; and in fixing the price of any product or commodity the Board shall consider only matters that relate to that product or commodity in its Provincial aspect and shall not fix the price of any product or commodity for the purpose of affording protection or assistance to any other product, commodity, or industry, and this Act shall not apply to the importation into or export from the Province of any product or commodity.

The Attorney-General stated to us that during the argument on the interlocutory proceedings for an interim

1940

HOME OIL DISTRIBUTORS LTD. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Davis J.

injunction counsel for the appellants had contended that the statute was the outcome of the commissioner's inquiry and report and was intended to implement or carry into effect the report and that the real character of the Act was to be gathered from a consideration of the report. The Attorney-General said that the legislature then desired to make a declaration that it had not been its intention to implement or carry into effect any recommendations or findings of the report and that in fixing the price of any product or commodity the Board should consider only matters that relate to the product or commodity in its provincial aspect, and that the Act should not apply to the importation into or export from the province of any product or commodity, and accordingly the legislature passed the above amendment to the statute. The Attorney-General conceded in his argument before us the submission of counsel for the appellants that a legislature cannot support an Act attacked as being *ultra vires* by denying to a citizen access to the courts for purpose of attacking the legislation or by denying to the courts access to the evidence. But he said that the amendment was not in any sense an attempt to deny the appellants any right to attack the constitutional validity of the Act; the amendment was merely to make plain what the intention of the legislature was in view of contentions made during the course of the interlocutory proceedings.

The appeal should be dismissed with costs.

HUDSON J.—The statute in question is clearly on its face within the legislative competence of the British Columbia Legislature. In the case of *Shannon* v. *Lower Mainland Products Company* (1), an Act in many respects similar to the present was upheld by the Judicial Committee. Lord Atkin, in giving the judgment of the Board, repeated what has been the principle of many leading cases, namely, page 720:

> The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore *intra vires* of the Province.

Mr. Farris, in a very able and exhaustive argument, contended that the Act under consideration in the present

(1) [1938] A.C. 708.

1940

HOME OIL DISTRIBUTORS LTD. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Hudson J.

case was designed to affect extra-territorial business, and was not in pith and substance directed to the regulation of particular businesses within the Province.

On examination of the evidence, I am of opinion that the Legislature here at most did no more than take into account extra-territorial marketing conditions and sources of supply in making regulations for the conduct of particular businesses within the Province. In my view, this is something which might be done legitimately. The direct purpose of the Act as expressed was to regulate sales of coal and gasoline taking place within the Province and I think the ultimate object was to do this.

Fortunately we are not concerned with the wisdom or policy of the legislation, and in construing section 91 (2) of the *British North America Act* we are bound by a long series of decisions which preclude us from giving weight to many of the arguments of Mr. Farris, which otherwise might have been very convincing.

Appeal dismissed with costs.

Solicitors for the appellants: *T. E. H. Ellis.*
Solicitor for the respondents: *H. Alan Maclean.*

FERDINAND VOLKERT (PLAINTIFF).... APPELLANT;

AND

DIAMOND TRUCK COMPANY (DEFENDANT) ..... RESPONDENT.

1939

*Nov. 2.

1940

*Apr. 23.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Automobile—Negligence—Car left unattended on a public highway—Unauthorized use of the car by employee—Injury to person—Liability of owner—Art. 1054 C.C.—Motor Vehicle Act, R.S.Q., 1925, c. 35, ss. 31 and 53.

The respondent, engaged in a trucking business, operated a warehouse in the city of Montreal which was also used as a garage for its trucks. In May, 1937, the appellant was struck by one of respondent's trucks, operated by one of its employees and he sued the respondent for the damages resulting from the accident. This

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1940

VOLKERT v. DIAMOND TRUCK CO.

employee was not employed as a truck driver, but was simply a helper; he had no operator's licence and took the truck without the respondent company's knowledge, permission or consent and in breach of the company's instructions and regulations. The respondent had left the truck unattended on the street, with the key in the switch. The appellant sought to hold the respondent responsible both under Article 1054 C.C. and under sections 31 and 43 of the Quebec *Motor Vehicle Act*. The action, tried before a jury, was dismissed by the trial judge, which judgment was affirmed by the appellate court.

Held, affirming the judgment appealed from (Q.R. 66 K.B. 385), that the respondent was not liable.

Held, also, that article 1054 C.C. had no application in the circumstances of this case. According to the evidence, the employee took the truck contrary to formal prohibition of his employer and exclusively for his own purposes and, therefore, could not be held to have been in the performance of the work for which he was employed. Moreover the respondent cannot be held to be liable on the ground that the injury was caused by a thing under his care, as the real cause of the accident was the employee's intervention; the latter, in acting as he did, was a stranger *vis-à-vis* the respondent.

Held, also, that section 53 of the Quebec *Motor Vehicle Act,* which places the onus on the owner of a car to establish that the loss or damage did not arise through his negligence or improper conduct, has no application under the circumstances of the case; the proximate cause of the appellant's injury was the independent act of the employee and not any conduct of the respondent. Moreover, the presumption of liability created by that enactment was amply rebutted by the evidence.

Held, further, that the respondent cannot be found guilty of negligence, for having left the truck unattended on the street in front of the garage with its key in the switch, in contravention of the provisions of section 31 of the Quebec *Motor Vehicle Act. Prima facie,* in view of the sanction by penalty, the owner of a motor vehicle guilty of an offence under that section by reason of which another person suffers harm is not responsible in a civil action. Such section is a police regulation and is not intended to attach a civil liability. But, assuming that an offence against that section may entail civil consequences, civil responsibility can only arise when the damage caused is the direct consequence of the offence. In this case, the damage was the direct consequence of the act of the employee and it was, moreover, the direct consequence of his independent wrongful act; there was no relation of cause and effect between the alleged negligence of the respondent and the accident which subsequently took place. Davis J. was of the opinion that it was unnecessary to decide the question whether, in a case of an alleged breach of a statutory duty, the imposition of a penalty leaves any room for an additional civil remedy, and held that, in all the circumstances of this particular case, the injuries sustained by the appellant were not the result of the respondent's breach of the statute in leaving the truck on a public highway unlocked; there was no causal relation.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Duclos J., with a jury and dismissing the appellant's action in damages.

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

Gordon D. McKay for the appellant.
L. E. Beaulieu K.C. and *Réné Duguay* for the respondent.

THE CHIEF JUSTICE.—I agree with the conclusion of my brother Rinfret. I add one or two observations to what he has said.

Dealing first with the question of liability apart from the enactments of the *Motor Vehicles Act* of 1925. The facts as he has stated them leave room for only one conclusion and that is that the cause, not only the immediate cause but the real cause of the appellant's injury was the conscious act of the volition of St. Germain in wrongfully possessing himself of the car and driving it negligently; in these acts St. Germain was a stranger *vis-à-vis* the respondents.

Under section 53 the onus was, no doubt, on the respondents in the strict sense. It was their duty to establish that the loss or damage did not arise through their negligence or improper conduct; but it is plain that on the facts as my brother Rinfret has stated them the proximate cause of the appellant's injury was the independent act of St. Germain and not any conduct of the respondents. There are no circumstances disclosed which, in point of law, could form the basis (apart from the statute) of an affirmation that the respondents were under any obligation to the appellant or the public generally to protect him or them against the acts of such wrongdoers as St. Germain by taking precautions in respect of the locking of the truck.

I turn now to section 31 of the statute. It is in these words:

31. (1) Every motor vehicle shall be provided with a lock or other device to prevent such vehicle from being set in motion.

(2) When a motor vehicle is left unattended on a public highway, it shall be locked or made fast in such a manner that it cannot be set in motion.

(1) (1939) Q.R. 66 K.B. 385.

1940

VOLKERT v. DIAMOND TRUCK CO.

Duff C.J.

By section 49, anybody contravening this enactment is guilty of an offence against the Act and incurs certain penalties as set forth in that section.

Prima facie, in view of the sanction by penalty, the owner of a motor vehicle guilty of an offence under section 31 by reason of which another person suffers harm is not responsible in a civil action. Assuming, however, that an offence against this section may entail civil consequences, and I did not understand Mr. Beaulieu to dispute that, civil responsibility can only arise where the damage caused is the direct consequence of the offence. Here, I repeat, the damage was the direct consequence of the act of St. Germain; it was, moreover, the direct consequence of his independent wrongful act. The offence of the respondents furnished the opportunity, the occasion for the commission of St. Germain's wrong; and the respondents do not, by reason of this circumstance, incur civil responsibility in respect of that wrong unless it can be affirmed that it is the intention of the section to impose upon the owner of a motor vehicle a duty to the appellant or to the public generally to observe the enactments of the section for the purpose of protecting him or them against the acts of such independent wrongdoers as St. Germain. I am satisfied that the statute neither expresses nor evidences any such intention.

It should, perhaps, be noted that certain decisions of this court have been cited in the course of the proceedings as authoritative (*Montreal Rolling Mills Co.* v. *Corcoran* (1); *Tooke* v. *Bergeron* (2)). These cases were cited by Mr. Justice Girouard in *Dominion Cartridge Co.* v. *McArthur* (3), in support of the proposition that the plaintiff must fail unless

> * * * the latter proves, by positive testimony, or by presumptions weighty, precise and consistent, that there is fault on the part of the former, and that this fault is the immediate, necessary and direct cause of the injury he sustains.

The judgment of the Judicial Committee delivered on appeal in the *Dominion Cartridge Co's* case (4) by Lord Macnaghten made it very clear that the principle of these

(1) (1896) 26 Can. S.C.R. 595, at 599.
(2) (1897) 27 Can. S.C.R. 567.
(3) (1901) 31 Can. S.C.R. 392, at 398.
(4) [1905] A.C. 72.

decisions resting upon a doctrine propounded by the French tribunals cannot be accepted as establishing a rule of general application in Quebec. The rule enunciated again and again by the judgments of this court since the *Dominion Cartridge Co's* case (1) and now well established is that, in Quebec as elsewhere, where an issue of fact is to be tried by a jury, if the party on whom rests the burden of proof adduces reasonable evidence in support of his allegation he is entitled to have the issue submitted to and passed upon by the jury.

I should add a word of appreciation for the admirable argument contained in the factum for the appellants.

The appeal must be dismissed with costs.

The judgment of Rinfret, Kerwin and Hudson JJ. was delivered by

RINFRET J.—The respondent is engaged in the trucking business and operates a warehouse on Argyle street, in the city of Montreal, which is also used as a garage for its trucks.

On the 30th day of May, 1937, the appellant was struck by one of respondent's trucks, operated by one of its employees and he sued the respondent for the damages resulting from the accident.

The case came before a jury; and, at the conclusion of the appellant's evidence, the trial judge dismissed the action on the ground that the appellant had given no evidence upon which a jury could find a verdict.

This judgment was unanimously confirmed by the Court of King's Bench.

The employee, one St. Germain, was co-defendant in the action brought against the respondent; but in this appeal we are concerned only with the latter's responsibility.

It may be assumed, for the purpose of the discussion, that the accident was due to the employee's negligence.

The appellant sought to hold the respondent responsible both under art. 1054 C.C. and under secs. 31 and 53 of the *Motor Vehicle Act*.

In the circumstances, art. 1054 C.C. does not help the appellant.

St. Germain was not employed as a truck driver; he was simply a helper. He had no licence and he had nothing

(1) (1901) 31 Can. S.C.R. 392, at 398.

1940
VOLKERT
v.
DIAMOND
TRUCK CO.
Rinfret J.

to do whatever with the driving of the truck. He took the truck without the company's knowledge, permission or consent, and in breach of the company's instructions and regulations. In fact, he took it contrary to formal prohibition and exclusively for his own purposes. He could not possibly be held to have been in the performance of the work for which he was employed.

Moreover, on the authority of *Pérusse* v. *Stafford* (1), the appellant could not succeed in this Court on the ground that the injury was caused by a thing under the care of the respondent. The real cause of the accident was St. Germain's intervention.

If, on the other hand, the rule laid down in paragraph 2 of sec. 53 of the *Motor Vehicle Act* be urged as being applicable to the respondent, the presumption of liability created by this enactment was amply rebutted by the evidence.

Under that paragraph,

> Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

In this case, the truck was taken surreptitiously by St. Germain. The respondent had done everything that it could reasonably be expected to do. With all the precautions taken by the respondent, the theft of the car by one of the employees was not a circumstance which might have been anticipated. The fact of the theft in itself acted in exoneration of the respondent as owner or master, both under sec. 53 of the *Motor Vehicle Act* and art. 1054 C.C.

I fully agree with the statement of the law made by Savatier: "Traité de la responsabilité civile," 1939, vol. 1, p. 533:

> Le propriétaire de la voiture ne saurait donc répondre en cette seule qualité d'un risque qui ne s'est réalisé que par la faute d'un tiers et qui doit donc peser exclusivement sur la personne en faute. Il n'en est autrement que si lui-même vient à être prouvé auteur d'une faute dommageable.

In this case, under the circumstances proven, St. Germain was in no way the "préposé" of the respondent.

(1) [1928] S.C.R. 416.

He was to all intents "un tiers"; and the general rules concerning the exoneration of the owner through the fault of a third party must apply.

The appellant, however, contends that there was some negligence on the part of the respondent because it left the truck unattended on the street in front of the garage; and, in support of that contention, the appellant refers to sec. 31 of the *Motor Vehicle Act,* which reads as follows:

31. 1. Every motor vehicle shall be provided with a lock or other device to prevent such vehicle from being set in motion.

2. When a motor vehicle is left unattended on a public highway, it shall be locked or made fast in such a manner that it cannot be set in motion.

In our view, this section does not pretend to deal with the liability for actionable negligence. It is a police regulation; and the sanction is the penalty provided by the statute. It is not intended to attach a civil liability.

Dealing with the matter, however, as a question of common law independently of the statute, we agree with the Court of King's Bench that, even if the facts were assumed, there is no relation of cause and effect between the alleged negligence of the respondent and the accident which subsequently took place. The accident was caused exclusively through the human agency of St. Germain; and the supposed link between that and the respondent in this particular case is too remote to be of any legal consequence on the question of responsibility. The cause of the accident was St. Germain's fault; and there was no direct relation between leaving the truck on the street and the injury caused to the appellant.

While we do not wish to be understood to say that the truck was left unattended within the meaning of the statute, we think the statute in itself does not create any civil liability and that, as a matter of common law, no link existed between the act of leaving the truck as it was and the subsequent accident.

Savatier, in the recent work already referred to, in vol. 2nd, parag. 473, examines precisely the responsibility of the owner of an "automobile laissée sans précaution dans un lieu public" and he states that in cases such as these it is impossible to speak of "un dommage normalement

1940
VOLKERT
v.
DIAMOND
TRUCK CO.
Rinfret J.

prévisible." He follows up the discussion in the light of the jurisprudence in France and comes to the following conclusion (no. 478):

> Nous croyons pourtant que la négligence du propriétaire de l'automobile volée ne doit pas être considérée comme la cause directe, au sens général de la jurisprudence, de l'accident causé à un tiers par le voleur.

This conclusion agrees with the unanimous judgment of the Court of King's Bench and the reasons given by each of the judges composing that Court; and it also expresses our view of the law which should be applied in the premises.

We have, therefore, come to the conclusion that the appeal should be dismissed with costs.

DAVIS J.—The appellant took action to recover damages for personal injuries sustained on the night of May 30, 1937, when he was struck by a motor vehicle owned by the respondent which was being driven at the time by St. Germain, one of its employees. The facts are very simple. The respondent carries on a trucking business with headquarters in the city of Montreal and owns and operates some forty motor trucks. The warehouse premises in Montreal are used for loading and unloading and when several of the respondent's trucks are not on the road, they are parked for convenience on the public street in front of the warehouse, leaving the ground floor of the building available for such trucks as are, at the time, being loaded or unloaded. The trucks are driven by licensed chauffeurs but there are other employees who are engaged solely on what may be called the inside work, that is, the loading or unloading of the trucks. St. Germain was one of the latter class of employees; he did not even have a licence to operate a motor vehicle.

Shortly after midnight St. Germain, being engaged on the night shift and desirous of going down town to get something to eat, took without permission one of his employer's motor trucks that was standing on the street and drove it down town for his personal purposes. The key was in the lock in the car. In the course of St. Germain's journey the appellant, walking across a downtown street, was struck by the motor truck and suffered personal injuries for which he has sued in damages the respondent company.

The case against the respondent was first put upon the ground of negligence but in his answer to plea the appellant set up against the respondent a further cause of action by asserting a breach of a statutory duty which required that the truck should not have been left unattended on the public street without it being locked or made fast in such a manner that it could not be set in motion. The action came on for trial in the Superior Court, District of Montreal, before Duclos, J. with a jury. At the close of the appellant's case, on motion of counsel for the respondent, the trial judge took the case from the jury and dismissed the action without costs upon the ground that St. Germain had taken the truck without the respondent's permission and that he was not at the time of the accident acting in the performance of the work for which he was employed, and that there was no evidence of any negligence on the part of the respondent. Upon appeal being taken by the appellant to the Court of King's Bench, appeal side, that Court by a unanimous judgment found that there was no error in the judgment of the trial judge and affirmed the said judgment with costs to the respondent. The appellant then appealed further to this Court.

Counsel for the appellant before us limited his grounds of appeal to what he alleged was a breach of a statutory duty. He was content for the purpose of the appeal to treat St. Germain as if he were a stranger or even a thief. The case was put this way to us: The respondent in breach of a statutory duty allowed its truck to be left standing in the public street without being locked (or at least with the key in the lock) and as a result of that St. Germain was able to take the car and the appellant's injuries were due directly to that breach of statutory duty.

The relevant sections of the Quebec *Motor Vehicle Act*, R.S.Q. 1925, ch. 35, are these:

31. (1) Every motor vehicle shall be provided with a lock or other device to prevent such vehicle from being set in motion.

(2) When a motor vehicle is left unattended on a public highway, it shall be locked or made fast in such a manner that it cannot be set in motion.

53. (1) The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council.

(2) Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such

1940

VOLKERT
v.
DIAMOND TRUCK CO.

Davis J.

loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

Sec. 49 provides penalties for anyone who contravenes any of the provisions of the Act (other than those of sec. 48 with which we are not concerned).

Counsel for the respondent contends that it is not open to the appellant to raise the alleged breach of statutory duty in that this cause of action was not stated in the writ or in the declaration annexed to it but was only brought in by the appellant's answer to plea. But that is a matter of practice and procedure and we should not interfere with the disposition of that question by the provincial court.

Although it was contended that the evidence did not strictly establish a breach of the statutory duty referred to, I think the evidence shows that the statutory provision was not complied with. The difficult question of law which so often arises where you have a breach of statutory duty, whether the imposition of a penalty leaves any room for an additional civil remedy, may not arise upon the interpretation of this statute because sec. 53 (1) has expressly made the owner of the motor vehicle responsible for any violation of the Act committed with such motor vehicle and this provision follows after the penalty clauses. See *Square* v. *Model Farm Dairies* (1). But it is unnecessary to express any opinion in this case upon that question because, assuming there is a civil remedy, the underlying problem is always whether the damage done or the personal injuries sustained are the direct result of the act complained of, in this case the breach of the particular statutory duty. In many cases it is a difficult problem. Where the consequence complained of is the ordinary consequence of the original negligence, the interference of another, however wrongfully or even criminally that other may have acted, may not affect the liability of the original wrongdoer. See *Haynes* v. *Harwood* (2). It is safe to say, I think, that in all the circumstances of this particular case the injuries sustained by the appellant were not the result of the respondent's breach of the statute in leaving the truck on the public highway unlocked. There is no causal relation.

(1) [1939] 2 K.B. 365, at 375. (2) [1935] 1 K.B. 146.

1940

VOLKERT v. DIAMOND TRUCK CO.

Davis J.

The Quebec statute, sec. 53 (2), puts the onus of proof upon the owner of the motor vehicle but that does not mean that a plaintiff may not be non-suited in a non-jury trial where at the conclusion of the case all the available facts have been brought out in examination and cross-examination of the witnesses and the evidence plainly discloses that the loss or damage did not arise through the negligence or improper conduct of the defendant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Genser & McKay.*

Solicitors for the respondent: *Duguay, Carignan & Lalande.*

1940

*Mar. 4, 5.
*May 21.

MAGAZINE REPEATING RAZOR COMPANY OF CANADA LIMITED AND MAGAZINE REPEATING RAZOR COMPANY (PLAINTIFFS).. APPELLANTS;

AND

SCHICK SHAVER, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade mark—Action for alleged infringement—Use of surname—Plaintiff's registration of specific trade mark to be applied to named kinds of articles including articles not manufactured or sold by plaintiff but later manufactured and sold by defendant—Effect of agreements—Amendment of trade mark—Right of defendant to use of name—Word mark or design mark—"Design mark"—Condition for reliance upon trade mark as word mark—Distinction of goods—Similarity of goods—Conduct of parties—Production of certified copy of record of registration as conclusive evidence of certain facts—Unfair Competition Act, 1932 (Dom.), c. 38, ss. 2 (c), 2 (k), 2 (l), 18, 19, 23 (1), 23 (5) (c), 52; Trade Mark and Design Act, R.S.C. 1927, c. 201, ss. 11 (e), 42, and Rules 10, 11, made under s. 42.

Plaintiff company, which had assignments of patents and patent applications from, and agreements with, one Schick, an inventor, registered in Canada on August 3, 1927 (on application dated March 21, 1927), under the *Trade Mark and Design Act* (R.S.C. 1927, c. 201), a

*PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

specific trade mark "'Schick', as per the annexed pattern and application," to be applied to the sale of razors and other articles, including "shaving machines." "Shaving machines" (operating by electric motor and without a blade) were patented by Schick (and called "Schick dry shavers") in November, 1928; there had been and were subsequently agreements between Schick and plaintiff in respect thereto; but plaintiff never manufactured or sold "shaving machines." In 1930 Schick, who had been released by plaintiff from all obligations relative to shaving machines, assigned his interest in patents and patent applications relating to shaving machines, and granted the sole and exclusive right to use the name "Schick" in connection with shaving machines, to a company then recently incorporated, which rights, defendant claimed, were subsequently acquired by defendant, Schick Shaver Ltd. Defendant manufactured and sold shaving machines and used the word "Schick" in association therewith. Plaintiff (and its co-plaintiff, to which it had assigned its said trade mark) brought action in 1938, claiming that defendant had infringed its trade mark. Defendant, by counterclaim, asked (*inter alia*) that plaintiff's trade mark be modified to exclude therefrom shaving machines. By the judgment in the Exchequer Court (Maclean J., [1939] Ex.C.R. 108) the registration of plaintiff's trade mark was amended by striking therefrom the words "shaving machines"; plaintiff's action was dismissed, except that defendant was restrained from using the word "Schick" otherwise than in a way specified. Plaintiff appealed from the judgment. Defendant cross-appealed, asking removal of said restraint.

Held: Plaintiff's appeal should be dismissed and defendant's cross-appeal allowed.

Per the Chief Justice and Hudson J.: Plaintiff could not rely upon its trade mark as a word mark unless, at all events, it had established that the word "would at the date of registration have been registrable independently of any defined form or appearance and without being combined with any other feature" (*Unfair Competition Act, 1932,* c. 38, s. 23 (5) (*c*)). No attempt was made to comply with that condition. Moreover, of the Rules made under authority of s. 42 of the *Trade Mark and Design Act* (R.S.C. 1927, c. 201), it is not seriously open to dispute that the registration of plaintiff's trade mark was a registration under R. 11 (of surname "presented in a distinctive form, or accompanied by a distinctive device") and not under R. 10 (registration of surname upon evidence that the mark has "through long-continued and extensive use thereof in Canada acquired a secondary meaning, and become adapted to distinguish the goods of the applicant"); it would have been difficult to the point of practical impossibility to show that the surname "Schick" had in its very brief period of use prior to the application for the trade mark become distinctive in Canada of the applicant's wares in the sense of R. 10. R. 10 was validly made and was intended to, and did, give effect to s. 11 (*e*) of the *Trade Mark and Design Act,* which provided for refusal of registration "if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking" and thus imposed a condition for valid registration (*Canadian Shredded Wheat Co. Ld.* v. *Kellogg Co. of Canada Ld.,* 55 R.P.C. 125). It follows that plaintiff's mark was only a "design mark having the features described in the application therefor but

without any meaning being attributed to the words" (s. 23 (5) (*c*) of the *Unfair Competition Act, 1932*)—"a trade mark consisting of an arbitrary and in itself meaningless mark or design" (s. 2 (*c*) of that Act, defining "design mark"); it is in this sense only that plaintiff could have any exclusive rights in respect of its trade mark; it has no exclusive rights in respect of the use of the surname "Schick" because for the purpose of determining its rights the letters in its mark are to be emptied of all such meaning; the design is the only thing which plaintiff is entitled to have protected; and defendant is entitled to use the name "Schick," provided that its design is not the same or "similar" (as defined in s. 2 (*k*) of that Act) to plaintiff's design; and the evidence quite failed to establish such sameness or similarity.

On the evidence, "shaving machines" are recognized by the trade as entirely distinct from any goods made or sold at any time by plaintiff and it cannot be rightly affirmed that at the date of registration of plaintiff's mark it was carrying on or had any intention of presently carrying on any business which included the manufacture or sale or dealing in or with such machines in the trade mark sense. The trade mark registered was a specific trade mark and, as the trade mark of plaintiff, it could not, in the circumstances, have any meaning as applied to such machines. Plaintiff could not have a trade mark in respect of such machines within the meaning of the provisions of said *Trade Mark and Design Act,* and consequently its registered mark was not valid in relation to such goods.

It was not established (as a basis for alleged infringement of plaintiff's mark, even as amended by striking out "shaving machines") that "shaving machines" are goods similar to the goods in which plaintiff deals, within the tests of similarity set forth in s. 2 (*l*) of the *Unfair Competition Act, 1932.*

Moreover, as regards the whole issue of infringement, plaintiff's conduct in permitting until a quite recent date the Schick companies to use the name "Schick" in connection with their goods justifies the conclusion that it was not seriously apprehensive of any risk of confusion that could be of any commercial importance.

With regard to plaintiff's contention based on ss. 18 and 23 (1) of the *Unfair Competition Act, 1932,* that the production of a certified copy of the record of registration was conclusive evidence of certain facts, questions as to the meaning and effect of those enactments were discussed; but decision on those questions was deemed unnecessary because (1) plaintiff's argument left untouched the point that its mark was a design mark and the consequences thereof; and (2) ss. 18 and 19 of said Act must be read together, and as "it appears" (s. 19) from the undisputed facts that plaintiff was not entitled to register its mark as a trade mark for shaving machines, effect must be given to s. 19 against plaintiff's contention.

Per Kerwin J.: Even if plaintiff was entitled to rely upon s. 18 of the *Unfair Competition Act, 1932,* s. 18 must be read in conjunction with s. 19. Defendant is entitled to succeed on its counterclaim that said registration of plaintiff's trade mark should be amended by striking therefrom the words "shaving machines" and therefore the foundation of plaintiff's action disappears. It appears from the history and

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

the agreements (discussed in the judgment) of Schick, plaintiff company, and the companies bearing Schick's name, that plaintiff's registration "does not accurately express or define" (s. 52 of said Act) plaintiff's existing rights with reference to shaving machines, and that the rights to manufacture and sell shaving machines and use the name "Schick" as a trade mark in connection therewith is now vested in defendant company, which is, therefore, an interested party under s. 52 of said Act and is entitled to the order made by the Exchequer Court amending the plaintiff's registration as aforesaid.

Per Taschereau J.: In view of the fact that the articles which were understood to be referred to by the words "shaving machines" were not patented until after registration of plaintiff's trade mark, and in view of the agreements (discussed in the judgment) between Schick and plaintiff company and of the transactions of Schick and the companies bearing his name, plaintiff's registration, in so far as it covers "shaving machines," is irregular and should be amended by striking those words from it, and defendant has the right to use the word "Schick" in connection with such machines.

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing their action and also directing an amendment of their registered trade mark in question. The plaintiffs claimed that the defendant had infringed the plaintiffs' rights in a certain registered trade mark, and asked for an injunction, damages, etc. The defendant, in addition to disputing the plaintiffs' claim, counterclaimed, asking (*inter alia*) that the registration of the trade mark should be declared invalid and expunged, or modified to exclude therefrom shaving machines.

By the formal judgment in the Exchequer Court it was ordered and adjudged that the action be dismissed ("except as herein ordered"); that the registration of the trade mark be amended by striking therefrom the words "shaving machines" (and that otherwise defendant's counterclaim be dismissed); but, by paragraph 4 of the judgment, that

the defendant, its officers, servants, agents and workmen, be and they are hereby perpetually restrained from using the said trade mark "SCHICK" on or in association with, or in connection with, the manufacture and/or distribution and/or sale and/or advertisement of mechanical razors or shaving machines unless it be immediately preceded or succeeded by some other word having the same number of letters as the name "SCHICK" in letters of a size at least equal to that of the letters composing the word "SCHICK" and of the same style of type.

(1) [1939] Ex.C.R. 108; [1939] 2 D.L.R. 17.

The plaintiffs appealed to this Court. The defendant cross-appealed, asking that the judgment in the Exchequer Court be varied by striking out said paragraph 4 therefrom.

The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported. The plaintiffs' appeal to this Court was dismissed and the defendant's cross-appeal allowed with costs throughout.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellants.

J. D. Kearney K.C., E. G. Gowling and *J. D. MacKay* for the respondent.

The judgment of the Chief Justice and Hudson J. was delivered by

THE CHIEF JUSTICE.—The appellants' trade mark was registered on the 3rd of August, 1927, when the *Act respecting Trade Marks and Industrial Designs* (which I shall refer to as the Trade Marks Act) was still in force. Some enactments of the Trade Marks Act and of the Rules made under that Act will have to be noticed.

Section 42 of the Act is in these words:

42. The Minister may, from time to time, subject to the approval of the Governor in Council, make rules and regulations and adopt forms for the purposes of this Act respecting trade marks and industrial designs; and such rules, regulations and forms circulated in print for the use of the public shall be deemed to be correct for the purposes of this Act.

(2) All documents executed according to the said rules, regulations and forms, and accepted by the Minister, shall be deemed to be valid so far as relates to official proceedings under this Act.

Of the Rules made under the authority given by this section, Rules 10 and 11 are material. They are as follows:

10. A Trade Mark consisting either of a surname, a geographical name or adjective, or a word having a direct reference to the character or quality of the goods in connection with which it is used, may be registered as a Specific Trade Mark upon the filing of the prescribed application and payment of the prescribed fee, and upon furnishing the Commissioner with satisfactory evidence, either by statutory declaration or by affidavit, that the mark in question has, through long-continued and extensive use thereof in Canada acquired a secondary meaning, and become adapted to distinguish the goods of the applicant.

11. A Trade Mark consisting of the name of an individual, a firm, or a company, or of a surname, if presented in a distinctive form, or accompanied by a distinctive device, may be registered as a Trade Mark upon compliance with the requirements of the Act, Rules and Forms.

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

Duff C.J.

The application of the Magazine Repeating Razor Co., dated the 21st of March, 1927, is as follows:

We, Magazine Repeating Razor Company, a corporation organized and existing under the laws of the State of New Jersey, United States of America, located at Sound Beach, State of Connecticut, U.S.A., hereby request you to register in our name a Specific Trade Mark to be used in connection with the sale of razors of all kinds; safety razors of all kinds; mechanical, automatic, and magazine razors; shaving machines; razor blades; razor blade holders; stroppers for razor blades; magazines, containers, and receptacles for razor blades; cutlery of all kinds, safety razor sets; machinery for making razors and razor blades; shaving brushes; shaving soaps, creams and powder; pharmaceutical products, including antiseptics, talcum powder, face lotions, cold cream, perfumery, toilet preparations and toilet articles, which we verily believe is ours on account of having been the first to make use of the same.

We hereby declare that the said Specific Trade Mark was not in use to our knowledge by any other persons than ourselves at the time of our adoption thereof.

The said Specific Trade Mark consists of the word

"SCHICK"

A drawing of the said Specific Trade Mark is hereunto annexed.

Signed at New York City, this 21st day of March, 1927, in the presence of the two undersigned witnesses.

MAGAZINE REPEATING RAZOR COMPANY.

By ORLANDO B. WILLCOX,
Vice-President.

Witnesses:
Edward G. McLaughlin
William H. Crawford

To the Minister of Trade and Commerce,
Ottawa, Ontario.

The certificate filed in proof of the registration of the trade mark is in these words:

SCHICK

CANADA

THIS IS TO CERTIFY that this Trade Mark (Specific) to be applied to the sale of Razors of all kinds, Safety Razors of all kinds, Mechanical, Automatic, and Magazine Razors, Shaving Machines, Razor Blades, Razor Blade Holders, Stroppers for Razor Blades, Magazines, Containers, and Receptacles for Razor Blades, Cutlery of all kinds, Safety Razor Sets, Machinery for making Razors and Razor Blades, Shaving Brushes, Shaving Soaps, Creams and Powder, Pharmaceutical Products, including Antiseptics, Talcum Powder, Face Lotions, Cold Cream, Perfumery, Toilet Preparations and toilet articles, and which consists of the word:

"SCHICK"

as per the annexed pattern and application has been registered in The Trade Mark Register No. 191, Folio 42001, in accordance with "The Trade Mark and Design Act," by

Magazine Repeating Razor Company,

a Corporation, of Sound Beach, State of Connecticut, United States of America, on the 3rd day of August, A.D. 1927.

Patent and Copyright Office (Copyright and Trade Mark Branch), Ottawa, Canada, this 3rd day of August, A.D. 1927.

(Sgd.) Thos. L. Richard,
Acting Commissioner of Patents.

It is not seriously open to dispute that the registration of this trade mark is a registration under Rule 11. Subsection 5 (*c*) of section 23 of the *Unfair Competition Act, 1932,* shows the effect to be given to the registration of a mark such as that of the appellants where the registration took place before that statute came into force. The subsection is in these words:

23. * * *

(5) Marks registered before the coming into force of this Act shall be treated as word marks or as design marks according to the following rules:—

* * * *

(*c*) Any mark including words and/or numerals in combination with other features shall be deemed to be a design mark having the features described in the application therefor but without any meaning being attributed to the words or numerals, which shall, however, also be deemed to constitute a word mark if and so far as they would at the date of registration have been registrable independently of any defined form or appearance and without being combined with any other feature.

It is perfectly clear that the appellants cannot rely upon their trade mark as a word mark unless, at all events, they have established that the word "would at the date of registration have been registrable independently of any defined form or appearance and without being combined with any other feature." If this condition had been fulfilled I assume for our present purposes that the word could have been so relied upon. No attempt has been made to comply with the condition. It appears (See the American application) that the use of the word "Schick" as a trade mark by the applicants began only a week or two before the date of the application and it would have been difficult to the point of practical impossibility to show that the surname "Schick" had in that brief period become distinctive in Canada of the applicants' wares in

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* v. SCHICK SHAVER LTD.

Duff C.J.

the sense of Rule 10. Rule 10, in my opinion, was validly made under section 42 and was intended to give effect to section 11 (*e*) which is in these words:

> 11. The Minister may refuse to register any trade mark or union label
>
> * * * *
>
> (*e*) if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking.

This section imposes a condition and a trade mark which does not conform to the condition cannot validly be registered (*Canadian Shredded Wheat Co. Ld.* v. *Kellogg Co. of Canada Ld.* (1). I repeat, I think regulation 10 is intended to give effect to section 11 (*e*) and in my opinion it does so. The registration of a surname which had not acquired a secondary meaning, in such a manner as to become adapted to distinguish the goods of the applicant, would be wanting in the essential elements of a trade mark within the contemplation of section 11. That, I think, was the law governing the registration of trade marks under the Trade Marks Act.

It follows that the appellants' mark is only a "design mark having the features described in the application therefor but without any meaning being attributed to the words" (s. 23 (5) (*c*)). In the language of section 2 (*c*) which defines "design mark," such a mark means "a trade mark consisting of an arbitrary and in itself meaningless mark or design." It is in this sense only that the appellants can have any exclusive rights in respect of their trade mark. They have no exclusive rights in respect of the use of the surname "Schick" because for the purpose of determining their rights the letters in their mark are to be emptied of all such meaning.

This appears to me to be quite conclusive upon the issue of infringement. The appellants, relying upon the *Unfair Competition Act, 1932,* must bring themselves within the terms of that statute. By the combined operation of sections 3 and 10 they must establish that their mark, or a similar mark, has been taken by the respondents as a trade mark for the respondents' wares or similar wares.

(1) (1938) 55 R.P.C. 125.

I do not propose to enter upon the evidence. It is not even suggested that the respondents have taken the appellants' trade mark as a design mark and I think the evidence quite fails to establish that they have adopted a trade mark similar in the sense of section 2 (*k*) to the appellants' mark as a design mark. The only thing charged against them is the use of the name "Schick." They are entitled to use the name "Schick" provided that the design, because that is the only thing the appellants are entitled to have protected, has not such a similarity with the design of the appellants that the contemporaneous use of the two in the same area and in association with wares of the same kind would be likely to lead to confusion. In my opinion, the evidence fails to establish that. No confusion has arisen from any such similarity of design.

But there is another limitation to which the appellants' trade mark is subject. It is a specific trade mark and *ex facie* as registered it is to be applied to "shaving machines" among other articles. It is not disputed that the appellants have never at any time sold or manufactured or in any manner dealt in the class of goods designated by the phrase "shaving machines,"—machines, that is to say, in which the operation of removing hair from the human face is performed by a machine operated by an electric motor and without a blade. The plaintiff had no right to register a trade mark in respect of such goods. They are, I think the evidence establishes, recognized by the trade as entirely distinct from any goods made or sold at any time by the appellants and it cannot be rightly affirmed that at the date of registration the appellants were carrying on or had any intention of presently carrying on any business which included the manufacture or sale or dealing in or with such machines in the trade mark sense. The trade mark registered is a specific trade mark and, as the trade mark of the appellants, it could, in the circumstances, have no meaning as applied to such shaving machines. It is very clear to me that they could not have a trade mark in respect of such articles within the meaning of the provisions of the Trade Marks Act and that, consequently, their registered trade mark was not a valid registered trade mark in relation to such goods.

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

Duff C.J.

It is necessary, however, to consider the provisions of the *Unfair Competition Act, 1932*. It was argued that "shaving machines" are goods similar to the other goods in which the appellants deal and have always dealt within the test of "similarity" laid down in the Unfair Competition Act (s. 2 (*l*)); and accordingly it is contended that, assuming the original registration was invalid as respects shaving machines, nevertheless, since the appellants are entitled to protection in respect of the use of their design mark in association with shaving machines as being wares similar to the wares to which they are entitled to apply that mark, their case for infringement is made out, on the assumption, of course (with which, as I have just explained, I do not agree), that the respondents are using a design mark similar to theirs. In other words, it is contended that the appellants' trade mark amended, as the learned trial judge has amended it, by striking out "shaving machines" is infringed. This appears to me to be a question of fact and, I think, when section 2 (*l*), which sets forth the tests of similarity in respect of wares, is properly understood, the proper conclusion is that the appellants fail.

I have not overlooked Mr. Biggar's argument touching the case of *Edwards* v. *Dennis* (1), but I think Lord Justice Cotton in his judgment in that case puts the test in a few words: The appellants must establish that the respondents "have done or are doing" something "calculated to mislead the public into thinking that their goods are the goods of the" appellants. I think for the purposes of this case that sums up the rule embodied in section 2 (*l*) and, in my opinion, in this the appellants have failed.

As regards the whole issue of infringement, I think it is important to consider the conduct of the appellants. I think their conduct in permitting the Schick companies to use the name "Schick" in connection with their goods justifies the conclusion that they were not seriously apprehensive of any risk of confusion that could be of any commercial importance. If they thought of it at all they

(1) (1885) 55 LJ. Ch. 125.

treated it as a case of *de minimis*. They were, I am satisfied, quite content until a quite recent date to allow these companies to make use of the name "Schick."

For these reasons the appellants fail on the issue of infringement; and the learned trial judge, moreover, was right in amending the register by striking out "shaving machines" from the record of the appellants' trade mark.

The appellants rely on section 18 and the first subsection of section 23 of the *Unfair Competition Act, 1932*. These enactments are in these words:

18. (1) In any action for the infringement of any trade mark, the production of a certified copy of the record of the registration of such trade mark made pursuant to the provisions of this Act shall be *prima facie* evidence of the facts set out in such record and that the person named therein is the registered owner of such mark for the purposes and within the territorial area therein defined.

(2) Such a certified copy shall also, subject only to proof of clerical error therein, be conclusive evidence that, at the date of the registration, the trade mark therein mentioned was in use in Canada or in the territorial area therein defined for the purpose therein set out, in such manner that no person could thereafter adopt the same or a similar trade mark for the same or similar goods in ignorance of the use of the registered mark by the owner thereof for the said purpose in Canada or in the defined territorial area within Canada.

23. (1) The register now existing under the *Trade Mark and Design Act* shall form part of the register maintained pursuant to this Act, and, subject as hereinafter provided, all entries therein shall hereafter be governed by the provisions of this Act, but shall not, if properly made under the law in force at the time they were made, be subject to be expunged or amended only because they might not properly have been made hereunder.

By force of section 18, the appellants contend, the certified copy of the record of the registration of the appellants' trade mark is conclusive evidence that, at the date of its registration in August, 1927, it was in use in Canada in the manner stated in the second subsection of section 18. I think it is open to serious doubt whether the registration of the appellants' trade mark, which was effected, as we have seen, under the Trade Marks Act before the Unfair Competition Act came into force, is a registration "made pursuant to the provisions of" the Unfair Competition Act within the meaning of section 18. The statute, in legislating with regard to registrations effected under the Trade Marks Act in the first and fourth subsections of section 4, for example, uses precise language. In subsection 1 such trade marks are described as trade

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* v. SCHICK SHAVER LTD.

Duff C.J.

marks "recorded in the register existing under the *Trade Mark and Design Act* at the date of the coming into force of this Act." Where, as in subsection 4, trade marks registered under the Trade Marks Act and then registered under the Unfair Competition Act are both included, the phrase again is precise: "unless such trade mark is recorded in the register maintained pursuant to this Act."

I do not think that the words of section 23 (1), which provides that the register now existing under the Trade Marks Act shall form part of the register maintained pursuant to the Unfair Competition Act and that all entries in that register "shall be governed by the provisions of the Unfair Competition Act," would alone be sufficient to bring registrations under the Trade Marks Act within the description "registrations made pursuant to the Unfair Competition Act." On the other hand, it must be admitted that the phrase "registered pursuant to the provisions of this Act" is very loosely used in more than one place in the statute, and in some cases (it could be argued with a good deal of force) with the plain intention of denoting registrations under the earlier Act, as well as those effected under the Unfair Competition Act.

It is not necessary to decide the point for the purposes of this appeal. In the first place, accepting Mr. Biggar's argument as he puts it, it leaves untouched the point that the appellants' mark is a design mark and the consequences thereof. In the second place, sections 18 and 19 must be read together. Neither of the two sections is at all happily expressed, and it may be that, when read together, the only effect of subsection 2 is to create a legal presumption on the production of the certified copy of the record of the registration.

However that may be, "it appears" in this case from the undisputed facts that the appellants' predecessors were not entitled to register their trade mark as a trade mark for shaving machines and effect must be given to section 19 accordingly.

It was agreed by counsel on both sides that paragraph 4 of the formal judgment of the Exchequer Court cannot be sustained and the judgment ought to be modified accordingly.

The appeal should be dismissed and the cross-appeal allowed with costs.

RINFRET J.—I would dismiss the appeal with costs and I would dispose of the cross-appeal in the manner indicated in his reasons by my brother Kerwin.

KERWIN J.—The plaintiffs in this action are Magazine Repeating Razor Company, a United States company, hereinafter referred to as the Magazine Company, and Magazine Repeating Razor Company of Canada, Limited, a company incorporated under the laws of the Dominion of Canada. The defendant is Schick Shaver, Limited, a company incorporated in the Bahamas but licensed to do business in the Province of Quebec. The action was brought in the Exchequer Court of Canada for infringement of a Canadian trade mark "SCHICK," granted to the Magazine Company and assigned by the latter to its co-plaintiff. In addition to denying the validity of the trade mark and the allegation of infringement, the defendant counter-claimed to have the registration expunged or modified.

The registration of the trade mark was ordered to be amended by striking therefrom the words "shaving machines." With one exception, the claims in the action were dismissed. The exception appears in clause 4 of the judgment which, although the President had in his reasons expressed doubt as to his power so to do, restrains the defendant from using the trade mark on or in association with, or in connection with, the manufacture and/or distribution and/or sale and/or advertisement of mechanical razors or shaving machines unless it be immediately preceded or succeeded by some other word having the same number of letters as the name "SCHICK" in letters of a size at least equal to that of the letters composing the word "SCHICK" and of the same style of type. The plaintiffs now appeal and the defendant cross-appeals and asks that clause 4 of the judgment be stricken out. Counsel for the appellants admitted that, if they could not succeed on the main appeal, the respondent was entitled to the relief claimed by its cross-appeal.

The trade mark in question was applied for March 21st, 1927. It was granted August 3rd, 1927, and according to the record in the Trade Mark Office it was

to be applied to the sale of Razors of all kinds, Safety Razors of all kinds, Mechanical, Automatic, and Magazine Razors, *Shaving Machines*,

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

Kerwin J.

Razor Blades, Razor Blade Holders, Stroppers for Razor Blades, Magazines, Containers, and Receptacles for Razor Blades, Cutlery of all kinds, Safety Razor Sets, Machinery for making Razors and Razor Blades, Shaving Brushes, Shaving Soaps, Creams and Powder, Pharmaceutical Products, including Antiseptics, Talcum Powder, Face Lotions, Cold Cream, Perfumery, Toilet Preparations and toilet articles.

It consisted of the word "SCHICK," in accordance with the application and pattern annexed.

The registration was made pursuant to the provisions of the *Trade Mark and Design Act*, R.S.C. 1927, c. 201, and at the trial the appellants produced a certified copy of the record. By the time the action was brought, *The Unfair Competition Act, 1932* (c. 38 of the Statutes of 1932), was in force. By section 23, the register existing under the old Act is to form part of the register maintained pursuant to the new Act and "all entries therein shall hereafter be governed by the provisions of this Act," but even if the appellants were entitled to rely upon section 18 of The Unfair Competition Act, that section must be read in conjunction with section 19. The two sections are as follows:

18. (1) In any action for the infringement of any trade mark, the production of a certified copy of the record of the registration of such trade mark made pursuant to the provisions of this Act shall be *prima facie* evidence of the facts set out in such record and that the person named therein is the registered owner of such mark for the purposes and within the territorial area therein defined.

(2) Such a certified copy shall also, subject only to proof of clerical error therein, be conclusive evidence that, at the date of the registration, the trade mark therein mentioned was in use in Canada or in the territorial area therein defined for the purpose therein set out, in such manner that no person could thereafter adopt the same or a similar trade mark for the same or similar goods in ignorance of the use of the registered mark by the owner thereof for the said purpose in Canada or in the defined territorial area within Canada.

19. If it appears to the court that a registered trade mark was not registrable by the person by whom the application for its registration was made, the owner thereof shall not be entitled to any remedy or relief in an action for the alleged infringement of such mark without other evidence of his rights than the mere production of a certified copy of the record of the registration.

It is unnecessary to express any opinion upon various defences to the claim for infringement raised by the respondent, as it is entitled to succeed on its counter-claim that the registration of the Canadian trade mark should be amended by striking therefrom the words "shaving

machines" and the foundation of the action therefore disappears. Section 52 of The Unfair Competition Act provides:

52. (1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

(2) No person shall be entitled to institute under this section any proceeding calling into question any decision given by the Registrar of which such person had express notice and from which he had a right to appeal.

As will appear from the history of one Jacob Schick, various companies bearing his name, and the Magazine Company, the registration here in question does not actually express or define the appellants' existing rights with reference to shaving machines. Schick was an inventor and the owner of certain United States letters patent and of other applications for United States letters patent relating to a certain safety razor and blades to be used therein. On March 18th, 1925, he assigned all his right and interest in the letters patent and applications to Sharp Manufacturing Corporation (by which name the Magazine Company was previously known). On October 8th, 1926, the Magazine Company applied for, and on March 1st, 1927, was registered in the United States as the owner of, a trade mark as shown in an accompanying drawing. It is stated in the application that "the word 'Schick' is disclaimed apart from the mark as shown," and:

The class of merchandise to which the trade mark is appropriated is Class 23, Cutlery, machinery, and tools, and parts thereof, and the particular description of goods comprised in said class upon which said trade mark is used is SAFETY RAZORS AND RAZOR BLADES.

The "mark as shown" in the United States trade mark is in a form different from that which appears in the Canadian trade mark in question, which, it will be recollected, was applied for on March 21st, 1927, although not granted until August 3rd, 1927. On March 31st, 1927, the Magazine Company filed in the United States Trade Mark Office another application to be registered as the owner of the trade mark "Schick" shown in the accompanying drawing, stating that such mark had been used continuously in the Company's business since March 12th,

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

Kerwin J.

1927. This drawing corresponds to the one appearing in the Canadian trade mark. The disclaimer of the word "Schick" does not appear in this United States application but the class of merchandise to which the trade mark is to be appropriated is the same as that described in the prior United States trade mark. Registration was not granted until April 24th, 1928.

In the meantime, on May 1st, 1927, an agreement was entered into between Schick and the Magazine Company whereby, after a recital that Schick had filed certain other applications for letters patent in the United States, Schick agreed to assign and transfer them to the Magazine Company and agreed that the Company "may use the name 'Schick' in connection with the razors, blades and other articles, on the sale of which royalties are payable." Paragraph XI provided that if, while there were in effect any letters patent or applications for letters patent of the United States, acquired by the Magazine Company under this or the prior agreement of March 18th, 1925, and while the agreement was not terminated, Schick should make any invention or discovery relating to the "art of shaving," other than inventions or discoveries relating to razors or blades or machinery or process for the manufacture thereof, he would disclose the same to the Company and make and file applications for letters patent thereon of the United States and such foreign countries as he might deem advisable and would assign and transfer such applications to the Company on such terms as should be fixed by agreement of the parties or by arbitration as therein provided.

A reorganization of the Magazine Company apparently being contemplated, Mr. Willcox, a director of and counsel for the Magazine Company, wrote Jacob Schick on October 25th, 1927, for a letter confirming the statement that the Company was the

> sole owner of all the patents and patent rights of the United States and all foreign countries covering all inventions of said Jacob Schick relating to razors and razor blades and the machines, tools and processes employed in making the same.

Mr. Willcox concluded by stating:

> I understand, of course, that the shaving machine, which does not employ blades and which is not properly classified as a razor, is not included in such assignments.

On January 1st, 1929, the Magazine Company released Schick from all claims, demands, obligations and liabilities which then existed or which might at any time exist under or by reason of paragraph XI of the agreement of May 1st, 1927, in so far as it applied to shaving machines or designs thereof, or machinery, tools or process for the manufacture thereof, or inventions, discoveries, letters patent or applications for letters patent relating to shaving machines, or machinery, tools, or process for the manufacture thereof. This was done as part of an arrangement, the remainder whereof was taken care of by an agreement of the same date whereby Schick granted to the Magazine Company an exclusive licence to make and sell in the United States, its territories and possessions, during the existence of the agreement, under the name of "SCHICK", shaving machines embodying the inventions described in certain letters patent of the United States and the letters patent which might be issued upon applications for letters patent of the United States, or any thereof. By one of the recitals:

> the expression "Schick Dry Shavers" is hereinafter used to designate shaving machines which are characterized by a thin slotted shear plate engaging the skin and a moveable cutter behind the plate, the slots being narrow and open at both ends and the slots and the cutter being so shaped and proportioned that the operation of the cutter shaves close to the skin without cutting the skin, and the expression "shaving machines" is hereinafter used to designate all kinds of shaving machines, including Schick Dry Shavers;

Clause 16 of this agreement provides, *inter alia*, that, if the Magazine Company should terminate the agreement in accordance with clause 14 thereof, it would assign, transfer and deliver to Schick:

> (1) the entire business or businesses of manufacturing and selling shaving machines then conducted by the Licensee, or any agent of the Licensee, the good will thereof and all trade marks and trade names used exclusively in connection therewith, the exclusive right to use the name of "Schick" upon or in connection with shaving machines, and the exclusive right without compensation to use in connection with the manufacture and sale of shaving machines all inventions acquired or controlled by the Licensee, or any agent of the Licensee, which relate directly to shaving machines or machinery or process for the manufacture thereof, and
>
> (2) all the special machinery and all the tools, jigs and fixtures acquired or controlled by the Licensee, or any agent of the Licensee, and designed or used exclusively for the manufacture of shaving machines or parts thereof, including special machinery, tools, jigs and fixtures adequate for the manufacture of slotted shear plates and cutters for Schick Dry Shavers at the rate of at least five hundred per day.

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

Kerwin J.

On March 26th, 1930, in accordance with clause 14 of this agreement, the Magazine Company exercised its option to terminate the arrangement provided for by clause 16 and thereby the agreement would cease to operate on July 1st, 1930, as regards shaving machines. Before the expiration of that period, a release and agreement dated May 14th, 1930, was entered into between the parties. By it the sum of $14,000 was paid by the Company to Schick as remuneration for its inability to deliver to him special machinery, tools, jigs and fixtures adequate for the manufacture of slotted shear plates and cutters at the rate of at least five hundred per day. Schick released and discharged the Company from all claims and demands under the agreement of January 1st, 1929, and the Company

> hereby releases and discharges Schick from all claims, demands, obligations and liabilities which now exist or which might at any time exist under said agreement dated January 1, 1929, and the Company further agrees that any and all rights relative to Schick Dry Shavers and shaving machines, including all rights in connection with the machinery or processes for the manufacture thereof, heretofore granted to it by Schick under said agreement dated January 1, 1929, is now terminated and at an end.

Pausing here, for a moment, in the narrative, it is clear that the Magazine Company was under no misapprehension as to what was included in the term "shaving machines" and that it had divested itself of all rights relating to them in favour of Schick. As between him and the Magazine Company there could be no question of his right to use his own name as a trade mark as applied to those machines. It is unnecessary to state categorically the proceedings which Schick might be entitled to take against the Company in order to secure the transfer to him of the Company's interest in the Canadian trade mark as applied to shaving machines. The release and agreement is dated May 14th, 1930,—prior to the coming into force of The Unfair Competition Act. The connection between Schick and the respondent company must now be traced.

On April 30th, 1930, a company known as Schick Dry Shaver Incorporated had been incorporated under the laws of the State of Delaware. The fact of this incorporation was known to the Magazine Company, as appears from a letter of August 22nd, 1930, to its Treasurer, written by a

Mr. Bonbright, and from the reply thereto, of September 5th, 1930, written by the Secretary of the Company. On October 24th, 1930, Schick entered into an agreement with Schick Dry Shaver Incorporated, assigning his interest in certain letters patent and applications for letters patent in the United States and other countries, relating to shaving machines, and also granted to the Company the sole and exclusive right, throughout the entire world, to own, use and enjoy, and to register in its name, the name "Schick" in such form or forms, and with such designs or devices as the Company might from time to time elect, as trade marks and/or trade names, in connection with shaving machines.

The first recorded order for a shaving machine from the United States was received by Schick Dry Shaver Incorparated on October 28th, 1930, and the machine was shipped by the Company on March 18th, 1931. So far as Canada is concerned the first shaving machine was ordered in March, 1931, and shipped in June of that year; 1,944 shaving machines were sold in Canada from 1931 to December, 1933, during which period no machine was made in this country.

By agreement dated December 28th, 1933, Schick Dry Shaver Incorporated transferred to Schick Limited, an intervening company incorporated in the Bahamas on November 16th, 1933, certain letters patent and applications therefor,—presumably those it had acquired from Jacob Schick. No mention is made of trade mark rights in the agreement but the objects of Schick Limited were to manufacture and sell shaving machines and their parts and accessories. As a matter of fact it sold 25,513 machines in Canada from January 1st, 1934, to February, 1936, when it ceased to do business. It has since been wound up and its charter surrendered. The respondent, Schick Shaver Limited, sold 35,359 shaving machines in Canada in 1936, 1937, and down to August 1st, 1938.

The rights to manufacture and sell shaving machines and use his own name as a trade mark in connection therewith, being vested in Jacob Schick on May 14th, 1930, under the agreement of that date, it has been shown that Schick transferred all such rights, on October 24th, 1930, to Schick Dry Shaver Incorporated. The result of the

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

Kerwin J.

evidence indicated above, together with the evidence as to the holdings of the capital stock in the various Schick companies, which need not be detailed, is that Schick Dry Shaver Incorporated transferred all such rights to Schick Limited, and that the latter, in turn, transferred them to Schick Shaver Limited, the respondent. It follows that the respondent is an interested party under section 52 of The Unfair Competition Act, and that it is entitled to the order made by the Exchequer Court amending the registration of the appellants by striking therefrom the words "shaving machines."

The appeal is therefore dismissed, the cross-appeal allowed, and the judgment below amended so as to dismiss the action and amend the registration in the manner indicated, with costs throughout.

TASCHEREAU J.—In March, 1925, Jacob Schick entered into an agreement with Sharp Manufacturing Corporation, whereby in consideration of the assignment by Schick of certain patents on safety razors and blades, the Company agreed to pay Schick $50,000 and an annual royalty. This agreement contained amongst other things:

* * * and Schick has granted and hereby grants to the Corporation the exclusive right to manufacture, use, offer for sale and sell said safety razor and blades throughout the entire world, and hereby grants to the Corporation all rights to all patents, trade marks, trade names and other privileges relating to said safety razor and blades throughout the entire world, * * *

Later, on the 1st of May, 1927, the Corporation, then operating under the name of Magazine Repeating Razor Company, and Jacob Schick, modified and supplemented the former agreement of March, 1925, and additional patents relating to razors and blades were assigned to the Company. An important clause of this second agreement is the following:

Schick agrees that the Corporation may use the name "Schick" in connection with the razors, blades and other articles *on the sale of which royalties are payable* under the provisions of this paragraph IV, and that such razors, blades or other articles may be marked or associated with the name of "Schick".

It is worth while to note that the right for the Company to use the word "Schick" applies only to the razors, blades and other articles on the sale of which royalties are payable.

Subsequently, on the 6th of November, 1928, Schick registered and became the owner of new letters patent relating to shaving machines called "Schick Dry Shavers" which were not included in the previous agreements. A new agreement was therefore signed by the parties on January 1st, 1929, which embodied the following clauses:

The Licensor grants and agrees to grant to the Licensee an exclusive licence to make and sell in the United States, its territories and possessions, during the existence of this agreement, under the name of "Schick", shaving machines embodying the inventions described and claimed in said letters patent of the United States and the letters patent which may be issued upon said applications for letters patent of the United States, or any thereof.

* * * *

The Licensee [The Magazine Repeating Razor Company] agrees that if the Licensor [Jacob Schick] shall terminate this agreement in accordance with paragraph 11, paragraph 12 or paragraph 13 hereof, or if the Licensee shall terminate this agreement in accordance with paragraph 14 hereof, the Licensee will assign, transfer and deliver to the Licensor the entire business or businesses of manufacturing and selling shaving machines then conducted by the Licensee, or any agent of the Licensee, the good will thereof and all trade marks and trade names used exclusively in connection therewith, *the exclusive right to use the name of "Schick"* upon or in connection with shaving machines * * *

The Magazine Repeating Razor Company gave notice on March 26th, 1930, that the agreement would come to an end, and on the 14th of May, 1930, Schick received the sum of $14,000 and each party released the other from all obligations and claims existing in relation to the Schick Dry Shavers as defined in the agreement of January 1st, 1929.

As a result of the execution of this release which embodies the following clause,

* * * and the Company further agrees that any and all rights relative to Schick Dry Shavers and shaving machines, including all rights in connection with the machinery or processes for the manufacture thereof, heretofore granted to it by Schick under said agreement dated January 1, 1929, is now terminated and at an end.

the Company ceased to have any rights relative to Schick Dry Shavers, but its rights on razors and blades governed by the former agreements were still in existence.

Jacob Schick then proceeded to organize a Company called "Schick Dry Shaver, Inc." to which he assigned his rights on the 24th of October, 1930, and later Schick Shaver Limited, the respondent, acquired these same rights. The defendant proceeded to manufacture shaving machines,

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* *v.* SCHICK SHAVER LTD.

Taschereau J.

using the word "Schick", which had formerly been registered as a trade mark by the appellants on the 3rd day of August, 1927. The registration included: safety razors of all kinds, mechanical, automatic and magazine razors, shaving machines, razor blades, etc., etc. The appellants then took action for infringement of their statutory rights under the *Unfair Competitions Act, 1932,* and claimed an injunction to restrain the defendant from infringing the plaintiffs' trade mark and from selling, distributing or advertising in Canada any manufactured razors or shaving machines not of the plaintiffs' manufacture in association with the word "Schick", or any other word so similar to the trade mark "Schick" as to be calculated to cause confusion. They also claimed damages in the sum of $100,000. This action was dismissed by Mr. Justice Maclean and this is an appeal from that judgment.

The recital of the various agreements shows that originally in 1925 and 1927, Jacob Schick assigned to the appellants patents for razor and blades and the right to use the word "Schick", but only for the sale of these articles on which a royalty was payable. However, the appellants registered the word "Schick" as a trade mark and this registration covered razors, blades and *shaving machines.* It was only on the 6th of November, 1928, that "Schick Dry Shavers" were patented by Schick and could not therefore have been transferred in 1925 nor in 1927. It was by the agreement of January 1st, 1929, that the appellants acquired rights on these patents and the right to use the word "Schick" in respect of the sale of these machines. This agreement of January, 1929, came to an end by mutual consent, and the release signed by the parties on the 14th of May, 1930, covered this last agreement only and, consequently, the rights to manufacture these shaving machines and to use the word "Schick" reverted to the respondent. The appellants remained the owners of the patents affecting razors, which are quite different from the dry shavers, and have the right to use the word "Schick" only for the sale of the former.

The registration of August 3rd, 1927, in so far as it covers shaving machines is irregular, and I am of the opinion that Maclean, J., was right in ordering that the

registration of the trade mark "Schick" made at folio 42001 be amended by striking therefrom the words: "shaving machines". I believe also that the judgment below should be varied to allow the respondent to use the word "Schick" in association with the manufacture and sale of its shaving machines without restriction.

1940

MAGAZINE REPEATING RAZOR CO. OF CANADA LTD. *et al.* v. SCHICK SHAVER LTD.

Taschereau J.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the appellants: *Smart & Biggar.*
Solicitors for the respondent: *Ralston, Kearney & Duquet.*

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

DOMINION BRIDGE COMPANY LIMITED (SUPPLIANT) . . . . . RESPONDENT.

1940

*Feb. 29.
*Apr. 23.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Petition of right to recover money paid to the Crown for sales tax—Goods sold and delivered—Special War Revenue Act, R.S.C., 1927, c. 179, secs. 86, 87, 87 (d), 105.

By certain contracts entered into between the suppliant and His Majesty the King, represented by the Minister of Public Works for the province of Quebec, the suppliant undertook to erect the structural steel superstructure of three bridges in that province, in consideration of the sums set out in each contract. The suppliant erected the three bridges and was paid according to the contracts. In respect of the materials incorporated in the bridges, suppliant was assessed for sales tax, alleged due under the terms of the *Special War Revenue Act*, R.S.C., 1927, c. 17 and amendments. It paid under protest a proportion of the amounts so assessed to the Commissioner of Excise. The suppliant then claimed by way of a petition of right before the Exchequer Court of Canada a return of the moneys so paid on the grounds that no tax was payable by it in respect of the materials supplied in virtue of the contracts or, alternatively, that, if the materials were taxable, suppliant was entitled to a refund by reason of the fact that the materials were sold, if sold at all, to His Majesty the King in the right of the province of Quebec.

Held, that the above transaction between the suppliant and the Crown in right of the province of Quebec must, by force of section 87 (*d*)

*PRESENT:—Duff C.J. and Rinfret, Davis, Hudson and Taschereau JJ.

1940

THE KING v. DOMINION BRIDGE CO. LTD.

of the *Special War Revenue Act*, be deemed to be a sale and that the suppliant was rightly chargeable accordingly for a sales tax. (*The King* v. *Fraser Companies*, [1931] S.C.R. 490 applied); but

Held, also, that the suppliant was entitled to a refund of the money paid to the Crown appellant, pursuant to s. 105 of *The Special War Revenue Act*. The "transaction" in this case involved translation of the property in the goods to the provincial government, and, taking the provisions of sections 86 and 87 into account as a whole, such transaction must be deemed to fall within section 105. "Goods" are "sold" within the meaning of that section when there is a sale that is such solely by force of the statutory declaration that it shall be deemed to be a sale for the purposes of the statute. Section 105 is part of the statute and transactions within the declaration are, therefore, deemed to be sales for the purposes of the section.

Judgment of the Exchequer Court of Canada ([1939] Ex. C.R. 235) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J., (1) holding that the suppliant (the present respondent) was entitled to a refund of a sum of $1,503 paid by it to the Crown (now appellant) on account of sales tax assessed against it under the *Special War Revenue Act*.

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.

L. A. Forsyth K.C. and *J. de M. Marler* for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The contract in this case was a contract for building the superstructure of a bridge and the erection of it and the securing of it; and the contract price was an entire price for the entire job. It was not, in the ordinary sense of the words, a contract, I think, for the sale of the superstructure or for the sale of the members of the superstructure. The production, however, of the members of the superstructure for the purpose of fulfilling the contract would bring the case within section 87 (*d*) (*Special War Revenue Act*, R.S.C. 1927, c. 179 and amendments).

In *The King* v. *Fraser Companies* (2), four judges of this Court (Newcombe, Rinfret, Lamont and Smith JJ.) expressed the view touching the application of section 87 (*d*)

(1) [1939] Ex. C.R. 235. (2) [1931] S.C.R. 490.

to the facts of that case which, I think, applies here. In the judgment of those learned judges, delivered by Smith J., it is said (p. 493):

> * * * it is not unusual for a manufacturer engaged in the production and manufacture of lumber for sale to engage at the same time in the business of a building contractor. He manufactures his lumber for sale, and, as a general rule, would not manufacture any specific lumber for use in connection with his building contracts, but would simply take lumber for these purposes from the general stock manufactured for sale, and might thus, under the view taken in the court below, escape taxation on all lumber thus diverted from the general stock manufactured for sale.
>
> I am of the opinion that, construing the provisions of the Act as a whole, the respondent is liable for taxes on the lumber consumed by him, as claimed.

This passage in the reasons of my brother Smith was not part of the *ratio decidendi* but it was the considered opinion of the four judges who constituted the majority of the Court. They said that, if a building contractor is also a manufacturer of building material, lumber or brick for example, and uses, for the purpose of executing a building contract, brick or lumber produced by himself, that is a case within section 87 (*d*) and the transaction is, by force of that section, deemed to be a sale and he is chargeable accordingly. In the present case the members of the bridge produced were produced specially for the purposes of the contract.

I have fully considered the able argument addressed to us by Mr. Forsyth and my conclusion is that, when sections 86 and 87 are read together, this transaction falls within the category of cases described by section 87 (*d*), and that the view expressed by my brother Smith in *Fraser's* case (1) is the view which ought to govern us in the disposition of this appeal. I think, in this respect, the practice of the Department is right.

Then comes the question, the real question I think on the appeal, whether in such circumstances section 105 applies. Section 105 is in these words:

> 105. A refund of the amount of taxes paid under Parts X, XI, XII and XIII of this Act may be granted to a manufacturer, producer, wholesaler, jobber or other dealer on goods sold to His Majesty in the right of the Government of any province of Canada, if the said goods are purchased by His Majesty, for any purpose other than purposes of resale or of any railway, commission, board or public utility which is operated by or under the authority of the Legislature or the Lieutenant-Governor in Council of the province.

(1) [1931] S.C.R. 490.

1940

THE KING v. DOMINION BRIDGE CO. LTD.

Duff C.J.

The question to be decided is not without difficulty. I have come to the conclusion that "goods" are "sold" within the meaning of this section when there is a sale that is such solely by force of the statutory declaration that it shall be deemed to be a sale for the purposes of the statute. Section 105 is part of the statute and transactions within the declaration are, therefore, deemed to be sales for the purposes of the section. A transaction within section 87 (2), for example, would, if the other conditions were fulfilled, be a sale within section 105.

Mr. Varcoe's argument is that here, while the transaction (the production of the goods in question for the use of the producer in fulfilling this contract) is deemed to be a sale by force of the statute, the goods produced are not "sold" to the provincial government. This argument has force and I have given it attentive consideration. The "use" of these goods for the purposes of the respondents in fulfilling the contract involves a translation of the property in them to the provincial government by force of the contract under which the entire consideration for the whole work is payable by the provincial government to the respondents.

Our duty, as Lord Hailsham said in *Dominion Press* v. *Minister of Customs* (1), is to ascertain whether the goods are "sold" to the provincial government within the meaning of those words as employed in the statute. I think, in view of the fact mentioned, that the "transaction" involves translation of the property in the goods to the provincial government, the proper view, when the provisions of sections 86 and 87 are taken into account as a whole, is that it falls within section 105.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*

(1) [1928] A.C. 340 at 342.

EDGAR A. STORRY (PLAINTIFF).....APPELLANT;

AND

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

1940

* May 30.
* June 29.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Railways—Motor vehicles—Plaintiff's motor car stalled on railway track—Plaintiff waving to approaching train and trying to push car off track—Train striking motor car and latter striking plaintiff in act of escaping—Claim against railway company for injury to plaintiff and damage to his car—Questions as to negligence of railway company and of plaintiff—Wrongful withdrawal of case from jury—Power of Court of Appeal in giving judgment on the evidence—Question as to application of s. 48 of Highway Traffic Act, R.S.O., 1937, c. 288.

Plaintiff in his motor car, going easterly, in daylight, while approaching a railway crossing, heard the whistle from defendant's train coming from the south. He applied his brakes, and the engine of his car stalled but the car kept going and stopped with its rear end over the east side of the railway track. He saw that the train was 1,000 feet or more distant, he alighted, went to the back of his car, waved signals to the train to stop, alternating with attempts to push the car off the track, until the train (which had kept sounding warning whistles) was near (60 or 70 feet away, when plaintiff first realized it was not going to stop, according to his evidence), when he ran to get behind a "wig-wag" signal post on the northeast corner of the crossing. When he had nearly reached the post, he slipped and in falling threw his arm around the post and at that moment his car, being struck and thrown forward by the train, crashed into the post and crushed his arm. He sued defendant railway company for damages for personal injuries and damage to his car.

At trial with a jury, plaintiff was non-suited without submission of his case to the jury. The Court of Appeal for Ontario ([1940] 2 D.L.R. 101) held that there was no evidence that defendant was the cause of plaintiff's personal injuries; that plaintiff himself was the sole cause; but that, with respect to the claim for damage to the car, plaintiff might be entitled to the verdict of a jury on the questions whether the train could have been stopped and whether it ought to have been stopped before it reached the crossing; and plaintiff was given a right to elect for a new trial limited to that claim, but as he did not so elect his appeal was dismissed. He appealed to this Court.

Held: Plaintiff was entitled to have his claims, both for damage to his car and for personal injuries, submitted to a jury.

Per the Chief Justice, Davis and Taschereau JJ.: It was open to the jury to take the view that the train could have been stopped and that it was negligent not to stop it to avoid collision with the motor car

* PRESENT:—Duff C.J. and Crocket, Davis, Hudson and Taschereau JJ.

1940

STOREY
v.
CANADIAN
NATIONAL
RY. CO.

on the ground that defendant's engine driver, seeing plaintiff and his car, his signals and attempts to move the car, had not exercised the reasonable care incumbent upon him to employ in order to avoid unnecessary injury to property and persons on the highway; and the jury might properly have considered that to this negligence was proximately due the emergency which plaintiff said confronted him when he first realized (if the jury accepted his evidence as to when he first realized) that the train was not going to stop. If on these questions of fact the jury found against defendant, then the question of fact would remain for the jury whether plaintiff's injuries were solely the result of negligent conduct of himself or were, in part at least, caused by the negligence of defendant. As to defendant's contention that, in view of plaintiff's direction in running and the way his injuries occurred, his injuries did not follow in the ordinary course of things from its negligence, if there was such—that issue depends upon the answer to the question (which was for the jury) whether or not plaintiff's conduct when he ran for safety was so unreasonable in the particular circumstances as to take it outside of the category, the ordinary course of things. While remoteness of damage in itself is no question for the jury, issues as to reasonable conduct are questions for the jury.

Where the evidence is such that it should have been submitted to the jury, the power of the Court of Appeal to dismiss the action on the ground that on the whole of the facts in evidence only one reasonable conclusion could be arrived at (Ontario *Judicature Act*, s. 26) is a power which must be exercised with caution and, generally speaking, only when it is quite clear that the Court of Appeal has all the available evidence before it (*Paquin* v. *Beauclerk*, [1906] A.C. 148, at 161; *McPhee* v. *Esquimalt & Nanaimo Ry. Co.*, 49 Can. S.C.R. 43; *Skeate* v. *Slaters*, [1914] 2 K.B. 429).

Sec. 48 of the *Highway Traffic Act*, R.S.O., 1937, c. 288, has no application to the present case, where the role of the automobile was simply that of a projectile moving under the impulse of a blow from a railway train delivered at a highway crossing.

Per Crocket J.: There was sufficient evidence to go to the jury on the question whether defendant's engineer could have avoided hitting the motor car by the exercise of due care; and it follows that there was sufficient evidence to leave to the jury upon the further issue as to whether plaintiff's injuries, which immediately followed, were the direct and natural consequences of the train hitting and throwing the car in the direction in which plaintiff ran; this involves consideration of the question whether plaintiff, when he realized or should have realized that the train would hit the car, could in the existing circumstances have avoided the injuries by exercise of reasonable care; and that was a question peculiarly for the jury.

Per Hudson J.: There was some evidence which might properly have been submitted to the jury as to whether or not defendant's employees saw or reasonably should have seen plaintiff's predicament in time to stop the train and avoid the collision, and, this being so, the claims both for damage to the car and for personal injuries should have been submitted; it is a question of fact whether or not plaintiff acted reasonably under the circumstances, and on this he was entitled to have an expression of the jury's views.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing his appeal from the judgment of McFarland J. at trial dismissing his action, which was brought to recover damages for personal injuries and damage to his motor car when it was struck by defendant's train.

On November 29, 1938, at about ten o'clock a.m., the plaintiff in his motor car, going easterly, was approaching a crossing on defendant's railway tracks in the village of Stouffville, Ontario, when he heard the whistle from defendant's train coming from the south. He applied his brakes, and the engine of his motor car stalled but the car continued going and it stopped with its rear end over the east side of the railway track. Plaintiff saw that the train was 1,000 feet or more distant, and he alighted, went to the back of the car, waved signals to the train to stop, alternating with attempts to push the car off the track, until he realized that the train (which had kept sounding warning whistles) was near him (60 or 70 feet away, according to plaintiff's evidence). The above matters are dealt with in more particularity in the reasons for judgment of the Chief Justice of this Court, now reported, and in the reasons delivered in the Court of Appeal (1). The plaintiff then ran to get behind a "wig-wag" signal post on the northeast corner of the crossing. When he had nearly reached the post he slipped and in falling threw his arm around the post to save himself and at that moment his motor car, being struck and thrown forward by the train, crashed into the post and caught and crushed his arm.

The case was tried before McFarland J. with a jury. At the close of the plaintiff's case, counsel for the defendant moved for a non-suit and judgment on the motion was reserved. On the completion of the evidence the motion was renewed and was granted, the trial judge holding that the plaintiff had not established a *prima facie* case sufficient to justify the matter being referred to the jury, and the action was dismissed with costs.

The Court of Appeal held that there was no evidence that the defendant was the cause of the plaintiff's personal injuries; that the plaintiff was himself the sole cause; but that, with respect to the claim for damage to the motor

(1) [1940] 2 D.L.R. 101; [1940] Ont. W.N. 87.

1940
STORRY
v.
CANADIAN NATIONAL RY. CO.

car, it might be that the plaintiff was entitled to have the verdict of a jury on the questions whether the train could have been stopped and whether it ought to have been stopped before it reached the crossing. And the plaintiff was given the right to elect within a fixed time for a new trial limited to that claim; and if he did not so elect, the appeal should be dismissed with costs. The plaintiff did not so elect, and the appeal was dismissed with costs. The plaintiff appealed to this Court.

R. R. McMurtry and *H. A. C. Breuls* for the appellant.

R. E. Laidlaw K.C. and *A. D. McDonald* for the respondent.

The judgment of the Chief Justice and Davis and Taschereau JJ. was delivered by

THE CHIEF JUSTICE—I fully agree with the Court of Appeal that the appellant was entitled to have his claim for damages in respect of the loss of his motor car submitted to the jury; in other words, that there was reasonable evidence that the loss of the motor car was due to the negligence of the respondent railway company.

With great respect, I am unable to concur with their view that the trial judge was right in withdrawing from the jury the claim as to personal injuries.

In substance, the view of the Court of Appeal is that the learned trial judge ought to have submitted to the jury the appellant's claim that the destruction of his automobile, which was struck by the respondents' train, was the result of the negligence of the servants of the respondents in charge of the train and that consequently he was entitled to recover damages in respect of that negligence from the respondents. The Court of Appeal held that the appellant was entitled to have the jury pass upon the questions " whether the train could have been stopped and whether it ought to have been stopped before it reached the crossing." If they so found, the appellant would have been entitled to a verdict in respect of the destruction of his motor car, but the Court of Appeal's view was that, starting from the proposition that the respondents were negligent and that the result of this negligence was the impact of the railway train upon the motor car and the

throwing of the motor car from the place where it was to the place where it struck the appellant, this negligence was, nevertheless, not the cause of the injury thereby resulting to the appellant but that these injuries were the consequence of the appellant's own negligence and that the negligence of the respondents in no material respect was a contributing cause in producing them.

It is to be observed that the impact of the train upon the appellant's automobile had the immediate physical consequence of throwing the automobile to the point where it struck the appellant. The chain of physical occurrences is uninterrupted and, *prima facie,* the injury to the appellant is the natural and direct result of the impact of the train upon the motor car, in respect of which, on the evidence adduced, it was a question for the jury whether or not the respondents are responsible in law.

This, however, is by no means the whole story. The respondents contend, and the Court of Appeal has held, that by the exercise of the most ordinary care the appellant could have avoided the consequence of the respondents' negligence and that the appellant's injuries were solely due to his own negligent and heedless acts. As I think there must be a new trial, I refrain from discussing the facts further than is absolutely necessary in order to make intelligible my view of the case.

The plaintiff is a farmer living two or three miles out of Stouffville. On 29th November, 1938, at about 10 o'clock in the morning he drove to Stouffville in his motor car, entering the village from the west on Main street. This is a paved street running approximately east and west and it crosses, almost at right angles, the respondents' line of railway from Toronto to Lindsay. Coming along Main street to this crossing from the west there is first a local railway siding, then a vacant strip of land a few feet in width, and then the single track through railway line. Both the siding and the through line are planked on the crossing while the space between them is filled with cinders at about the same level.

As the plaintiff, driving easterly, approached the crossing at a speed of from eight to ten miles per hour, he heard the whistle of a locomotive from the south. He at once applied his brakes, and he says he put them on "pretty full." He was then to the south of the centre line of the

1940

STORRY v. CANADIAN NATIONAL RY. CO.

Duff C.J.

paved roadway and about thirty feet west of the westerly rail of the local siding. When the appellant applied his brakes his engine stalled and he did not get it started again. The motor car, however, continued on its way to the siding, across the siding, and the intervening strip and on to the main line. There it stopped, with the front wheels east of the easterly rail of the main line and the rear wheels at or close to that rail. When his car stopped the appellant saw that the train was still 1,000 feet or more distant; he at once alighted, thinking he might be able to push his car off the track. He first went to the back of the car, and with both arms elevated waved a signal to the train to stop. Then, turning to his car, he tried to push it ahead but could not move it, and having again, according to one of the witnesses, signalled the train to stop (the train was due to stop at Stouffville station less than forty yards north of the crossing), he made another and more persistent attempt to get the car over the rail. The train continued whistling—"tooting," he said, "for him to get off"—and he turned again to signal and did again signal the train to stop. He then realized that the train was coming toward him at a distance of 60 or 70 feet at from 30 to 35 miles an hour and, he says, it was not until then that he knew it was not going to stop. If the jury took the view that the servants of the railway company in charge of the train could have brought the train to a stop and were negligent in not bringing it to a stop in order to avoid collision with the motor car, they would do so on the ground, or they might do so on the ground, that the driver of the locomotive, having the appellant and his car in full view in broad daylight, seeing his signals, observing his two separate attempts to move his car off the railway track, had not, in the management of the train, exercised that reasonable care which it was incumbent upon him to employ in order to avoid unnecessary injury to property and persons on the highway. If this were their view, and if they should accept the appellant's statement that he first knew they were not going to perform their duty when the train was within 60 or 70 feet of the car, then the issue of fact would remain whether or not the injury which befell the appellant, notwithstanding his attempt to escape, was solely the result

of his own ineptitude and negligence, or whether the negligence of the railway servants was, in part at least, the cause of it. I am unable to agree that the jury might not properly have considered that the driver of the locomotive acted not only negligently but recklessly in giving no attention to the situation of the appellant and his car, and that to this negligence was proximately due the emergency which the appellant says confronted him when he first realized that the train was not going to stop. The jury in respect of this topic would be entitled to draw all proper inferences from the fact that the respondents did not call the driver of the locomotive as a witness. I think these questions were questions of fact for them. If they answered these questions in the affirmative, then it was still a question of fact for them whether or not the appellant's subsequent conduct was the sole cause of his injury.

With great respect, I am unable to agree with the view of the Chief Justice of Ontario that the fact the appellant accidentally slipped when running away from the track interrupted the chain of causation. If the jury accepted the appellant's story that he first realized the train was not going to stop when it was almost upon him, then the point for them to consider was whether in the circumstances, giving to his evidence as to the condition of the planking and the road east and west of the motor car as much weight as they might think proper, the appellant's injuries were due to the failure on his part to act with that degree of care for his own safety that a person of ordinary prudence placed in like circumstances would have shown. If they took the view that there was no such failure, then the fact that he accidentally slipped could not prejudice his right to recover. Remoteness of damage in itself is, of course, no question for the jury, but issues as to reasonable conduct are such questions. In this case the respondents contend that the appellant's injuries did not follow in the ordinary course of things from their negligence, if there was such; that issue depends upon the answer to the question whether or not the appellant's conduct when he ran for safety was so unreasonable in the particular circumstances to to take it outside of the category, the ordinary course of things.

There is another point which requires notice. The Court of Appeal, no doubt, has wider powers than the trial judge.

1940
STORRY
v.
CANADIAN NATIONAL RY. CO.
Duff C.J.

Even in a case where it is the duty of the trial judge to submit the case to the jury, the Court of Appeal may be in a position to set aside the verdict and either grant a new trial or give judgment on the ground that on the whole of the facts in evidence only one reasonable conclusion could be arrived at (Ontario *Judicature Act*, sec. 26). This is not material here, because there being, as I think, evidence which it was the duty of the trial judge to submit to the jury, the action ought not to be dismissed in any view of that evidence, because the power to dismiss the action on this ground where there is evidence for the jury is a power which must be exercised with caution and, generally speaking, only when it is quite clear that the Court of Appeal has all the available evidence before it (*Paquin* v. *Beauclerk* (1); *McPhee* v. *Esquimalt & Nanaimo Ry. Co.* (2); *Skeate* v. *Slaters* (3)). In this case, as has already been observed, the respondents did not see fit to produce the driver of the locomotive.

I may add that I think section 48 of the Ontario *Highway Traffic Act* has no application to a case of this kind where the role of the automobile was simply that of a projectile moving under the impulse of a blow from a railway train delivered at a highway crossing.

The appeal should be allowed; a new trial should be ordered with costs of the appeal to the Court of Appeal and to this Court, the costs of the abortive trial to abide the event of the new trial.

CROCKET J.—I think this appeal should be allowed and the whole action sent back for a new trial, as well in respect of the claim for personal injuries, as in respect of the claim for damage to the plaintiff's motor car. The judgment of the Appeal Court gave the plaintiff the option of accepting an order for a new trial, limited to the latter claim and taking the risk as to costs, or of having the entire action dismissed with costs. As the plaintiff did not elect to take an order for a new trial so limited, the action was formally dismissed with costs.

That the evidence adduced on the trial was such as to entitle the plaintiff to have his case presented to the jury on the issue as to whether the damage to the motor car

(1) [1906] A.C. 148, at 161. (2) (1913) 49 Can. S.C.R. 43.
(3) [1914] 2 K.B. 429.

had been caused in whole or in part by the negligence of the engineer of the defendant's train in approaching the crossing, seems to me to be quite clear. Indeed the judgment of the Appeal Court in giving the plaintiff the option of accepting a new trial upon that issue can only mean that the learned Appeal Judges were of that opinion themselves. Their decision to dismiss the action entirely in the event of the plaintiff not electing to take an order for a new trial, limited in the manner indicated, can only be maintained upon the ground that they were themselves justified in trying and disposing of that issue upon the printed trial record. It seems to me, with the highest respect, that they were not warranted in so doing. If there was sufficient evidence to go to the jury that the defendant's engineer could have avoided hitting the motor car by the exercise of due care on his part as the train was approaching the crossing—and it must be taken there was—, it seems to me equally clear that there was also sufficient evidence to leave to the jury upon the further issue as to whether the serious personal injury, which immediately followed, was the direct and natural consequence of the locomotive hitting and throwing the car in the direction in which the plaintiff ran in his attempt to escape injury himself. This, of course, involves consideration of the question as to whether the plaintiff, when he realized or should have realized that the train would hit the car, could in the existing circumstances have avoided the injury by the exercise of reasonable care upon his part. To my mind that was a question peculiarly for a jury, and one which, (I say this also with every respect), the jury, who heard all the witnesses as they gave their evidence, was in a much better position to determine than the learned judges sitting on appeal.

The appellant should have his costs of appeal to the Court of Appeal and to this Court, the costs of the abortive trial to abide the event of the new trial.

HUDSON J.—The plaintiff's automobile stalled on the defendant's railway line on a highway crossing. The plaintiff got out and endeavoured to push his automobile across, but his efforts not being at all successful and finding that a train on the defendant's tracks was rapidly approaching, he abandoned his efforts and ran some 27 feet to a point behind a signal post. At that moment the train arrived,

1940

STORRY
v.
CANADIAN NATIONAL RY. CO.

Hudson J.

struck the automobile and threw it over to the post and there injured the plaintiff. The motor car was wrecked.

The action was brought on for trial before Mr. Justice McFarland and a jury, but the case never was submitted to the jury, Mr. Justice McFarland coming to the conclusion that there was no evidence to support the plaintiff's claim. He held specifically that there was no negligence on the part of the defendant company in the operating of its train, that is, that all the provisions of the law had been complied with and that the plaintiff himself was solely responsible for the accident.

On appeal, the Court of Appeal directed a new trial limited to the claim in respect of the motor car, holding that the plaintiff's personal injuries were due to his own negligence.

On reading over the evidence I would not care to disturb the findings of the learned trial judge in respect to the defendant company having observed all the statutory requirements in regard to operation.

The only point on which there may be room for doubt is as to whether or not the defendant's employees saw, or reasonably should have seen, the plaintiff's predicament in time to stop the train and avoid the collision. Apparently the learned judges in the Court of Appeal thought that there was some evidence on this point which might properly have been submitted to the jury and it was for that reason that they gave the judgment which they did. With some hesitation, I come to the conclusion that I should not differ from them in this view. On the other hand, once this is admitted, I find it difficult to agree with the views of the Court of Appeal in respect to the personal injuries. The facts are extraordinary and anyone might very well come to the same conclusion as did the learned judges below. Still it is a question of fact whether or not the plaintiff acted reasonably under the circumstances and on this he was entitled to have an expression of the jury's views.

I think the judgment appealed from should be set aside and a new trial directed—costs to abide the event.

Appeal allowed with costs; new trial ordered.

Solicitors for the appellant: *Weldon, Breuls & Arnold.*
Solicitor for the respondent: *R. E. Laidlaw.*

PHILCO PRODUCTS, LIMITED, AND CUTTEN-FOSTER & SONS, LIMITED (DEFENDANTS) ..... APPELLANTS;

AND

THERMIONICS, LIMITED, AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

1939
*Nov. 21, 22
1940
*June 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents — Pleadings — In action for alleged infringement of patents, defendants seeking to plead an illegal conspiracy or combine — Question raised whether such defence could constitute a good defence in such an action — Insufficiency of the pleading in question — Application of the principle ex dolo malo non oritur actio.

In an action for alleged infringement of patents of invention, defendants sought by amendment to plead "that the plaintiffs, or some of them, together or with others, have entered into an illegal conspiracy or combine contrary to the common and statute law of the Dominion of Canada, and, in particular, contrary to The Combines Investigation Act (R.S.C., 1927, c. 26) and The Criminal Code (R.S.C., 1927, c. 36) and are disentitled to any relief in this action because: (*a*) The assignments, transmissions, agreements or other means whatsoever, by which rights in the patents in suit are claimed, were made in pursuance, or as a result, of the said conspiracy or combine and were ineffective to convey such rights; or (*b*) in the alternative, if any rights in the patents in suit were acquired, such rights have been used, in this action and otherwise, in pursuance of the said conspiracy or combine in such a way as to disentitle the plaintiffs to any relief." The question whether, in an action for infringement of a patent, such a defence could constitute a good defence was argued as a question of law before trial, and was determined in the negative by Maclean J. in the Exchequer Court of Canada. On appeal:

Held: The proposed amendment, in the form in which it was put, was improper and was rightly rejected; but it should be open to defendants to apply to amend by proper and properly framed amendments.

The principle *ex dolo malo non oritur actio* (stated in *Gordon* v. *Chief Commissioner of Metropolitan Police,* [1910] 2 K.B. 1080, at 1098) is applicable to a case in which a plaintiff must necessarily, in order to establish his cause of action, prove that he is a party to an illegal conspiracy upon which his cause of action rests; and applies to an action for infringement of a patent; if the plaintiff's title is founded upon an agreement which amounts to a criminal conspiracy to which he is a party, and which he must establish in order to prove his

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1940

PHILCO PRODUCTS LTD. ET AL. v. THERMIONICS LTD. ET AL.

title, then he cannot succeed. And it cannot be said that in no circumstances can the existence of an illegal combine be an answer to such an action.

If at the trial it appeared that the plaintiff's case was founded upon an illegal transaction to which he was a party, in the sense above indicated, it would be the duty of the trial judge to take notice of it and dismiss the action. But here defendants are proposing to set up their objection in their pleading and in doing so they must observe the rules of pleading and allege the facts which constitute the illegality complained of and the connection of the plaintiff's cause of action with that illegality.

APPEAL by the defendants from the judgment of Maclean J., President of the Exchequer Court of Canada, refusing certain proposed amendments to the statement of defence.

The action was brought against the defendants for alleged infringement of two patents of invention. The defendants moved for an order permitting them to amend their statement of defence by inserting therein the following:

4. The defendants deny the allegations in paragraph 4 of the plaintiffs' amended statement of claim and put the plaintiffs to the strict proof thereof, and the defendants allege that the plaintiffs, or some of them, together or with others, have entered into an illegal conspiracy or combine contrary to the common and statute law of the Dominion of Canada, and, in particular, contrary to The Combines Investigation Act (R.S.C., 1927, c. 26) and The Criminal Code (R.S.C., 1927, c. 36) and are disentitled to any relief in this action because:

(*a*) The assignments, transmissions, agreements or other means whatsoever, by which rights in the patents in suit are claimed, were made in pursuance, or as a result, of the said conspiracy or combine and were ineffective to convey such rights; or

(*b*) In the alternative, if any rights in the patents in suit were acquired, such rights have been used, in this action and otherwise, in pursuance of the said conspiracy or combine in such a way as to disentitle the plaintiffs to any relief.

On consent of counsel for plaintiffs and defendants given on the hearing of the motion, it was ordered that the question whether in an action for the infringement of a patent a defence such as that above set out could constitute a good defence should be treated as having been directed to be set down for argument as a question of law for decision by the Court in advance of the trial under the provisions of Rule 151 of the General Rules and Orders of the Exchequer Court of Canada.

Maclean J. determined said question of law in the negative, holding that the proposed amendments could not be raised as defences in an infringement action. The defendants appealed.

W. D. Herridge K.C. and *E. G. Gowling* for the appellants.

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE—There is one principle upon which it is conceivable that the defence discussed on the argument, if properly pleaded and proved, might be available: *ex dolo malo non oritur actio.* This principle is stated in the judgment of Buckley L.J. in *Gordon* v. *Chief Commissioner of Metropolitan Police* (1) in these words:

> It is certainly the law that the Court will refuse to enforce an illegal contract or obligations arising out of an illegal contract, and I agree that the doctrine is not confined to the case of contract. A plaintiff who cannot establish his cause of action without relying upon an illegal transaction must fail; and none the less is this true if the defendant does not rely upon the illegality. If the Court learns of the illegality, it will refuse to lend its aid. The rule is founded not upon any ground that either party can take advantage of the illegality, as, for instance, the defendant by setting it up as a defence. It is founded on public policy. Lord Mansfield in *Holman* v. *Johnson* (2) said "Ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

The passage was quoted with approval by Lord Wright, M.R., in *Berg* v. *Sadler* (3).

I do not see any reason why this principle is not applicable to a case in which a plaintiff must necessarily, in order to establish his cause of action, prove that he is a party to an illegal conspiracy upon which his cause of action rests; nor can I understand why the principle does not apply to an action for infringement of a patent. If the plaintiff's title is founded upon an agreement which amounts to a criminal conspiracy to which he is a party, and which he must establish in order to prove his title, then he cannot succeed. There is nothing, in my opinion,

(1) [1910] 2 K.B. 1080, at 1098. (2) (1775) 1 Cowp. 341, at 343.
(3) [1937] 2 K.B. 158, at 166-167.

1940

PHILCO PRODUCTS LTD. ET AL. v. THERMIONICS LTD. ET AL.

Duff C.J.

in the provisions of the *Patent Act* referred to on the argument that affects the application of this fundamental principle.

I am not satisfied that in no circumstances can the existence of an illegal combine be an answer to such an action. A reference to a recent decision in the Supreme Court of the United States will illustrate my point. The first two paragraphs in the head-note to *Ethyl Gasoline Corp.* v. *United States* (1) are as follows:—

1. The regulation of prices and the suppression of competition among purchasers of the patented article are not within the scope of the monopoly conferred upon a patentee by the patent laws.

2. A system of licences employed by the owner of patents for an improved motor fuel, whereby jobbers who do not conform to the market policies and posted gasoline prices adopted by the major oil companies may be cut off from the list of those to whom refineries licensed to manufacture such fuel may sell it, and which has been used to coerce adherence to those prices and policies, is not within the monopoly conferred by the patents and operates as an unreasonable restraint of interstate commerce in such fuel, in violation of the Federal Anti-trust Act.

Now, if the plaintiff in an action for infringement must, in order to make out his title, prove such a combine, and that he is a party to it, and if his alleged rights are founded upon it or "directly result from it," I think he would find himself in great difficulties.

I do not pursue the subject further. The doctrine laid down by the learned President in his judgment is too sweeping if it is inconsistent with this.

I do not, however, think that the proposed amendment states that the respondents' cause of action is connected with the alleged illegal conspiracy in such a manner as to bring this fundamental, and indeed rudimentary, principle into play.

If B commits an indictable offence and the direct consequence of that indictable offence is that A suffers some special harm different from that of the rest of His Majesty's subjects, then, speaking generally, A has a right of action against B. As at present advised, I think it is not obvious that this well settled doctrine does not apply to indictable offences under section 498 of the *Criminal Code;* and it is not necessary to decide whether there are no circumstances in which the principle would not operate to prevent the owners of patents and the

(1) (1940) 84 Law. ed. 559.

licensees under patents enforcing their *prima facie* rights against persons who are the objects and the intended victims of their criminal activities. There is nothing, however, in the proposed amendment to suggest the application of any such principle.

It ought to be remembered that the office of pleadings is to state the facts which are the constitutive elements of the cause of action or the defence. The proposed amendment does not profess to state the nature of the illegal conspiracy alleged beyond the vague allegation that it is contrary to the common and statute law of the Dominion. On this ground the application to put this amendment on the record ought to have been dismissed *in limine*. The learned President by consent treated this vague allegation as raising a question of law within rule 151. If at the trial it appeared that the plaintiff's case was founded upon an illegal transaction to which he was a party, in the sense above indicated, it would be the duty of the trial judge to take notice of it and dismiss the action; but the appellants are proposing to set up their objection in their pleading and in doing so they must observe the rules of pleading and allege the facts which constitute the illegality complained of and the connection of the plaintiff's cause of action with that illegality.

I do not think myself that the proposed pleading raises any question of law which could usefully be considered. The function of rule 151 is to enable questions of law to be decided which arise upon facts alleged or admitted. Here, there are no such facts alleged in the pleading sense. There is a bald allegation, I repeat, of an illegal conspiracy in restraint of trade which is set up, an illegality because it is contrary to the law of the Dominion of Canada. The facts constituting the illegality are not set up. We are not told whether it is a conspiracy to enhance prices or to restrict competition, or what the particular nature of it is, or what the relation of it is to the respondents' cause of action. And the question seems to have been treated as the question whether in any circumstances the existence of an illegal conspiracy in restraint of trade, to enhance prices for example, could be an answer to an action for the infringement of a patent. That proposition includes the proposition that in such an action a

1940

PHILCO PRODUCTS LTD. ET AL. v. THERMIONICS LTD. ET AL.

Duff C.J.

plaintiff may succeed even though his title to sue is directly founded upon a crime to which he is a party, and is, therefore, too broad; but, for the reasons just given, the amendment was properly rejected.

I think the proper course is to say that we do not think fit to pronounce upon any question of law except to say that the amendment is not a proper amendment and ought not to be allowed. It will be open, of course, to the appellants to apply to amend their defence by proper and properly framed amendments.

The costs of the appeal will be costs in the cause.

Appeal dismissed without prejudice to right of appellants to apply to amend their defence by properly framed amendments. Costs of appeal to be costs in the cause.

Solicitors for the appellants: *Herridge, Gowling, MacTavish & Watt.*

Solicitors for the respondents: *Smart & Biggar.*

1940

* June 6, 7.

JOHN COMER (PLAINTIFF).....APPELLANT;

AND

F. R. BUSSELL AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobile Insurance—Action under s. 205 of Insurance Act, R.S.O., 1937, c. 256, to recover from alleged insurers the amount unpaid of judgment recovered against driver of motor car for damages for injuries—Question whether driver was insured by "owner's policy" because driving with consent of "person named" therein (s. 198 of said Act)—"Owner's policy" (s. 183 (g))—Question whether motor car "owned" by "person named" in policy.

The action was brought under s. 205 of the Ontario *Insurance Act*, R.S.O., 1937, c. 256, to recover from defendants, as insurers, the unpaid amount of a judgment recovered in a previous action by plaintiff against K. and J. for damages for injuries caused by a motor car. The insurance policy was issued in the name of S. The ground of

* PRESENT:—Duff C.J. and Crocket, Davis, Hudson and Taschereau JJ.

the plaintiff's claim in the present action was that K., the driver of the motor car, though not named in the policy, is thereby "insured" (within the meaning of said s. 205) in virtue of s. 198 of said Act.

Held: The dismissal of the action by the Court of Appeal for Ontario ([1940] 1 D.L.R. 97) should be affirmed. K. was not a person entitled by said s. 198 to indemnity under the policy. In considering the question of the application of s. 198 to the facts of the case, that section must be read as subject to the definition of "owner's policy" in s. 183 (*g*). Plaintiff's contention that K. came within s. 198 (1) by virtue of the fact that he was driving the car with the consent of S., the "person named" in the policy within the meaning of s. 183 (*g*) (that is, "named in" the "owner's policy" under which the action is brought), rests, by the definition of "owner's policy," upon the proposition that the car was "owned" by S. in the sense of that definition (s. 183 (*g*)); and, on the evidence, the decision of the Court of Appeal negativing such ownership by S. should not be reversed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Kelly J. at trial) dismissed the action, which was brought under s. 205 of *The Insurance Act*, R.S.O., 1937, c. 256, to recover from defendants (commonly known as Lloyd's), as insurers, the unpaid amount of a judgment recovered against certain persons for damages for injuries caused by a motor car.

One George Johnson bought from one Seaman a taxi-cab business at Fort Frances, Ontario, and his son, Fredolph Johnson, took charge of its operation. It was found that Fredolph Johnson could not have a licence from the town to operate the taxi-cab business, as he lived a short distance outside the town limits and therefore did not fulfil the town's residential requirements. Therefore it was decided to apply for a licence in Seaman's name and Fredolph Johnson went through the form of executing a transfer of the business to Seaman (a chattel mortgage being given by Seaman to the Johnsons for their protection), and the motor car in question and another motor car, both used in the said taxi-cab business, were registered under the Ontario *Highway Traffic Act* in Seaman's name.

On an application signed by Seaman an insurance policy of defendants was issued to him upon the motor car in

(1) [1940] 1 D.L.R. 97.

1940

COMER v. BUSSELL ET AL.

question, agreeing to indemnify against liability for injuries to the person or property of others. The policy contained an agreement by the insurer

> to indemnify the Insured, his executors or administrators, and, in the same manner and to the same extent as if named herein as the Insured, every other person who, with the Insured's consent, uses the automobile, against the liability imposed by law upon the insured or upon any such other person for loss or damage arising from the ownership, use, or operation of the automobile within Canada, * * *

(See also s. 198 of *The Insurance Act,* R.S.O., 1937, c. 256, quoted in the judgment now reported).

Subsequent to the transactions aforesaid the plaintiff was injured by the motor car in question which was at the time of the injury driven by one Kowaluk who was an employee in the said taxi-cab business. In an action for damages the plaintiff recovered judgment against Kowaluk and George Johnson (1), and later brought the present action under said s. 205 of *The Insurance Act* to recover from the present defendants the unpaid amount of his judgment.

The trial judge, Kelly J., gave judgment for the plaintiff. This was reversed by the Court of Appeal for Ontario (2), which dismissed the action. The plaintiff appealed to the Supreme Court of Canada.

C. L. Yoerger for the appellant.

C. K. Guild K.C. for the respondents.

After hearing the argument of counsel for the appellant, the Court, without calling on counsel for the respondents, delivered judgment orally dismissing the appeal with costs.

THE CHIEF JUSTICE—We do not think it necessary to call upon you, Mr. Guild. We desire to express our appreciation of the able argument on the part of the appellant by Mr. Yoerger; we are nevertheless of opinion that no purpose would be served by prolonging the argument.

This is a creditor's action under section 205 of the *Insurance Act,* the first subsection of which is as follows:—

> Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money

(1) [1938] O.R. 655. (2) [1940] 1 D.L.R. 97.

payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

The appellant has no judgment against Seaman, who, it is argued, is the owner of the car within the meaning of certain other sections of the Statute.

The ground of the appellant's claim is that Kowaluk, the driver (against whom he has a judgment), though not named in the policy, is thereby "insured" (within the meaning of section 205) in virtue of section 198; and that is the question of substance in this appeal.

There was no contractual relationship between Kowaluk and the Insurance Company, and, therefore, the provisions in the policy taken out by Seaman (apart from the enactments of the *Insurance Act*) could give Kowaluk no status to sue. Mr. Yoerger, of course, does not dispute this. The point is settled by the judgment of the Privy Council in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (1).

The precise point to be decided is whether the driver, against whom the appellant has a judgment, is one of the persons entitled to indemnity under the policy by force of section 198. Section 198, in so far as pertinent, is in these words:—

(1) Every owner's policy shall insure the person named therein, and every other person who, with his consent, uses any automobile designated in the policy, against the liability imposed by law upon the insured named therein or upon any such other person for loss or damage,—

(*a*) arising from the ownership, use or operation of any such automobile within Canada or the United States of America, or upon a vessel plying between ports within those countries; and

(*b*) resulting from

(i) bodily injury to or death of any person; or

(ii) damage to property; or

(iii) both. 1932, c. 25, s. 2, *part;* 1935, c. 29, s. 32.

(2) Any person insured by but not named in a policy may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor. 1932, c. 25, s. 2, *part.*

It is obvious from inspection that by this section any person insured in a policy within the scope of subsection

(1) [1933] A.C. 70.

COMER v. BUSSELL ET AL.

Duff C.J.

(1), though not named therein, may, by force of subsection (2), recover indemnity as if named therein as insured.

In order to apply these enactments to the facts of this case we must read them as subject to the definition of "owner's policy" given in section 183, subsection (*g*):—

> "Owner's policy" means a motor vehicle liability policy insuring a person named therein in respect of the ownership, operation or use of any automobile owned by him and designated in the policy.

It is contended that Kowaluk, the driver, comes within section 198 (1) by virtue of the fact that he was driving the automobile with the consent of Seaman, who was the "person named" in the policy within the meaning of section 183 (*g*); that is to say, "named in" the "owner's policy" under which the action is brought. By the definition of "owner's policy" that contention rests upon the proposition that the automobile was "owned" by Seaman in the sense of that definition (section 183 *supra*). The Court of Appeal has taken the view that this question must be answered in the negative. We are satisfied that the decision of the Court of Appeal on this point ought not to be reversed. Accordingly, the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. R. Fitch.*

Solicitor for the respondents: *A. G. Murray.*

1940

* Feb. 27.
* June 29.

L'ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE (DEFENDANT) ..... APPELLANT;

AND

LA CITÉ DE CHICOUTIMI (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Assessment and taxation—Association for the welfare of youth—Incorporated by provincial statute—Exemption from municipal and school taxes—Same as that granted to religious or educational establishments—Exemption when property owned and occupied by corporation for its purposes—Whether Association entitled to exemption when practically the building is rented and leased for revenue.

* PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

1940

ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE v. LA CITÉ DE CHICOUTIMI.

The appellant association was incorporated in 1916 by a special Act of the Quebec legislature (7 Geo. V, c. 110), its object being by section 3 "to assure to its members personal development by means of study circles, and to devote itself to all works of public utility within the domain of charity, education and moral, social, national and economic questions." Then in 1932, this statute was amended (22 Geo. V, c. 136), and, amongst additional powers thereto granted, the association was authorized to "install and equip, for the use of its members and of the public, establishments for the teaching and practice of physical culture and athletic and sporting exercises"; and, by section 4, it was enacted that "lands and other immoveables held as owner and occupied by the corporation for the above purposes are assimilated to the property of educational establishments as to exemptions from municipal and school taxes." Subsequently, the appellant association became owner of a property situated in the city respondent, it consisting of a large building in which there were offices, a theatre, a skating rink, badminton courts, billiard rooms, bowling alleys and restaurants. The theatre, two of the offices, and the skating rink were leased and a general admission fee was charged by the association for the privilege of using the other entertainment places, there being no difference in the fee depending on whether one of the public was a member of the association or not. But there were two offices used by the association, one being occupied by a priest acting as chaplain and co-manager and the other serving as library and meeting hall for the members. The respondent city sued the appellant association for $4,060.64 for municipal and school taxes imposed for the fiscal years of 1936 and 1937. The appellant took the ground that its property was exempt from these taxes under the amended statute above mentioned; and it also urged that the chaplain's office and the library room, being used for the purposes of the association, and therefore not taxable, had been illegally assessed for taxation and that the whole valuation of the appellant's property was null and void; but, in its conclusions, the appellant merely asked for the dismissal of the respondent's action. Judgment was rendered by the Recorder's Court in favour of the respondent for the amount of its claim, less the sum of $94.35, the Recorder exempting the two offices from taxation; and that judgment was affirmed by the appellate court. There was no cross-appeal in that Court or in this Court as to the partial exemption granted by the trial judge.

Held that the judgment appealed from should be affirmed and the respondent city's action maintained.

Per Rinfret, Crocket, Hudson and Taschereau JJ.—The theatre, the arena, the rented offices and the restaurants constituted for the benefit of the appellant association sources of revenues; and consequently the latter could not benefit from the exemption of taxes provided by the statute. The appellant's rights are the same as those of the religious institutions or educational establishments; and the clause creating an exemption from taxes has its application only when the properties are occupied by them for the purposes for which they have been established, and not solely to raise a revenue.—The other ground of appeal raised by the association that the valuation was null in toto for the reason that part of the building, not being taxable, had been assessed, must be dismissed.

1940

ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE v. LA CITÉ DE CHICOUTIMI.

as there is no clear and positive evidence that these two offices were occupied by the association for the attainment of the purposes mentioned in the incorporating Act. *Toronto Ry. Co.* v. *Toronto* ([1904] A.C. 809), *Donohue* v. *Paroisse de St. Etienne de la Malbaie* ([1924] S.C.R. 511) and *Montreal L.H. & P. Co.* v. *Westmount* ([1926] S.C.R. 515) discussed.

Per Davis J.—The incorporating statute clearly enacts that the exemption is only while the property is owned and occupied by the appellant association for the purposes of the corporation. Moreover, the building cannot be assessed piecemeal; two or three rooms out of a large office building, for instance, cannot be left free from taxation and yet all the other rooms be subject to it; the building is either taxable or it is not taxable.—Whatever may be said as to the occupation of several different parts of the building, it is not disputed that two portions are rented for private office use and the theatre portion is leased on a yearly basis. On a fair interpretation of the statutory provision, the corporation to be entitled to exemption must occupy the immoveable property for its own purposes and it cannot be said to occupy the immoveable property when any substantial portion of it is in the occupation of others. The statute is not satisfied by showing that the corporation occupies some portion of the building for its own purposes.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Recorder's Court of the city of Chicoutimi and maintaining the respondent city's action for the recovery of taxes on property owned by the appellant.

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

Paul Leblanc and *Jean Filion* for the appellant.

J. C. Gagné K.C. and *J. A. Gagné K.C.* for the respondent.

RINFRET J.—Pour les raisons que donne mon collègue, M. le juge Taschereau, et dans lesquelles je concours, je suis d'avis que l'appel doit être rejeté avec dépens.

DAVIS J.—The appellant association was incorporated in 1916 by a special Act of the Quebec legislature, being 7 Geo. V, ch. 110. The object of the Association was by sec 3,

to assure to its members personal development by means of study circles, and to devote itself to all works of public utility within the domain of charity, education and moral, social, national and economic questions.

The preamble of the statute stated that the Association had been founded at Montreal in 1904, that it had existed since that date, and had a great many members grouped among over one hundred study circles.

Then in 1932, by 22 Geo. V, ch. 136, the statute was amended. The preamble to this amending statute, after repeating the object of the Association, proceeded to state,

> That, to realize the above purpose, it is necessary to develop in young men, members of the Association or not, besides intellectual and moral vigour, a robust physical constitution by sound and healthy athletic exercises.

It is to be noted that the words are "members of the Association or not." The preamble proceeds to say

> That such program demands that the (Association) found, in various parts of the province, establishments wherein will be taught and practised for purposes of education and of moral and physical training, all bodily exercises pertaining to physical culture and gymnastics; and that to attain such objects the Association needs to acquire and possess moveable and immoveable property of a higher value than that presently fixed by its Charter.

The preamble proceeds to state that the Association has acquired by deed certain immoveable property in the city of Montreal from the National Amateur Athletic Association which, with the furniture and various moveable things, may serve to utilize the immoveable property "as a sporting and educational establishment"; and that, certain doubts having arisen as to the validity of the acquisition of this property, the validation of the deed of sale is required. Then follow in the preamble words that may be of importance in this case by way of explanation:

> That, by its charter, the National Amateur Athletic Association benefited by certain privileges and tax exemptions:
>
> That the (Association) by pursuing amongst other objects the work of the National Amateur Athletic Association, with a larger scope, needs the benefit of the same privileges;
>
> That for such purposes the (Association) requires that more ample powers be granted in the exercise of its charter, and, particularly certain privileges and tax exemptions, and
>
> Whereas it is expedient to grant its prayer;

There is then enacted sec. 1, which repeals sec. 4 of the original Act and substitutes a new section 4; sec. 2 of the amending statute validates the deed of sale from the National Amateur Athletic Association; and sec. 3 enacts that the Act shall come into force on the day of its sanction.

1940

ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE v. LA CITÉ DE CHICOUTIMI.

Davis J.

Reverting then to new sec. 4 with which we are concerned, it contains by repetition the general powers granted by the original statute but adds additional powers, amongst which is to be found one in these words:

> The corporation * * * may * * * found, install and equip, for the use of its members and of the public, establishments for the teaching and practice of physical culture and athletic and sporting exercises;

The words " for the use of its members and of the public " are to be noted. The omnibus clause is repeated:

> and, generally, exercise the powers vested in civil corporations and such powers as may aid it in attaining its object, or serve to put its means of action in operation and to carry out its undertakings.

As part of new sec. 4 and immediately following the enumeration of the powers of the corporation, are these words:

> Any law or by-law to the contrary notwithstanding, the buildings, lands and other immovables held as owner and occupied by the corporation for the above purposes are assimilated to the property of educational establishments as to exemptions from municipal and school taxes.
>
> Such tax exemption shall not apply to the water tax nor to special taxes for sewers, paving, sidewalks and public lighting.

In this action the respondent, the city of Chicoutimi, sued the appellant Association for $4,060.64 for municipal and school taxes imposed for the fiscal years 1936 and 1937 in respect of the appellant's immovable property in the said city. The appellant took the ground that its said property was exempt from these taxes under the amending statute above mentioned but in its defence, while it pleaded that the entry on the valuation roll was null and void, merely asked for the dismissal of the action with costs. The position taken by the city was that the immovable property of the Association is only entitled to exemption when it is owned and occupied by the corporation for the purposes of the corporation.

The action was tried in the Recorder's Court of Chicoutimi and the Recorder gave judgment in favour of the city for the amount of its claim, less the sum of $94.35. The property in question is owned by the appellant and consists of a large building in which there are offices, a theatre, a skating rink, badminton courts, billiard rooms, bowling alleys and restaurants. Part of the building, the theatre, is leased for use for the exhibition of moving

pictures at a rental of $2,000 per year plus a share in the profits. One of the offices is rented to a Mr. Murdock at $40 per month and another office is rented at $25 per month. The Arena is used in the winter for skating and hockey games and in the summer months is leased from time to time for professional wrestling at the rate of $40 per evening. A general admission fee to the public is charged for the skating rink, the bowling alleys, the billiard rooms, the badminton courts, etc. Apparently there is no difference in the admission fee depending on whether one of the public is a member of the Association or not.

The Recorder on the evidence came to the conclusion that the whole building was really used for commercial purposes and gain but he did think that two small rooms in the building might be regarded as used solely for the purposes of the Association;

> though from a strictly legal point of view, in view of the absence of clear and positive evidence, these two rooms should not be exempt, I exempt them from taxation;

and the Recorder accordingly reduced the respondent's claim by $94.35. The appellant Association appealed against this judgment to the Court of King's Bench which by a majority affirmed the judgment. The appellant has now appealed to this Court.

It is clear upon the statute that the exemption is only while the property is owned and occupied by the corporation for the purposes of the corporation. Now the building cannot be assessed piecemeal; you cannot take two or three rooms out of a large office building, for instance, leave them free from taxation and yet tax all the other rooms in the building. The building is either taxable or it is not taxable. The city very naturally, as its counsel states, did not appeal from the judgment which gave it its entire claim except $94.35. What the city says is that if it had any right of appeal, which it doubts, in respect of the amount of the small deduction, it was not worth the costs of an appeal and the city was quite content to let the small item go.

Whatever may be said as to the occupation of several different parts of the building, it is not disputed that two portions are rented for private office use and the theatre portion is leased on a yearly basis. On a fair

1940

ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE v. LA CITÉ DE CHICOUTIMI.

Davis J.

interpretation of the statutory provision, the corporation to be entitled to exemption must occupy the immovable property for its own purposes and it cannot be said to occupy the immovable property when any substantial portion of it is in the occupation of others. The statute is not satisfied by showing that the corporation occupies some portion of the building for its own purposes.

For these reasons I am of opinion that the appeal should be dismissed with costs.

The judgment of Crocket, Hudson and Taschereau JJ. was delivered by

TASCHEREAU J.—L'appellante, l'Association Catholique de la Jeunesse Canadienne-Française, a été incorporée par 7 Geo. V, chapitre 110. En 1932, en vertu du statut 22, Geo. V, chapitre 136, sa charte a été amendée et certaines exemptions de taxes municipales et scolaires lui ont été accordées.

L'article 3 de la dite loi telle que revisée se lit de la façon suivante:—

3. L'objet de la corporation est d'assurer à ses membres un complément de formation personnelle au moyen de cercles d'études, et de travailler au succès des entreprises d'utilité publique qui se rapportent à la charité, à l'éducation et aux questions morales, sociales, nationales et économiques.

L'article 4 est ainsi rédigé:—

4. La corporation aura succession perpétuelle, et pourra:

Avoir un sceau commun et le modifier à volonté; ester en justice; fonder des cercles d'études, organiser des cours, des conférences, des journées d'études et des congrès, pour la poursuite de son objet; fonder et maintenir des bibliothèques et des salles de lecture; acheter, imprimer, éditer, publier et vendre des revues, livres, journaux, brochures et feuilles de propagande assortis à ses desseins et à son objet; fonder, installer et équiper, pour l'usage de ses membres et du public, des établissements pour l'enseignement et la pratique de la culture physique et des exercices athlétiques ou sportifs; accepter, acquérir et recevoir, par achat, donation, testament, legs ou autrement, et posséder des biens meubles et immeubles, en retirer des revenus, pourvu que le revenu annuel des immeubles appartenant à la corporation et possédés par elle pour des fins de revenu n'excède pas deux cent mille dollars; les louer, vendre, échanger, hypothéquer, céder, aliéner ou autrement en disposer; emprunter, émettre des obligations (debentures) garanties par hypothèques, par gage ou nantissement, s'il y a lieu; percevoir de ses membres des cotisations, contributions, souscriptions et abonnements; encourager les études et les œuvres qui se rapportent à l'objet de l'A.C.J.C.; organiser des concours, fonder des prix, attribuer des récompenses; aider et soutenir, dans la mesure de leurs besoins et des ressources de la corporation, des entreprises propres à répandre la culture de l'esprit et à assurer la défense des

intérêts religieux, sociaux et nationaux; et, en général, exercer les pouvoirs qui appartiennent aux corporations civiles ordinaires, et les pouvoirs qui peuvent l'aider à atteindre son but ou servir à la mise en œuvre de ses moyens d'action et à l'exécution de ses entreprises.

Nonobstant toutes lois ou règlements à ce contraire, les bâtiments, terrains et autres immeubles possédés à titre de propriétaire et occupés par la corporation, pour les fins susdites, sont assimilés aux biens des maisons d'éducation, quant aux exemptions de taxes municipales et scolaires.

Cette exemption de taxes ne s'appliquera pas à la taxe d'eau ni aux taxes spéciales pour canaux d'égouts, pavages, trottoirs et éclairage public.

1940

ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE v. LA CITÉ DE CHICOUTIMI.

Taschereau J

La ville de Chicoutimi où est situé l'immeuble de l'appelante a institué des procédures légales contre celle-ci pour lui réclamer la somme de $4,060.64 représentant les taxes municipales et scolaires pour les années 1936 et 1937, ainsi que les intérêts. L'appelante a répondu qu'elle ne devait pas le montant parce que l'immeuble est possédé et occupé par elle pour les fins mentionnées à la loi qui l'incorpore, et que les règlements, résolutions, ainsi que les rôles d'évaluation et de perception invoqués par l'intimée sont illégaux et *ultra vires*. Le Recorder de Chicoutimi devant qui la cause a été instruite a partiellement admis cette prétention de l'appelante. Il en est venu à la conclusion que la majeure partie de l'immeuble était taxable, que le reste ne l'était pas, et il a maintenu l'action pour la somme de $3,966.29 avec intérêts et dépens.

Cet immeuble qui fait l'objet du présent litige est connu sous le numéro P. 233 et P. 234 du cadastre de la ville de Chicoutimi. L'appelante n'occupe pas cet immeuble en entier. Elle a loué un théâtre à un particulier qui l'exploite pour son bénéfice personnel; elle a aussi loué une pièce à un monsieur Murdock qui l'occupe comme bureau, une salle de 55 par 60 pieds au Syndicat Catholique, et quelques petits restaurants attenant aux pièces ci-dessus mentionnées. Le reste de la bâtisse, comprenant le bureau de l'aumônier, et la salle de l'Association ne sont pas loués et sont occupés par l'appelante.

Dans l'immeuble se trouve également une patinoire. La preuve révèle que cette patinoire n'est pas louée et à cet cet endroit, durant l'hiver, on y donne des exhibitions payantes de hockey, et durant d'autres saisons des séances de lutte.

Je partage l'opinion du Recorder de Chicoutimi et celle de la majorité des juges de la Cour du Banc du Roi qui en sont venus à la conclusion que le théâtre, l'arena, le

1940

ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE v. LA CITÉ DE CHICOUTIMI.

Taschereau J

bureau occupé par monsieur Murdock, la salle du syndicat catholique ainsi que les trois restaurants constituent pour l'appelante des sources de revenus et ne sauraient en conséquence bénéficier de l'exemption de taxes prévue au statut. L'appelante n'a pas plus de droits que les communautés religieuses et les maisons de charité, car l'acte législatif qui l'incorpore la place sur le même pied que celles-ci. La clause créant l'exemption de taxes municipales et scolaires ne trouve son application que lorsque les propriétés sont occupées par des institutions religieuses ou charitables, pour les fins pour lesquelles elles ont été établies, et non pas uniquement pour en retirer un revenu. (Vide loi des cités et des villes, art. 520; loi de l'Instruction Publique, art. 251.)

Il en est ainsi de l'immeuble de l'appelante. Quand le statut décrète que les immeubles possédés et occupés par elle pour les "fins susdites", sont assimilés aux biens des maisons d'éducation quant aux exemptions de taxes municipales et scolaires, je crois qu'il faut voir dans les mots "fins susdites" une référence à la section 3 de la loi qui définit les objets de l'A.C.J.C., et non pas à la section 4 qui donne les moyens d'atteindre ces objets. Il semble clair que le théâtre, l'arena et quelques autres pièces de l'immeuble constituent des sources de revenus, et ne sont pas occupés par l'appelante pour les fins qui lui permettent d'atteindre les objets mentionnés à l'article 3 de sa charte. Même si les revenus sont versés au fonds général de l'appelante, l'immeuble serait taxable, car c'est l'usage que l'on fait de l'immeuble qu'il faut considérer et non pas l'usage des revenus de cet immeuble.

Mais, nous dit l'appelante, le bureau de l'aumônier et la salle de l'Association sont occupés par elle et servent à assurer à ses membres un complément de formation personnelle et à atteindre ainsi l'objet de la corporation. Cette partie de l'immeuble n'était pas taxable, et a été tout de même imposée par la ville. Cette imposition de taxe étant illégale, il s'ensuivrait que tout le rôle quant à l'appelante est nul, et on nous cite de nombreuses autorités pour appuyer cette prétention. C'est ainsi que dans son factum et à l'argument l'appelante a cité les causes

de *Toronto Railway Co.* v. *Toronto Corporation* (1); *Donohue* v. *La Corporation de la Paroisse de St-Etienne de la Malbaie* (2); *Montreal Light, Heat & Power* v. *Cité de Westmount* (3). Dans la première de ces causes, *Toronto Railway Co.* v. *Toronto Corporation* (4), il a été décidé ce qui suit (p. 815):—

It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision, is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity.

Et plus loin, à la même page:—

In *Nickle* v. *Douglas* (5) the exact point arose. The appellant had unsuccessfully appealed to the Court of Revision, and it was held, after an elaborate examination of the previous authorities in the English and Canadian Courts, that that Court had no jurisdiction to decide any question whether particular property was assessable, and also that the party was not estopped by having previously appealed to the Revision Court. In *London Mutual Insurance Co.* v. *City of London* (6), the decision of the county court judge was treated as final, because the question was within the jurisdiction of the assessor.

Dans la cause de *Donohue* v. *La Corporation de la paroisse de St-Etienne de la Malbaie* (7), le juge Anglin dit à la page 516:—

The appellants' machinery was non-assessable. In assessing the appellants in respect of it the assessors were dealing with something beyond their jurisdiction. The assessment was therefore a nullity and neither appeal from it nor action to question the roll for illegality in respect of it was necessary.

Et plus loin:—

In the *Shannon* case (8) the subject-matter of the assessment was admittedly within the jurisdiction of the assessors; it was over-valuation that was complained of; that over-valuation was charged to be the result of a systematic disregard of the prescribed principles of assessment.

Dans la cause de *Montreal Light, Heat & Power* v. *City of Westmount* (9), il a été décidé par cette Cour que l'action de la cité de Westmount au montant de $8,226.86 devait être rejetée, parce que ce montant représentait des

(1) [1904] A.C. 809, at 814.
(2) [1924] S.C.R. 511, at 516.
(3) [1926] S.C.R. 515.
(4) [1904] A.C. 809, at 814.
(5) (1875) 37 U.C. (Q.B.) 51.
(6) (1887) 15 Ont. A.R. 629.
(7) [1924] S.C.R. 511.
(8) [1924] A.C. 185.
(9) [1926] A.C. 515.

1940

ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE v. LA CITÉ DE CHICOUTIMI.

Taschereau J

taxes sur l'évaluation de compteurs électriques qui étaient installés dans des maisons privées. La Cour a décidé que ces compteurs n'étaient pas des immeubles, et non seulement l'action a été rejetée mais le rôle quant à la Montreal Light, Heat & Power a été annulé.

Le cas qui nous occupe est bien différent. L'immeuble dans son ensemble constitue une source de revenus pour l'appelante, et même s'il n'était pas productif de revenus, il serait encore taxable, à moins qu'il ne soit démontré qu'il sert à atteindre l'objet de la corporation qui est, encore une fois:—

> d'assurer à ses membres un complément de formation personnelle au moyen de cercles d'études, et de travailler au succès des entreprises d'utilité publique qui se rapportent à la charité, à l'éducation et aux questions morales, sociales, nationales et économiques.

C'est à cette seule condition que l'immeuble est assimilé aux maisons d'éducation. Il importait donc à l'appelante de démontrer l'application de la loi exceptionnelle qui la régit. La preuve révèle au contraire que dans le bureau de l'aumônier qui, avec un monsieur Gagnon, est le gérant de l'immeuble, se contrôlent les diverses opérations financières, se perçoivent les loyers, et s'exercent la censure des vues cinématographiques.

Quant à la salle où se trouve une bibliothèque, je partage l'opinion du Recorder, de M. le juge Barclay et de M. le juge Galipeault, qui ne sont pas satisfaits de la preuve apportée par l'appelante pour soustraire cette partie de l'immeuble à l'imposition des taxes foncières.

En quoi cette salle et le bureau de l'aumônier servent-ils aux " fins susdites "? Il est possible qu'il en soit ainsi, et que dans cette salle et le bureau de l'aumônier on pose des actes qui soient de nature à aider la corporation à atteindre les fins mentionnées à sa charte. Mais il faut le prouver, et non pas se contenter d'affirmations générales et imprécises qui ne nous éclairent pas sur la véritable nature des œuvres accomplies.

A défaut de cette preuve positive qui incombe à l'appelante, je ne puis me permettre de faire des conjectures, et je ne puis pas présumer que ces pièces de l'immeuble servent à des travaux d'utilité publique, d'éducation, de charité, ou à des œuvres où se discutent des questions morales, sociales, nationales et économiques.

Il est vrai que le Recorder exempte l'appelante des taxes payables pour le bureau de l'aumônier et la salle, mais, après avoir démontré que le tout doit être taxé, il s'exprime de la façon suivante:

> Cependant, bien qu'au point de vue strictement légal, ces deux appartements vu l'absence d'une preuve claire et positive, ne devraient pas être exempts, je les exempte de la taxe.

Evidemment, le Recorder ne conclut pas suivant les faits prouvés. Mais, parce qu'il réduit la réclamation de la ville de $94.35, ou de $47.17 par année, devons-nous pour cela décider que tout le rôle est nul et que l'appel doit être maintenu?

Je ne le crois pas, et je ne suis pas prêt à me rallier à cette opinion. La ville de Chicoutimi n'a pas logé de contre-appel. Elle a agi sagement, car il est douteux qu'elle eût le droit de le faire, et le montant en jeu était si minime qu'il n'en valait pas la peine. Ce que j'ai dit précédemment indique que si semblable contre-appel eût été logé, pour ma part je l'aurais maintenu.

Son défaut de le faire ne fait perdre à la ville que cette somme de $94.35 mais aucun autre de ses droits. Ce serait jeter la confusion dans les affaires municipales de l'intimée que d'annuler tout le rôle quant à l'appelante.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Paul Leblanc.*

Solicitor for the respondent: *J. C. Gagné.*

1940
* May 14, 15, 17.
* June 29.

CONCRETE COLUMN CLAMPS LIMITED (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF QUEBEC (MIS-EN-CAUSE) ..... RESPONDENT.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LIMITÉE (DEFENDANT) ..... APPELLANT;

AND

CONCRETE COLUMN CLAMPS LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Privilege—Sub-contractor—Registration—Notice or memorial—Whether affidavit necessary—Reservoir—Construction on Crown property—Reservoir to form part of existing municipal aqueduct—Whether subject to privilege—Public domain—Arts. 2013 (a) (f), 2103 C.C.—Arbitration — Award — Validity—Companies—President—Authorization to sign—Conduct of parties—Evidence as to alleged irregularities—Art. 1432 C.C.P.

The appellant in the first appeal, Concrete Column Clamps Limited, sued La Compagnie de Construction de Québec Limitée, appellant in the second appeal, to recover the sum of $75,173.55, representing the price for work done and materials furnished under a sub-contract with that company, the latter being the principal contractor under a contract with the city of Quebec, respondent in the first appeal, for the construction of an underground reservoir eventually to become the property of that city. That construction was to pass through the National Battlefields, which are the property of the Federal Government, and the National Battlefields Commission consented gratuitously to allow such construction on its land without relinquishing its right or ownership on behalf of the Dominion. The city of Quebec was made a party to the action, for the purpose of obtaining an order that the reservoir as well as the land itself should be declared subject to a privilege which would guarantee the payment of the sum due. Both the defendant and the *mis-en-cause* filed separate pleas. Before

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Taschereau JJ.

1940

CONCRETE COLUMN CLAMPS LTD. v. THE CITY OF QUEBEC.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE. v. CONCRETE COLUMN CLAMPS LTD.

the case actually came to trial, La Compagnie de Construction and the Concrete Column Clamps agreed to submit the lawsuit to arbitrators, and their decision was that the latter company was entitled to recover a sum of $25.622.74. This award of the arbitrators was deposited with the record of the case by order of Gibsone J. whose decision was affirmed by the appellate court. Then, after trial, the Superior Court, Prévost J., dismissed *in toto* the action of the Concrete Column Clamps against the Compagnie de Construction, rejecting therefore the award of the arbitrators, and also refused to grant the conclusion of that action against the city of Quebec to the effect that the reservoir and the land upon which it had been constructed were subject to a privilege. The Concrete Column Clamps appealed to the Court of King's Bench, and that Court dismissed the appeal on the question of privilege; but reversed the judgment of the trial judge and allowed this last company the sum of $25,622.74, being the amount awarded by the arbitrators. The ground raised in the first appeal is whether the appellant The Concrete Column Clamps is entitled to its claims against the city respondent on the ground that the reservoir and the land upon which it has been constructed were subject to a privilege; and the questions at issue are whether such privilege has been legally drafted, whether the necessary notices have been given within the prescribed delay and finally whether the reservoir and the land can be subject to a contractor's privilege. In the second appeal, the question at issue is whether the award of the arbitrators is valid and binding between the parties.

Held, affirming the judgment appealed from (Q.R. 67 K.B. 536) that the maintaining of The Concrete Column Clamps's action against La Compagnie de Construction de Quebec for $25.622.74 by the Court of King's Bench should be affirmed, as well as its decision dismissing the demand of the Concrete Column Clamps against the city of Quebec for a declaration of a privilege.

Held that the general rule, and it is an imperative one, that governs the registration of privileges (art. 2103 C.C.) and which stipulates that a notice or memorial to which a sworn deposition of the creditor is annexed must be deposited at the registry office, also applies in the case of a claim by a sub-contractor. Although supplementary formalities are imposed by article 2013 (*f*) in the case of a sub-contract, the sub-contractor must nevertheless perform the other essential formalities prescribed by the general rule contained in article 2103 C.C.— Sworn deposition must be given by the creditor whether registration is by way of notice or by way of memorial. In this case, no privilege could have been acquired by the claimant company as the latter has not accompanied its claim with the affidavit required by the Civil Code. Moreover, even assuming that the registration would be valid in law, no privilege could have been created, as there is no evidence in the record to establish that the amount awarded by the arbitrators were in payment of work done before or after the date on which notice of the contracts had been given to the city of Quebec.

Held, also, that, although the land upon which the reservoir has been constructed cannot be made subject to a privilege, such land being the property of the Crown, the reservoir itself may be so subject as a distinct immoveable. But, in this case, such reservoir, being connected with the municipal aqueduct then in operation, forms part of the public domain and consequently cannot be made subject to a

1940

CONCRETE COLUMN CLAMPS LTD. v. THE CITY OF QUEBEC.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE. v. CONCRETE COLUMN CLAMPS LTD.

privilege. Such reservoir, from the very beginning of the work, and not from the date of the completion of the work, was part of public domain by destination.

Held, further, that under the circumstances of this case, the award of the arbitrators should be declared to be binding upon the parties who have agreed to such submission.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming that part of the judgment of the Superior Court, Prévost J. (2) which had dismissed the demand of the appellant, Concrete Column Clamps Ltd., against the mis-en-cause, the city of Quebec, for a declaration of privilege; but reversing the other part of that judgment, which had dismissed the action of Concrete Column Clamps Ltd. against La Compagnie de Construction de Québec, Limitée, thus maintaining the same for a sum of $25,622.74 being the amount of an award given by arbitrators.

The appellant, the Concrete Column Clamps Limited, was a sub-contractor of the respondent company, La Compagnie de Construction de Québec Limitée, which latter had a contract with the city of Quebec relating to the construction of a municipal reservoir. The Concrete Column Clamps Limited appellant's claim is based upon two contracts with the respondent company, La Compagnie de Construction de Québec, Limitée, and the appellant sought to recover a balance alleged to be due under these contracts, which, with a further sum of "extras" agreed upon, amounted to the total sum of $75,173.55. The appellant further asserted a privilege upon certain immoveable property in connection with the reservoir and in relation to which the appellant had registered various claims for privilege. The action was contested by the respondent company, alleging that the work had not been completed by the appellant company but, in fact, had been abandoned; that no extras had been agreed upon, and the appellant had received more than it was entitled to. The respondent also contested the alleged claim for a privilege. The respondent mis-en-cause, the city of Quebec, by a separate plea, likewise contested the action on various grounds, and particularly contended that the immoveable property in question formed part of the public domain

(1) (1939) Q.R. 67 K.B. 536. (2) (1939) Q.R. 77 S.C 543.

and was not subject to any such registration of privileged claims. The city respondent further alleged that the essential formalities for registering such a privileged claim had not been complied with, and it further alleged that, in any event, such registration as was effected was tardy. The present action was taken in May, 1933. Before the case actually came to trial, the Concrete Column Clamps Limited and La Compagnie de Construction de Québec, Limitée, entered into an arbitration agreement. The Concrete Column Clamps Limited, being the party of the first part, was therein described as,

herein acting by Mr. Dominique Vocisano duly authorized by resolution of the board of directors, a copy of which is hereunto annexed to form part, adopted by the directors of the company on the 31st May, 1935.

The company respondent, La Compagnie de Construction de Québec, Limitée, is also therein described as,

herein acting by Mr. Béloni Poulin duly authorized hereto by resolution of the board of directors, adopted on the 1st December, 1932, a copy whereof if hereunto annexed.

This arbitration agreement, after having set out that the parties were then engaged in litigation, and that the respective claims involved questions of law and facts, and that the questions of fact were complicated, proceeds to declare that the parties desired to submit these questions to experts who shall decide in a final and definitive manner, after having examined the contracts and the agreement and heard the witnesses, what sums may be respectively due to each of the parties. The agreement further proceeded to name two civil engineers, Mr. Olivier Lefebvre and Mr. C. V. Johnson, as the arbitrators, and the parties agreed to submit to them all the documents that the experts considered necessary, and to produce their respective witnesses. It was further provided that no testimony would be taken by stenography, and no advocate would assist at the inquiry; the arbitrators were to make their report without being obliged to give any reasons for their decision; and the parties agreed, in advance, to accept the decision of the arbitrators as final. The award was to be rendered not later than thirty days after the date of the arbitration agreement. The arbitration agreement was signed as follows: Béloni Poulin; Concrete Column Clamps Limited, per Dominique Vocisano. The arbitrators accepted their appointment, and proceeded to execute their task,

1940

CONCRETE COLUMN CLAMPS LTD. v. THE CITY OF QUEBEC.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE. v. CONCRETE COLUMN CLAMPS LTD.

and on the 8th August, 1935, deposited their award with Mr. C. E. Taschereau, notary. In this award the arbitrators expressly mentioned that the two companies parties to the arbitration agreement had written letters extending the delay for rendering the award to the 15th day of August, 1935. The arbitrators had been duly sworn, and after hearing witnesses and examining the documents they agreed, in their decision, that the company appellant, the Concrete Column Clamps Limited, was entitled to the sum of $25,622.74 in final settlement of all claims due to one another: thus disposing of the counter-claim of the company respondent. The latter refused to abide by the award, or to pay the same, and ultimately the appellant company made a motion to be allowed to file a supplementary answer invoking the arbitration agreement and the award. This motion was granted, and on appeal to the Court of King's Bench, appeal side, the judgment allowing such supplementary answer was affirmed on the 19th March, 1936. The supplementary answer was accordingly produced, and a reply thereto filed by the respondent company. In opposition to this award the respondent company raised various objections, contending that certain formalities had not been complied with, but relying generally upon the contention that the arbitration agreement was intended to put an end to the litigation, and was therefore a "transaction." The respondent accordingly submitted that the arbitration agreement was illegal and invalid as not having been legally executed by the company respondent, the respondent alleging that, although the arbitration agreement was signed by its president, Béloni Poulin, as appeared from the document itself, the latter had no authority, as such, to enter into a contract amounting to a transaction. The respondent also alleged that although it appeared in the preamble to the arbitration agreement that Mr. Poulin was duly authorized by resolution of the board of directors, a copy of which was declared to be annexed thereto, no such copy was in fact annexed to the arbitration agreement, and as a consequence the appellant had failed to establish that Mr. Poulin, the president of the respondent company, had the

necessary authority to execute such an agreement, and accordingly the agreement itself was null and void and the award following thereon was valueless.

Gustave Monette K.C. and *B. Robinson K.C.* for the appellant in first appeal and respondent in second appeal, The Concrete Column Clamps Limited.

Aimé Geoffrion K.C. and *M.-L. Beaulieu K.C.* for the respondent The City of Quebec and the appellant La Compagnie de Construction de Québec, Limitée.

FIRST APPEAL

The judgment of the Court was delivered by

TASCHEREAU J.—L'appelante a poursuivi la Compagnie de Construction de Québec pour la somme de $75,173.55. Elle allègue dans son action que ce montant lui est dû pour travaux qu'elle a éxécutés en vertu d'un sous-contrat qui lui a été consenti par la Compagnie de Construction de Québec. Cette dernière compagnie était le contracteur principal nommé par la cité de Québec pour construire un réservoir municipal sur la Parc des Champs de Bataille. La cité de Québec est mise en cause afin qu'il soit dit et déclaré que le réservoir construit sur le lot 4437, de même que ce lot, sont affectés d'un privilège pour garantir le paiement de cette somme.

La Compagnie de Construction de Québec Limitée ainsi que la cité de Québec ont produit au dossier chacune un plaidoyer séparé, et avant que la cause ne soit inscrite pour audition il a été convenu entre la Compagnie de Construction et la Concrete Column Clamps Limited de soumettre le litige à des arbitres.

Ceux-ci en sont venus à la conclusion que la Concrete Column Clamps Limited avait droit à $25,622.74. Par décision de M. le juge Gibsone confirmée par la Cour du Banc du Roi, ce rapport des arbitres a été versé au dossier et l'honorable juge Prévost, le 30 juin 1938, a rejeté l'action de la Concrete Column Clamps contre la Compagnie de Construction, et il a également refusé d'accorder les conclusions contre la cité de Québec, à l'effet que le réservoir et le lot sur lequel le réservoir est construit, étaient affectés d'un privilège.

1940

CONCRETE COLUMN CLAMPS LTD. v. THE CITY OF QUEBEC.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE. v. CONCRETE COLUMN CLAMPS LTD.

Taschereau J.

La Concrete Column Clamps a appelé de ce jugement. Par jugement de la Cour du Banc du Roi, l'appel de la Concrete Column Clamps a été maintenu contre la Compagnie de Construction pour la somme de $25,622.74 déterminée par les arbitres, mais l'appel contre la cité a été rejeté avec dépens.

Nous avons à décider dans la présente cause si la Concrete Column Clamps Limited a droit aux conclusions qu'elle demande contre la cité de Québec, c'est-à-dire si le réservoir et le lot sur lequel il est construit sont affectés d'un privilège.

Les questions soumises sont donc de savoir si le privilège a été rédigé suivant les formes légales, si les avis nécessaires ont été donnés dans le temps voulu, et si ce réservoir, propriété de la cité de Québec, peut être affecté d'un privilège de constructeur.

La règle qui gouverne l'enregistrement des privilèges se trouve à l'article 2103 C.C. Cet article nous dit qu'un avis ou bordereau accompagné d'un affidavit doit être déposé au bureau d'enregistrement. C'est la procédure qui doit être rigoureusement employée pour que le privilège soit régulièrement conservé, et la règle est impérative. Elle s'applique pour la conservation du privilège d'architecte, de constructeur, de fournisseur de matériaux, mais fait exception pour le privilège de l'ouvrier qui est conservé sans les formalités de l'enregistrement.

Lorsqu'il s'agit du sous-entrepreneur, l'article 2013 (*f*) C.C. exige des formalités supplémentaires. Il faut, nous dit l'article, que le sous-entrepreneur dénonce au propriétaire l'existence de son contrat avec le contracteur principal et, à cette condition, le privilège sera conservé pour les travaux exécutés après la dénonciation. Mais le législateur n'a pas dispensé le sous-entrepreneur de remplir les autres formalités essentielles car l'article 2013 (*f*) C.C. ajoute "pourvu qu'il fasse enregistrer avant l'expiration des trente jours qui suivent la fin des travaux un état de sa créance. Ce privilège est soumis aux mêmes formaliés que celui du constructeur et de l'architecte, quant à sa création et son extinction." Quelles sont ces formalités? Elles se trouvent évidemment à l'article 2103 C.C. qui contient les règles générales concernant l'enregistrement de ces privilèges. Cet article ne mentionne pas le mot " sous-entrepreneur ",

mais l'article 2013 (*a*) C.C. nous dit que le mot " constructeur " comprend également un entrepreneur et un sous-entrepreneur.

On a soutenu que l'affidavit n'était nécessaire que lorsque l'enregistrement se faisait par bordereau et qu'il n'était pas essentiel lorsqu'on procédait au moyen d'un avis donné au propriétaire. Je ne puis accepter cette proposition. "Avis" et " bordereau" doivent être interprétés comme ayant un sens identique. La nécessité de l'affidavit est manifeste. Il a pour but d'empêcher un contracteur peu scrupuleux de grever d'un privilège frivole l'immeuble d'un propriétaire. Il serait étrange que l'affidavit fût nécessaire lorsque l'enregistrement se fait par bordereau, et qu'il ne le fût pas lorsqu'on enregistre au moyen d'un avis. Comme la loi est impérative et que le privilège n'est conservé que par l'enregistrement d'un avis ou bordereau sous forme d'affidavit, il s'ensuit que dans la présente cause soumise à la considération de cette Cour, le privilège est nul vu que l'affidavit nécessaire n'a pas été produit. Ce seul point pourrait disposer de la cause, mais il n'est pas sans intérêt de discuter également les autres questions soumises.

La demanderesse réclame un privilège comme sous-entrepreneur, mais tel privilège, nous l'avons vu, ne peut exister en faveur du sous-entrepremenur que pour la valeur des travaux exécutés après la dénonciation de son contrat au propriétaire.

L'appelante a notifié la cité de Québec une première fois par lettre le 21 juin 1932, mais il est prouvé et admis que cette lettre n'a été remise à la cité de Québec que le 6 septembre 1932. Un second avis a été adressé à la ville le 28 septembre 1932, mais à ces deux dates, la majeure partie de l'ouvrage était accomplie. Quant aux travaux supplémentaires, ils n'ont été dénoncés qu'après leur complète exécution.

Il n'y a aucune preuve au dossier nous permettant de conclure que les montants accordés par les arbitres sont en paiement des travaux exécutés avant ou après les dates où les contrats ont été dénoncés. A cause de cette incertitude, il me faut en venir à la conclusion que les dénonciations ont été tardives, et pour cette raison je crois que même si l'enregistrement eut été valide, le privilège serait inexistant.

1940

CONCRETE COLUMN CLAMPS LTD. v. THE CITY OF QUEBEC.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE. v. CONCRETE COLUMN CLAMPS LTD.

Taschereau J.

Enfin, une dernière question se présente. Ce réservoir construit sur un terrain propriété du gouvernement fédéral était-il susceptible d'être affecté d'un privilège? Ce terrain est connu sous le numéro 4437 du cadastre officiel de la Division Montcalm dans la cité de Québec. Il est la propriété du gouvernement fédéral mais est administré par la Commission des Champs de Bataille Nationaux. Le 3 juillet 1931, celle-ci, dûment autorisée, donnait à la cité de Québec le droit de construire un réservoir sur le lot 4437 sans cependant en abandonner la propriété. La Commission consentait à la ville un droit de superficie distinct du droit de propriété du gouvernement fédéral. L'existence d'un semblant de droit de superficie a été reconnue déjà par cette Cour dans une cause de *Tremblay* v. *Guay* (1). Il a de plus été défini de la façon suivante par Fuzier-Herman Répertoire Vo. Superficie, No. 1:

> Le droit de superficie consiste à avoir la propriété des édifices ou plantations reposant sur un terrain qui appartient à autrui.

Baudry-Lacantinerie & Chauveau, Bien, No. 372, s'expriment de la façon suivante:—

> L'article 555 statue en vue de constructions faites à l'insu du propriétaire du terrain. Si les constructions ont été faites à sa connaissance et surtout avec son autorisation, il ne pourra pas les revendiquer comme lui appartenant, ni forcer le constructeur à les démolir. Il intervient, en pareil cas, entre le propriétaire du terrain et le constructeur un contrat sui generis, en vertu duquel le propriétaire du sol autorise le constructeur à jouir des constructions pendant un certain temps, autant qu'elles dureront. Il y a création au profit du constructeur d'une sorte de droit de superficie.

Sirey, 3ième édition, 1892, page 671, nous dit ce qui suit:—

> Les constructions élevées sur un terrain dépendant du domaine public, en vertu d'une permission de l'administration, constituent, bien que cette permission soit révocable, des immeubles qui peuvent être valablement transmis, hypothèqués et saisis comme tels, sous la condition résolutoire de la révocation du dernier.

Il est certain que le terrain propriété de la Couronne ne peut être affecté d'un privilège, mais le réservoir, immeuble séparé, peut l'être s'il ne fait pas lui-même partie du domaine public. L'intimée cite la cause de *Gadbois* v. *Stimson-Reeb Builders Supply Co.* (2). Cette cause n'est pas semblable à celle qui nous est soumise, mais le procureur de l'intimé rappelle ce que disait M. le juge Lamont

(1) [1929] S.C.R. 29. (2) [1929] S.C.R. 587.

à la page 593 pour établir sa prétention que le mot "immeuble" comprend et la bâtisse et le terrain et en tire la conclusion que si le terrain ne peut pas être affecté d'un privilège, la bâtisse ne peut pas l'être davantage. Voici ce que disait M. le juge Lamont:—

> The word "immoveable" here means the premises to which additional value is given by the work done or the materials used. That is the land and any building erected thereon forming in law a part thereof.

Je concours dans cette expression d'opinion, mais dans cette cause qui nous est citée le terrain était susceptible d'être affecté d'un privilège. On ne peut pas cependant en conclure que si le terrain n'est pas susceptible d'être affecté d'un privilège, un immeuble dessus construit et qui constitue une entité différente jouira de la même exemption. Il ne faut pas donner au jugement dans cette cause de *Gadbois* (1) une portee qu'il n'a a pas. Je n'ai pas d'hésitation à dire qu'un réservoir raccordé à l'aqueduc municipal alors en opération, fait partie du domaine public et qu'il ne peut en conséquence être affecté d'un privilège. Vide: Aubry et Rau, Vol. 2, page 43, 5ième édition; Baudry & Lacantinerie, Vol. 6, "Des Biens" page 141, 3ième édition; Laurent, Vol. 6, No. 63, page 85; Dalloz, "Répertoire Pratique", Vo "Commune" No. 3232; Dalloz, Répertoire Pratique, Vo "Domaine public" No. 82; Hauriou, "Précis de Droit Administratif et de Droit Public", page 828, 12ième édition; Dillon, Municipal Corporations, 5ième édition, Vol. 3, Nos. 992 et 993, page 1586; McQuillan, Municipal Corporations, 2ième édition, Vol. 3, No. 1263, page 789.

L'appelante a soumis subsidiairement que même si, en principe, un immeuble municipal fait partie du domaine public, il ne peut être considéré comme tel qu'au moment de la prise de possession par la municipalité. Or, comme la cité de Québec n'a pris possession du réservoir que le 19 mai 1933, et qu'à cette date les travaux étaient exécutés, il s'ensuivrait que lorsque le privilège a été enregistré le réservoir pouvait être valablement affecté d'un privilège. Cette prise de possession ou affectation au domaine public dont parlent les auteurs et qui rend un immeuble municipal "extra commercium" est nécessaire lorsque l'immeuble en question a été originairement la propriété d'un individu. Si pendant cette possession l'immeuble est affecté d'un

(1) [1929] S.C.R. 587.

1940

CONCRETE COLUMN CLAMPS LTD. v. THE CITY OF QUEBEC.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE. v. CONCRETE COLUMN CLAMPS LTD.

Taschereau J.

privilège, celui-ci continuera à subsister lors même que la propriété serait subséquemment incorporée au domaine public. Mais lorsque dès avant la construction il y a une destination au domaine public, la situation légale n'est plus la même. Dans le cas qui nous occupe, l'affectation aux fins municipales a été déterminée par la loi 20 Geo. 5, article 1er, chap. 110 et aussi par la résolution de l'autorité municipale. Il s'ensuit donc que dès l'origine le réservoir, par destination faisait partie du domaine public et qu'il n'est pas susceptible d'être affecté d'un privilège.

Pour ces raisons, l'appel doit être rejeté avec dépens.

SECOND APPEAL

The judgment of the Court was delivered by

TASCHEREAU J.—L'appelante, la Compagnie de Construction de Québec Limitée, a obtenu de la cité de Québec un contrat pour la construction d'un réservoir municipal situé sur le Parc des Champs de Bataille. Elle a consenti un sous-contrat à l'intimé, la Concrete Column Clamps Limited, qui a institué contre l'appelante une action au montant de $75,173.55 pour travaux exécutés et non payés.

Au cours du procès, les parties ont décidé de soumettre leurs difficultés à un arbitrage et le rôle des arbitres était de déterminer le montant qui pouvait être dû au sous-contracteur.

La sentence arbitrale a fixé ce montant à $25,622.74, et par décision de M. le juge Gibsone confirmée par la Cour du Banc du Roi cette sentence a été versée au dossier. L'honorable juge Prévost a rejeté l'action, mais la Cour du Banc du Roi renversant la décision de la cour inférieure l'a maintenue pour cette somme.

L'appelante soutient que le contrat d'arbitrage exécuté entre les parties est illégal et nul parce qu'il n'a pas été signé par un de ses officiers ayant la capacité légale de le faire. Elle prétend également que la sentence arbitrale est inopérante parce qu'elle n'aurait pas été rendue dans les délais fixés au contrat intervenu entre les parties.

Si l'appelante a raison, l'action doit être rejetée car ce rapport des arbitres est la seule preuve qui soit au dossier.

L'article 1432 du Code de Procèdure Civile se lit de la façon suivante:—

> Il n'y a que ceux qui ont la capacité légale de disposer des objets compris dans le compromis qui puissent s'y soumettre.

Je ne crois pas que l'on puisse contester le pouvoir d'une compagnie de se soumettre à un arbitrage. Elle a la capacité légale de le faire et son acte n'est pas *ultra vires* de ses pouvoirs généraux. On conteste cependant l'autorité de Béloni Poulin, le président de la compagnie appelante, de signer pour celle-ci le contrat soumettant ce litige aux arbitres. Dans l'acte qu'il a signé, Béloni Poulin déclare qu'il y a été dûment autorisé, et l'absence d'une copie de résolution n'est pas, à mon avis, suffisante pour entrainer la nullité de l'acte.

On prétend que la résolution invoquée est antérieure au procès, vu qu'elle porte la date du 1er décembre 1932 et que l'action n'a été instituée qu'au cours du mois de mai 1933. L'explication fournie par le procureur de l'intimé me satisfait. Il s'agirait d'une résolution antérieure conférant au président le pouvoir général de signer des documents comme celui qui fait l'objet du présent litige.

D'ailleurs, il incombait à l'appelante de faire la preuve du défaut d'autorité de son président vu que c'est elle qui l'invoquait.

Il est à remarquer que c'est longtemps après la signature du contrat que l'appelante prend l'attitude actuelle. Après la signature de la convention, elle y a donné suite, elle a produit une preuve devant les arbitres, elle a fait venir ses témoins, et lorsque l'intimée a voulu verser au dossier le rapport des arbitres, elle a invoqué ce même arbitrage qu'elle veut répudier maintenant pour prétendre que le procès était définitivement réglé. Cette prétention que le président de l'appelante n'était pas autorisé vient, à mon sens, tardivement et ne peut pas être entretenue. Tout dans le dossier démontre que l'appelante a ratifié les actes de son président et elle n'a jamais songé à le désavouer.

Quant au second point soulevé à l'effet que la sentence arbitrale n'a pas été rendue dans les délais stipulés au contrat, je crois qu'il est mal fondé. L'appelante et l'in-

1940

CONCRETE COLUMN CLAMPS LTD. v. THE CITY OF QUEBEC.

LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE. v. CONCRETE COLUMN CLAMPS LTD.

Taschereau J.

timée ont toutes deux fait parvenir des lettres aux arbitres pour étendre le délai et ceux-ci ont rendu leur sentence dans le temps mentionné aux consentements.

Pour les raisons données lors de l'étude du premier grief de l'appelante, je crois que les signataires de ces lettres avaient l'autorisation voulue et que l'appel doit être rejeté avec dépens.

Appeals dismissed with costs.

Solicitors for the appellant in the first appeal and the respondent in the second appeal, The Concrete Column Clamps Limited: *Robinson & Shapiro.*

Solicitor for the respondent in the first appeal and the appellant in the second appeal: *Marie-Louis Beaulieu.*

1940

* May 17.
* June 29.

THOMAS-LOUIS BERGERON (PLAINTIFF) ..... APPELLANT;

AND

ERROL LINDSAY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Promissory note—Signed by two or more persons—Payment in full by one of them—Action by the latter against co-debtors to recover their share of the debt—Nature of the claim—Whether commercial matter—Prescription of the action—Whether by five or thirty years—Articles 1117, 1118, 1156, 2242, 2260 (4) C.C.—Bills of Exchange Act, s. 139.

When a promissory note signed by two or more persons has been paid in full by one of them, an action by the latter to recover from any of the co-debtors the share or portion due by him is subject to the prescription of five years provided by Article 2260 (4) C.C.

The claim of the holder against the signers, based upon a promissory note, is, at its origin, of the nature of a commercial matter; and the co-debtor who has paid it in full, having thus been subrogated in the rights of the creditor by operation of the law as to the share or portion of the note due by any of his co-debtors, has therefore acquired himself a claim of the nature of a commercial matter against such co-debtor.

* PRESENT:—Duff C.J. and Crocket, Davis, Hudson and Taschereau JJ.

1940

BERGERON v. LINDSAY.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Prévost J. and dismissing the appellant's action.

The appellant and the respondent, both directors of a limited company in insolvency, signed a promissory note in favour of a bank for a sum of $4,639.17 in payment of a debt due by the company to the bank. The appellant paid in full the amount of the note when due and brought an action against his co-debtor, the respondent, for $2,569.49 representing the latter's share or portion of the total amount paid to the bank for capital and interest. The last instalment paid by the appellant to the bank was in 1927, and the writ was served upon the respondent in 1938. The respondent pleaded that the appellant's claim was subject to the prescription of five years provided by paragraph 4 of article 2260 C.C.; while the appellant contended that the rights of the parties were governed by the terms of article 2242 C.C., on the ground that any claim under the promissory note had been extinguished by the payment of the note which no more existed and that a new debt not commercial in its nature has been created by articles 1117 and 1118 C.C. (1).

Aimé Geoffrion K.C. for the appellant.

J. A. Dion for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—L'appelant, demandeur en cour inférieure, et l'intimé étaient tous deux directeurs de la Cie de Canots de Roberval Ltée. Cette compagnie était incapable de rencontrer ses obligations, et les parties en cette cause ont alors signé en faveur de la Banque Canadienne Nationale un billet promissoire au montant de $4,639.17. L'appelant a payé seul la totalité du billet ainsi que les intérêts, moins ce qui a été réalisé par la vente de certaines garanties, et il a institué contre le défendeur une action pour la somme de $2,569.48, représentant la part de responsabilité de son codébiteur.

(1) Reporter's Note: The Court of King's Bench has rendered a previous decision on similar questions of law in *Lévesque* v. *Bergeron* (1939) Q.R. 66 K.B. 213.

1940

BERGERON v. LINDSAY.

Taschereau J.

L'action a été signifiée le 4 mars 1938, et le dernier paiement à la Banque fait par le demandeur l'a été le 27 septembre 1927. Le défendeur a invoqué le plaidoyer de prescription, et la Cour Supérieure et la Cour du Banc du Roi lui donnant raison ont rejeté la demande.

Devant cette Cour se soulève en outre la question de juridiction et il importe en premier lieu de la décider. Selon l'intimé, l'appelant aurait payé $2,888.00 de capital et $368.00 d'intérêt, formant un total de $3,256.00. On a produit à l'enquête un état démontrant en capital et intérêt déboursés, $4,256.00, mais ce chiffre comporte une erreur manifeste de $1,000.00. Cependant, à cette somme de $3,256.00 il faut ajouter les intérêts se chiffrant à $810.00, soit 5% sur $3,256.00 durant 5 ans, ce qui donne un montant global de $4,066.00. Comme l'appelant ne réclame que la moitié de cette somme, son action serait donc réduite à $2,033.00, et ce montant serait suffisant pour donner juridiction à cette Cour.

L'intimé prétend cependant que l'appelant ne peut pas réclamer d'intérêt sur l'item de $368.00 car, dans l'affirmative, il obtiendrait l'intérêt sur l'intérêt, ce qui est contraire aux dispositions du Code Civil. Je ne puis admettre cette prétention de l'intimé, car il ne s'agit pas de réclamer l'intérêt sur de l'intérêt, mais bien l'intérêt sur des déboursés faits par l'appelant. Le montant en jeu est donc de $2,033.00 et il est, en conséquence, suffisant pour donner juridiction à cette Cour.

La question la plus importante qui se pose est de savoir si le plaidoyer de prescription de l'intimé est bien fondé, comme l'ont décidé et la Cour Supérieure et la Cour du Banc du Roi. Il s'est évidemment écoulé entre la date du dernier paiement et la date de l'institution de l'action une periode de temps suffisante pour que la demande soit prescrite, si la prescription de 5 ans doit s'appliquer, mais si la prescription trentenaire doit régler les droits des parties, la situation sera bien différente.

L'appelant base ses prétentions sur les articles 1117 et 1118 du Code Civil qui se lisent de la façon suivante:—

1117. L'obligation contractée solidairement envers le créancier, se divise de plein droit entre les codébiteurs qui n'en sont tenus entre eux que chacun pour sa part.

1118. Le codébiteur d'une dette solidaire qui l'a payée en entier, ne peut répéter contre les autres que les parts et portions de chacun d'eux, encore qu'il soit spécialement subrogé aux droits du créancier.

Lorsque le billet a été payé, nous dit l'appelant, il a été libéré en vertu des dispositions de l'article 139 de la Loi des Lettres de Change, qui dit:—

139. Une lettre de change est acquittée par paiement régulier fait par le tiré ou accepteur ou pour lui.

Toujours d'après l'appelant, cet effet commercial étant disparu ne peut servir de base à l'action, mais celle-ci trouve son fondement sur les articles 1117 et 1118 C.C. qui donnent à celui qui a payé le droit de réclamer la moitié de ses déboursés en capital et intérêt. Il s'agirait, en conséquence, d'une créance nouvelle qui n'est pas assujettie à la prescription de 5 ans prévue au paragraphe 4 de l'article 2260 C.C. D'autre part, l'intimé soutient que l'appelant ayant payé la totalité du billet est subrogé dans les droits de la Banque Canadienne Nationale et a un recours contre son codébiteur pour la moitié de ses déboursés, non pas en vertu de 1117 et 1118 C.C. mais bien en vertu du paragraphe 3 de l'article 1156 C.C. qui se lit ainsi:—

1156. La subrogation a lieu par le seul effet de la loi et sans demande:

* * *

(3) Au profit de celui qui paye une dette à laquelle il est tenu avec d'autres ou pour d'autres, et qu'il a intérêt d'acquitter.

Il n'y a pas de doute que l'appelant et l'intimé étaient conjointement et solidairement responsables vis-à-vis la Banque pour le montant total apparaissant au billet promissoire. L'un n'était pas la caution de l'autre mais ils étaient bien tous deux responsables solidairement pour la totalité de la créance, et la Banque pouvait exercer son recours contre l'un ou contre l'autre.

M. Bergeron, le demandeur appelant, nous explique de la façon suivante comment cette dette a été créée vis-à-vis la Banque:—

M. Lindsay et moi avions avancé pas mal d'argent à la compagnie, et le seul moyen que nous avions d'espérer un remboursement partiel c'était de conserver les immeubles qui restaient à la compagnie. Nous avions un double intérêt à la conservation de ces immeubles. D'abord, nous voulions en empêcher la vente judiciaire. Nous n'avions pas les moyens dans le temps de racheter pour nous protéger, et une vente judiciaire provoquait immédiatement la demande d'une obligation de $10,000 en faveur de l'abbé Joseph Savard, que nous avions cautionnée, M. Lindsay et M. Armand Lévesque et moi, solidairement, par un billet. Alors une vente par le shérif nous mettait cette dette sur les épaules et nous enlevait toute protection possible pour notre remboursement.

1940

BERGERON v. LINDSAY.

Taschereau J.

Les parties étaient donc toutes deux responsables vis-à-vis la Banque, et celui qui payait la totalité de cette créance payait une dette à laquelle il était tenu avec l'autre, et qu'il avait manifestement intérêt d'acquitter, pour éviter des procédures légales et une exécution possible. La question ne manque pas d'intérêt, et pour la résoudre, il faut d'abord examiner la nature de la subrogation légale. Pothier la définissait de la façon suivante:—

> C'est une fiction de droit par laquelle le créancier est censé céder ses droits, actions, hypothèque et privilège à celui de qui il reçoit son dû.

Mourlon nous dit que

> c'est la substitution plus ou moins complète d'une tierce personne dans les droits du créancier qui a été payée par elle.

Ainsi donc, l'on voit par ces définitions que non seulement les garanties sont transportées au subrogé, mais également les droits et actions, et cela par l'opération de la loi sans qu'il soit nécessaire d'avoir recours à aucune formalité.

La créance elle-même est transportée au subrogé, et c'est ce qu'enseignent Planiol et Ripert, Traité Elémentaire de Droit Civil, Vol. 2, page 179, où, traitant de l'effet translatif de la subrogation, ils s'expriment de la façon suivante:—

> Dans son ensemble l'opération est une *transmission de créance*. Le débiteur a maintenant un créancier nouveau, le subrogé, à la place de l'ancien.
>
> La subrogation fait acquérir au subrogé tous les droits du créancier payé, non pas seulement les droits accessoires (privilège, hypothèque, cautionnement, etc.) mais la *créance elle-même,* le droit principal auquel ces diverses garanties sont attachées.

Ceci semblerait venir en conflit avec les dispositions de l'article 139 de la Loi des Lettres de Change cité plus haut, mais je crois qu'une distinction s'impose. L'article 139 libère sans doute la lettre de change qui est payée, mais l'obligation n'est éteinte par ce paiement qu'à l'égard du créancier et elle ne l'est certainement pas à l'égard du débiteur. La Banque Canadienne Nationale, évidemment, ayant reçu son paiement, ne peut plus exercer aucun recours, mais le nouveau créancier, l'appelant, subrogé par une fiction de la loi pour une partie de sa créance, peut sans doute exercer les droits que la Banque aurait pu exercer contre l'intimé.

Pothier, cité par Mourlon, "Subrogations Personnelles", page 12, dit ce qui suit, en traitant du paiement avec subrogation:—

C'est, dit-il, un vrai paiement, car ce n'est que par une fiction de droit que le subrogé est censé avoir plutôt racheté la créance que l'avoir payée, "magis emisse nomen quam solvisse intelligitur". Mais cette fiction ne doit profiter qu'à lui.

Un autre auteur, Bigot de Préameneu s'exprime ainsi:—

Une obligation peut être éteinte à l'égard du créancier par le paiement que lui fait un tiers subrogé dans ses droits, sans que cette obligation soit également éteinte, à l'égard du débiteur.

Mourlon au même traité nous dit à la page 10:—

Mais, dit-on, là où il y a paiement il y a extinction de la dette; donc la subrogation ne peut pas transporter la créance elle-même. Pour vouloir trop prouver, ce raisonnement ne prouve rien; car s'il est vrai qu'il est de l'essence d'un paiement d'éteindre la dette, s'il est vrai que la subrogation qui l'accompagne ne l'empêche pas de produire ses effets ordinaires, comment se fait-il que les accessoires de la dette lui survivent? Quoi! la créance est éteinte et ses garanties subsistent encore?

Il s'ensuit donc que l'effet de la subrogation légale prévue au paragraphe 3 de l'article 1156 est de transporter la *créance elle-même* avec tous ses accessoires. Pendant longtemps, la transmission de la créance a été contestée en France parce que l'on a prétendu que la subrogation avait seulement pour but de transmettre au subrogé les garanties accessoires qui appartenaient à l'ancien créancier. Planiol et Ripert, Traité Elémentaire de Droit Civil, vol. 2, page 179, nous disent que cette opinion est aujourd'hui entièrement abandonnée parce qu'elle est contraire à la tradition et surtout au texte du code qui dit que le subrogé acquiert tous les droits du créancier. S'il acquiert tous les droits, il acquiert évidemment la créance qui est le plus essentiel des droits et sans lequel les garanties ne pourraient pas subsister. A la même page de l'ouvrage déjà cité, le même auteur s'exprime de la façon suivante:—

Si le subrogé acquiert la créance elle-même, et non pas seulement ses accessoires, il pourra profiter de certains avantages attachés à cette créance et distincts de ses garanties. Ainsi, si la dette payée était commerciale, il pourra poursuivre le débiteur devant les tribunaux de commerce, etc. etc.

Cette dernière citation démontre bien que lorsque la dette payée était une dette commerciale, la créance de celui qui effectue le paiement contre son codébiteur a aussi le caractère d'une réclamation commerciale.

1940

BERGERON v. LINDSAY.

Taschereau J.

Il importe maintenant de considérer la nature de la créance originaire de la Banque Canadienne Nationale contre les signataires du billet. Il ne peut faire de doute que cette créance basée sur un billet promissoire était une créance commerciale, et que l'appelant ayant été subrogé par l'opération de la loi contre l'intimé pour une partie de cette créance, a à son tour une réclamation d'une nature commerciale à exercer contre l'intimé, et que la prescription de 5 ans doit nécessairement trouver son application, en vertu du paragraphe 4 de l'article 2260 C.C.

Les articles 1117 et 1118 C.C. ne viennent pas en conflit avec cette théorie. Il importe en effet, une fois que sont connus les droits du subrogé, de déterminer quelle sera l'étendue de ces droits. Or, c'est ici qu'interviennent ces deux articles du Code Civil et qu'ils nous disent que lorsqu'une obligation est contractée solidairement, le codébiteur qui a payé ne peut répéter des autres que les parts et portions de chacun d'eux. Dans le cas qui nous occupe, ils ne font que limiter les droits du subrogé.

J'en viens donc à la conclusion que la réclamation de l'appelant contre l'intimé est d'une nature commerciale, qu'elle est, en conséquence, prescrite et que les jugements de la Cour Supérieure et de la Cour du Banc du Roi sont bien fondés.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Roland Bergeron.*

Solicitor for the respondent: *J. Alf. Dion.*

1940

GEORGE WESLEY KING, ADMINISTRATOR OF THE ESTATE OF ALICE WINNIFRED KING (PLAINTIFF) ..... } APPELLANT; * June 5. * June 29.

AND

JOSHUA GOODMAN (DEFENDANT).....RESPONDENT.

GEORGE WESLEY KING (PLAINTIFF)....APPELLANT;

AND

JOSHUA GOODMAN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Quantum—Action for damages for deceased's loss of expectation of life, under The Trustee Act, R.S.O., 1937, c. 165, s. 37 (as it stood prior to amendment by 2 Geo. VI, c. 44, s. 3)—Inadequacy of sum awarded by jury—New trial for re-assessment of damages.

Plaintiff's daughter, aged 23 years, was killed in an accident which he alleged was caused by negligence of defendant. Plaintiff sued for damages under *The Fatal Accidents Act,* R.S.O., 1937, c. 210, and also, as administrator of his daughter's estate, for damages for her pain and suffering and loss of expectation of life, under *The Trustee Act,* R.S.O., 1937, c. 165, s. 37 (as it stood prior to the amendment by 2 Geo. VI, c. 44, s. 3). At trial the jury found defendant guilty of negligence causing the accident in the degree of 55%, and assessed the damages under each Act respectively at $500, and plaintiff recovered judgment for 55% thereof in each case. Plaintiff's appeal to the Court of Appeal for Ontario was dismissed, and he appealed to this Court on the question of the quantum of damages.

Held: The jury's assessment of damages under *The Fatal Accidents Act* should not be disturbed. But there should be a new trial for assessment of damages under *The Trustee Act.* Cases dealing with awards for loss of expectation of life reviewed.

Per the Chief Justice, Davis and Taschereau JJ.: It is impossible to say in this case that $500 can, in any view, be proper compensation for the loss of the expectation of life.

Per Crocket and Hudson JJ.: Considering the age, state of health and prospects of deceased, the amount awarded was so small as to indicate clearly that the jury did not appreciate the nature of the remedy provided by the statute.

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* PRESENT:—Duff C.J. and Crocket, Davis, Hudson and Taschereau JJ.

1940

KING v. GOODMAN.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of McTague J.

The plaintiff sued for damages by reason of the death of his daughter, 23 years of age, who was killed in a motor car accident which the plaintiff alleged was caused by negligence of the defendant. The deceased was a passenger in a car driven by one Brady, with which the defendant's car collided.

The plaintiff brought an action on behalf of himself and his wife under the provisions of *The Fatal Accidents Act,* R.S.O., 1937, c. 210, and also an action as administrator of the estate of his daughter, claiming in the latter action damages for the deceased's shortened expectation of life and pain and suffering, under s. 37 of *The Trustee Act,* R.S.O., 1937, c. 165 (as it stood before the amendment by s. 3 of 2 Geo. VI, c. 44, which amendment was subsequent to the commencement of plaintiff's action and therefore, under the provisions of said s. 3, did not apply). The two actions were consolidated. The consolidated action was tried before McTague J. with a jury. The jury, in answers to questions submitted to them, found that the accident was caused by the negligence of both the defendant and Brady, and ascribed the degrees of negligence as follows: against defendant 55%; against Brady 45%. They assessed the damages at $500 under *The Fatal Accidents Act* and at $500 under *The Trustee Act;* and plaintiff recovered judgment for 55% of said sums, namely, $275 in each case. Plaintiff appealed to the Court of Appeal for Ontario, complaining (*inter alia*) against the amount of damages awarded by the jury. His appeal was dismissed, and he appealed to the Supreme Court of Canada, limiting his appeal to the question of the quantum of damages. During the hearing of the appeal this Court stated that it would not interfere with the amount of damages as assessed by the jury under *The Fatal Accidents Act,* and the reasons for judgment now reported deal with the question as to the amount of damages under *The Trustee Act.*

R. A. Hughes for the appellant.

J. D. Watt for the respondent.

The judgment of the Chief Justice and Davis and Taschereau JJ. was delivered by

DAVIS J.—By sec. 3 of *The Trustee Amendment Act, 1938* (2 Geo. VI, ch. 44), assented to April 8, 1938, the Ontario Legislature amended subsec. 1 of sec. 37 of *The Trustee Act* (R.S.O., 1937, ch. 165) by adding at the end thereof the words:

> provided that if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso shall not be in derogation of any rights conferred by *The Fatal Accidents Act.*

The amendment was expressly declared by subsec. (2) of said sec. 3 not to apply to pending litigation. The writs in these actions, one under *The Fatal Accidents Act* and one under *The Trustee Act,* were issued March 2, 1938, and the actions were consolidated by an order dated March 24, 1938. We have therefore in this appeal to consider the question of damages for the loss of the expectation of life as the law stood prior to the amendment to *The Trustee Act* on April 8, 1938.

Alice Winnifred King, a young woman of 23 years of age, was struck by the respondent's motor car and died within a few hours from her injuries. The consolidated action went to trial before McTague J. with a jury. The jury found both parties to the accident at fault and apportioned fault, 55% against the respondent and 45% against the deceased. The jury assessed the damages under *The Fatal Accidents Act* at $500 and under *The Trustee Act* at $500. It is not disputed that the jury intended the $500 for loss of expectation of life to be in addition to the $500 under *The Fatal Accidents Act.* The appellant appealed to the Court of Appeal for Ontario against the quantum of the damages but the appeal was dismissed. The appellant then appealed to this Court.

As to the amount of damages under *The Fatal Accidents Act,* counsel for the appellant did not press that branch of his appeal and the Court in any event stated during the hearing that it would not interfere with that amount. The other branch of the appeal, the amount of damages for the loss of the expectation of life, has occasioned our serious consideration. The appellant contends that $500 was plainly an erroneous estimate of the loss of

1940
KING
v.
GOODMAN.
Davis J.

the expectation of life by the young woman of twenty-three years. In *Rose* v. *Ford* (1) the deceased woman was about the same age and the House of Lords awarded £1,000 for loss of expectation of life. In *Shepherd* v. *Hunter* (2), where a jury, after a proper summing up, had awarded £90 in respect of the loss of expectation of life by a healthy child, aged three, who was killed in a road accident, the Court of Appeal considered the verdict was clearly erroneous and directed a new trial in order that the amount might be re-estimated by another jury. In *Bailey* v. *Howard* (3), the loss of expectation of life by a child of three years had to be valued. The jury awarded £1,000 and the Court of Appeal refused to interfere. In *Ellis* v. *Raine* (4), a child of eight years had been killed by a motor car. The jury awarded £125 damages under *The Fatal Accidents Act* and no damages for loss of the expectation of life. The Court of Appeal sent the case back to be re-tried on the two issues of the amount of damages.

In the very recent case of *Mills* v. *Stanway Coaches Ltd.* (5), the deceased was a married woman thirty-four years of age and in good health. She survived the accident for only four days and for most of that time she was unconscious. The jury assessed the loss of the expectation of life at £2,000 but the Court of Appeal reduced the amount to £1,000.

We think that it is impossible to say in this case that $500 can, in any view, be proper compensation for the loss of the expectation of life. The learned trial judge, McTague J., appears to have taken the same view of the verdict in this regard because after the verdict he suggested to counsel that they endeavour to agree upon some compromise, stating that in his opinion it would be advisable to do so in view of the amount of damages that had been awarded. Counsel for both parties before us stated that they would be willing to have the Court re-assess the damages if we came to the conclusion that the amount awarded by the jury could not stand, but we

(1) [1937] A.C. 826; [1937] 3 All E.R. 359.
(2) [1938] 2 All E.R. 587.
(3) [1939] 1 K.B. 453.
(4) [1939] 2 K.B. 180.
(5) [1940] 2 K.B. 334; [1940] 2 All E.R. 586.

think that the only safe course, if the parties themselves cannot now agree upon an amount, is to have the damages assessed by another jury.

The appeal should therefore be allowed and a new trial should be directed, limited to the assessment of damages in respect of the claim sued upon under *The Trustee Act.* The appellant should have his costs both in this Court and in the Court of Appeal. The appellant will have his costs of the action down to and including those of the abortive trial; the costs of and consequent upon the new trial will be dealt with by the trial judge.

The judgment of Crocket and Hudson JJ. was delivered by

HUDSON J.—There were two actions: the first arising out of the claim under *The Fatal Accidents Act,* R.S.O., 1937, chap. 210, and the second under *The Trustee Act,* R.S.O., 1937, chap. 165.

The plaintiff was awarded by a jury damages of 55% of $500 under the provisions of *The Fatal Accidents Act.* The plaintiff was also awarded 55% of $500 under the provisions of *The Trustee Act.* On appeal to the Court of Appeal for Ontario, this decision was not disturbed. From that decision the present appellant now comes to this Court, the appeal being limited solely to the quantum of damages.

The question of the amount awarded under *The Fatal Accidents Act* was disposed of at the hearing before us and need not now be further considered.

The provision of *The Trustee Act* applicable and in force at the time of the accident is section 37 (1):

> 37. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased.

Miss King lived for a very short time after the accident. The principle upon which damages should be awarded in this case has been the subject of a great deal of discussion both in Canada and in England. The most authoritative statement is in the case of *Rose* v. *Ford* (1).

(1) [1937] 3 All E.R. 359; [1937] A.C. 826.

1940
KING
v.
GOODMAN.
Hudson J.

The statute provides that the administrator may maintain an action for injuries to the person of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do. The court whose business it is to fix the damages is given the very difficult task of postulating the situation of the deceased having brought an action herself for damages for the loss of what remained of her life. Inevitably opinions would vary within very wide range as to what should be awarded in a case of this kind. In a good many of the reported cases the amount awarded has been regarded as excessive in courts of appeal and that amount reduced. In some, where it was so small as to indicate that the trial court did not fully appreciate the nature of the action, the amount has been increased.

I think, in the present case, considering the age, state of health and prospects of the late Miss King, that the amount awarded was so small as to indicate clearly that the jury did not appreciate the nature of the remedy provided by the statute. For this reason, I am of opinion that the matter should be sent back to the trial court for a re-assessment of damages on the issue under *The Trustee Act*. The appellant should have his costs here and in the Court of Appeal and also his costs of action in any event.

Appeal allowed in part with costs, and a new trial ordered as to the amount of damages in respect of the claim under The Trustee Act.

Solicitors for the appellant: *Hughes & Laishley.*

Solicitors for the respondent: *Herridge, Gowling, MacTavish & Watt.*

HERMAS PERRAS ès-qual (PLAINTIFF)...APPELLANT; 1940

AND

BERNARD BRAULT (MIS-EN-CAUSE). }
CÉCILE DION (DEFENDANT) ..... } RESPONDENTS.

* May 20.
* June 29.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contract—Deed of transfer of property—Money consideration stipulated—Evidence of absence of such consideration—Deed not necessarily simulated—Deed valid if evidence of other real and valid consideration.

Where a deed of transfer of property stipulated certain money consideration and it has been later established by evidence that such consideration has never been received by the transferer, it does not necessarily follow that the deed was simulated, if it has been also established that some other real and licit consideration for the transfer had existed. The mere fact that false statements are contained in a deed does not necessarily constitute by itself elements of simulation: if the transferee has some legal right to get into possession of the property, the form under which it is transferred to him is not material.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Duclos J., and dismissing the appellant's action.

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

G. Guérin K.C. for the appellant.

L. E. Beaulieu K.C. for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—Donat Dion, le père de la défenderesse intimée Cécile Dion, était autrefois gérant d'une succursale de la Banque Canadienne Nationale à Montréal. Dans le cours du mois de septembre 1928, il emprunta du mis-en-cause Bernard Brault sept débentures, de $1,000 chacune, de la United Securities Co. Limited. Dion s'engagea à

(1) (1938) Q.R. 66 K.B. 110.

* PRESENT:—Duff C.J. and Crocket, Kerwin, Hudson and Taschereau JJ.

1940

PERRAS v. BRAULT.

Taschereau J.

remettre ces débentures au plus tard le 3 janvier 1929, et en garantie de ce prêt, il céda et transporta au dit Bernard Brault trois cents actions communes de Foreign & Power Securities Corporation Ltd. Il signa à cet effet le document suivant:—

Montréal, le 14 septembre 1928.

Je, soussigné, reconnais avoir reçu de Bernard Brault, comme prêt seulement, sept débentures de $1,000 chacune ($7,000) de United Securities Ltd., 5½%, datées du premier mai 1927, dues le premier mai 1952, et portant les numéros A. M 2859 à 2865 inclus et que je m'engage de lui remettre les débentures précitées d'ici au 3 janvier 1929.

En garantie seulement du prêt ci-haut, je cède et transporte un certificat de 300 actions communes de Foreign & Power Securities Corporation Ltd. portant le no. 08918, daté du 25 août 1928 et enregistré en mon nom.

(Signé) D. Dion.

Comme Dion n'a pu remplir son obligation de remettre les débentures en question, il s'engagea de donner à Brault des garanties supplémentaires, et, le 16 janvier 1931, il signa le nouveau document suivant:—

Montréal, 16 janvier 1931.

Je, soussigné, Donat Dion, de Montréal, pour valeur déjà reçue de M. Bernard Brault, m'engage à lui céder et transporter, à première demande, tous mes droits, titres ou intérêts dans "Duval Motors Limited", et au besoin ma propriété au village de Varennes, pour le cas où les parts de "Duval Motors Limited" ne pourraient pas être réalisées ou ne rapporteraient pas suffisamment pour couvrir ma dette avec le dit Bernard Brault.

Je m'engage en outre à faire les démarches nécessaires pour donner suite aux présentes, et à signer tous écrits en faveur dudit Bernard Brault, ou de celui qui serait désigné par lui.

En foi de quoi j'ai signé à Montréal, ce seizième jour de janvier, mil neuf cent trente-et-un.

(Signé) D. Dion.

La preuve révèle que plus tard, soit au début de 1933, Brault, sur le point de faire un voyage en Europe, demanda à Dion de lui transporter les actions de la Duval Motors Limited et la propriété de Varennes, en exécution de l'écrit du 16 janvier 1931. Brault voulait mettre ordre à ses affaires avant son départ.

Le 13 février 1933, un acte de vente fut signé devant Joseph Romuald Crépeau en vertu duquel la propriété de Dion située à Varennes fut transportée à Brault. Cet acte n'est pas un simple acte de transport tel qu'on pourrait s'y attendre, mais bien un acte de vente dans lequel un prix de $2,000 est stipulé, et où l'acquéreur s'engage à payer les taxes à partir du 1er janvier 1933.

Le 21 février de la même année, les actions de Duval Motors Limited sont effectivement transportées à Brault, et un certificat nouveau pour cent actions est émis en sa faveur. Apparemment, les choses en sont restées là jusqu'au début de 1935, alors que Dion sollicite de Brault un nouvel emprunt. Celui-ci refuse, mais pour des raisons que j'examinerai plus tard, il transporta à la fille de Donat Dion, Cécile Dion, l'intimée, la propriété de Varennes. L'acte signé par les parties est également un acte de vente, où le prix stipulé est de $2,000 que le vendeur Brault reconnaît avoir reçu le jour de la signature dudit acte, soit le 15 avril 1935.

Enfin, le 30 janvier 1936, Donat Dion a fait cession de ses biens et l'appelant, Hermas Perras, a été nommé syndic aux biens du failli. Le 14 septembre 1936, il a institué devant la Cour Supérieure de Montréal une action pour faire annuler et résilier le transport consenti par Dion à Brault ainsi que celui consenti par Brault à Cécile Dion. Il demande dans son action que ces actes soient déclarés simulés, qu'il soit dit et déclaré que le failli Dion a toujours été propriétaire de l'immeuble en question qui ne serait jamais sorti de son patrimoine.

La Cour Supérieure lui a donné raison, a déclaré les deux transports simulés, mais la Cour du Banc du Roi (MM. les juges Tellier et Barclay dissidents) a renversé cette décision. C'est de ce jugement qu'il y a appel.

Il importe de signaler dès maintenant que l'action instituée par le syndic à la faillite n'est pas une action paulienne malgré les allégations que l'on rencontre aux paragraphes 8, 9 et 16 de la déclaration. L'action paulienne doit être instituée avant l'expiration d'un an à compter du jour où le créancier a eu connaissance de la transaction frauduleuse, et elle ne peut être instituée que par un créancier qui connaît l'insolvabilité de la personne avec qui il contracte à titre onéreux. L'action soumise à la considération de cette Cour est bien différente. Il s'agit d'une action en déclaration de simulation et le requérant syndic à la faillite soutient que les actes attaqués sont inexistants, que l'immeuble qui fait l'objet du litige n'est jamais devenu la propriété de l'acquéreur, mais a toujours demeuré dans le patrimoine de Dion. Une semblable action, en conséquence, n'est pas sujette à

1940
PERRAS
v.
BRAULT.
Taschereau J.

la prescription édictée par l'article 1040 du Code Civil, et peut être instituée soit par les créanciers antérieurs à l'acte attaqué, soit par des créanciers postérieurs.

Les parties ne contestent pas que Dion a reçu les sept débentures de $1,000 chacune de la United Securities Co. Limited, et que Brault a également été mis en possession des trois cents actions communes de Foreign & Power Securities Corporation Ltd. L'appelant prétend cependant que Brault n'avait pas droit de se faire transporter la propriété de Varennes, à moins qu'il ne soit établi que les actions de la Duval Motors Limited n'ont pu être réalisées, ou qu'elles n'ont pas rapporté suffisamment pour couvrir la dette de Dion vis-à-vis de Brault. Il n'y a pas de doute qu'à la lecture de l'écrit du 16 janvier 1931 tel semble être le cas. Il est clair que Brault n'aurait pas pu exiger de Dion que l'immeuble lui fût transporté, à moins que les conditions mentionnées à l'acte ne soient réalisées. Mais les parties peuvent consentir, et ont évidemment consenti, à ce qu'il en soit autrement, car effectivement Dion a transporté en même temps, et les actions de la Duval Motors Limited et la propriété de Varennes. Rien ne s'oppose à ce que les parties modifient l'entente originaire intervenue entre elles.

A cette date, où Dion a ainsi transporté sa propriété à Brault, celui-ci était véritablement créancier et il ignorait, c'est ce que la preuve révèle, que Dion avait d'autres créanciers ou qu'il était insolvable. Comme résultat du transport de la propriété et des actions de la Duval Motors Limited, Brault a été totalement payé de sa créance. Voici ce que nous dit Donat Dion à ce sujet:—

R. Non, je ne devais pas à M. Brault, ça été réglé en 1933, quand j'ai vendu la propriété.

Q. Vous ne deviez plus à M. Brault?

R. Je ne devais plus à M. Brault, non.

Q. Vous n'avez rien donné en argent à M. Brault depuis 1933?

R. Absolument pas.

L'intimé Bernard Brault confirme ce témoignage de la façon suivante:—

R. Je vous demande pardon, en 1933, lorsque l'acte a été passé, la cession de la maison ainsi que la cession des actions de la Duval Motors, M. Dion me devait $7,000, à ce moment là.

Q. Quand vous avez transporté ou que vous avez fait cette supposée vente de la propriété à mademoiselle Cécile Dion, M. Dion ne vous devait plus rien?

R. Il ne me devait plus rien.

Je crois donc que lorsque l'acte de vente du 13 février 1933 a été signé, Bernard Brault, comme conséquence de l'acte du 16 janvier 1931 modifié par le consentement mutuel des parties, est devenu véritablement le propriétaire de l'immeuble en question. On semble trouver extraordinaire que, malgré que Brault fût devenu propriétaire de cet immeuble, Dion ait continué à l'habiter. Ceci s'explique facilement si l'on tient compte que Brault et Dion étaient des amis de longue date, qu'antérieurement Brault avait déjà prêté des sommes considérables à Dion que celui-ci avait remboursées, et que de plus, Dion avait été la cause que Brault avait réussi à faire de très heureuses spéculations. Il est naturel que celui-ci, qui ne tenait pas à habiter Varennes, laissât la jouissance de la maison à son ami, et en conservât la propriété.

Ce transport n'avait donc pas pour but de porter atteinte aux droits des tiers, et il est impossible de dire que cet acte a été fait pour soustraire l'actif de Dion à ses créanciers, ou qu'il est un simulacre de vente pour dépouiller en apparence Dion du gage commun de ses créanciers. Je ne vois dans cet acte aucun des éléments nécessaires pour qu'il y ait simulation et pour permettre de dire que Dion n'avait pas l'intention de transporter et que Brault n'avait pas l'intention d'acquérir.

Cette transaction est la conséquence d'une entente antérieure entre les parties, et n'est pas à mon sens un acte fictif ou simulé.

On prétend qu'il y a une preuve de simulation dans le fait que Dion et Brault ont effectué ce transport sous la forme d'un acte de vente pour la somme de $2,000. Il est clairement prouvé que lorsque le contrat a été signé, Brault n'a pas reçu la somme de $2,000 qui y est mentionnée. Mais comme Brault avait droit d'obtenir la propriété, la forme sous laquelle elle lui a été transportée ne peut pas affecter le résultat de cette cause et n'est pas une preuve de simulation. Il existait une cause réelle et licite pour le transport de la propriété et le fait d'intercaler dans un acte des choses fausses ne constitue pas nécessairement des éléments de simulation.

1940

PERRAS v. BRAULT.

Taschereau J.

Fuzier-Herman, Répertoire, Vo, Simulation, No. 11, page 235, dit ce qui suit:—

La simulation d'un acte n'est pas par elle-même une cause de nullité de cet acte, lorsque les parties ont fait sous une forme fictive ce qu'elles pouvaient accomplir sous une autre forme, et lorsque, malgré la cause énoncée qui est fausse, il en existe une réelle et licite.

Aubry & Rau, 5ème édition, T. 1, par. 35, page 175, dit que pour toute disposition ou convention dont le but peut être également atteint, soit au moyen d'un acte indiquant sa véritable nature, soit à l'aide d'un acte la représentant sous l'apparence d'une disposition ou convention d'une autre espèce, les parties peuvent indifféremment avoir recours à l'une ou l'autre de ces formes.

Il faut donc en venir à la conclusion que ce que les parties ont fait sous l'apparence d'un acte de vente couvrait un acte réel, et que l'intention des parties était bien d'effectuer le transport de cette propriété.

Etant devenu le propriétaire définitif de l'immeuble, Brault pouvait en disposer comme il l'entendait. Aussi, pouvait-il en effectuer le transport à la fille de Donat Dion, mademoiselle Cécile Dion, le 15 avril 1935.

J'en viens donc à la conclusion que cet immeuble est sorti du patrimoine de Dion lorsqu'il a été transporté à Brault le 13 février 1933, qu'il n'y a pas eu de simulation pouvant validement affecter le transport de la propriété, que les jugements de la Cour du Banc du Roi sont bien fondés et que les présents appels doivent être rejetés avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Guérin, Cousineau & Godin.*

Solicitors for the respondent: *Beaulieu, Gouin & Tellier.*

THE WORKMEN'S COMPENSATION BOARD ..... APPELLANT;

AND

HELEN ELIZABETH THEED ..... RESPONDENT.

1940

* May 8.
* June 29.

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

Workmen's Compensation Act—New Brunswick statute of 1932, c. 36, section 7—Injury sustained by a girl stenographer operating embossing machine—Whether an "accident" within the meaning of the Act.

The respondent was employed as a stenographer in the credit department of Irving Oil Company, Limited, at Saint John, N.B., from March, 1938, until the end of March, 1939. In December, 1938, in the course of her employment, she was asked to operate a new hand-embossing machine for making addressograph plates. The first morning she operated it she complained to the office manager that the machine was too heavy for a girl to operate, and that the first night she noticed a sore spot in her back, notwithstanding which she operated the machine again the next day. About two weeks or so later, she was again called upon to operate the machine and did so for two days or so. In the meantime, while employed about other office work, the sore spot continued. In consequence of her condition, she consulted several doctors and eventually had to undergo an operation. Section 7 of the New Brunswick *Workmen's Compensation Act,* ch. 36 of 1932, reads 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, compensation shall be paid to such workman or his dependents, as the case may be, as hereinafter provided * * *." On June 5th, 1939, the respondent applied to the Workmen's Compensation Board for compensation. The Board disallowed the claim on the ground that there was not sufficient evidence that the injury claimed for had been caused by an accident. On the submission of a further statement, the Board held an investigation with the result that the Board, upon a reconsideration of the entire case, made a new ruling and found: "1. That the personal injury of which the appellant (now respondent) complains arose out of and in the course of her operating their embossing machine in her employment within the scope of Part I of the said Act (The *Workmen's Compensation Act,* 1933, ch. 36 and amendments); and 2. That the said injury was not caused by accident." The respondent having obtained permission to appeal to the Appeal Division of the Supreme Court of New Brunswick, that Court allowed the appeal and held that the injury caused to the respondent was caused by accident within the meaning of the *Workmen's Compensation Act.*

Held, affirming the judgment of the appellate court (14 M.P.R. 499), that the personal injury, which the respondent suffered in the course of her operating the machine, was an accidental injury within the meaning of the statute.

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1), by special leave to appeal granted by that Court, reversing the decision of the Workmen's Compensation Board, which had disallowed the respondent's claim for compensation under the *Workmen's Compensation Act* of New Brunswick.

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

J. J. F. Winslow K.C. for the appellant.

D. King Hazen K.C. for the respondent.

CROCKET J.—The respondent was employed as a stenographer in general office work in the credit department of the head office of the Irving Oil Co., Ltd., at Saint John, N.B., from March, 1938, until the end of March, 1939. In December, 1938, in the course of her employment she was asked to operate a new hand-embossing machine for making addressograph plates. The machine, which worked stiffly at first, was operated by means of a lever, which required considerable exertion to make an impression. It was operated by different employees in the office as the occasion for making up new addressograph plates arose, and the credit manager admitted that he had complaints from other lady operators besides Miss Theed that it tired their muscles to operate it, explaining that its operation required the use of muscles not ordinarily used and that it would be liable to cause soreness in those muscles until they became accustomed to it. Miss Theed herself testified that the first morning she operated it she complained to the office manager that the machine was too heavy for a girl to work, and that the first night she noticed a sore spot in her back, notwithstanding which she operated the machine again the next day. It was about two weeks before she was called upon to operate it again and she did so for two days or so. In the meantime while employed about other office work the sore spot kept about the same and she consulted an osteopath, who told her she had twisted a rib and gave her about eleven treatments. Her condition showing no improvement, she obtained leave of absence and went to Montreal where she consulted Dr.

(1) (1940) 14 M.P.R. 499.

Shannon, who told her she had torn some ligaments and would have to have operative treatment. Returning to Saint John, Dr. George F. Skinner operated on her on July 25th, 1939, and, having in the meantime secured a new position as secretary at the Rothesay Collegiate School, she was able to take up her work there on September 1st. Dr. Skinner, when asked to explain the nature of the injury, for which he had operated, described it as one of those soft tissue injuries that is really indefinable, and which, for lack of a better term, would come under the group of sprains and strains. There was, he said, apparently constant tenderness and constant pain over the spine at the eighth thoracic vertebra. Dr. Shannon, Dr. Skinner said, had previously demonstrated this numerous times and found her condition just as Dr. Skinner described it with a tenderness over this point on movement. The operation disclosed nothing more than what one might call thickening of the fibrous tissue of the region; that was again one of the rather indefinite undefinable things that they had to face in sprains and strains. Right over the spinous process the tissues were so thickened that he had a sensation of cutting through a definite bursa. Injury like that he described as tears in the ligaments. Dr. Shannon had instructed him to operate. Dr. McKay, who had been called in consultation and assisted at the operation, agreed that the only way they could define the injury was that the fibrous ligamentous attachments to that particular bone had been strained and in healing they had healed so as to give abnormal tensions. In the operation all the muscles and ligamentous attachments were freed from that part of the bone and the spinous process itself was removed.

On June 5th, 1939, the respondent applied to the Workmen's Compensation Board for compensation. The Board disallowed the claim on the ground that there was not sufficient evidence that the injury claimed for had been caused by accident. On the submission of a further statement the Board held an investigation upon which the claimant, Dr. Skinner and other witnesses were examined and cross-examined by counsel with the result that the

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Crocket J.

Board, upon a reconsideration of the entire case, altered its prior ruling and found

1. That the personal injury of which the appellant complains arose out of and in the course of her operating the embossing machine in her employment within the scope of Part I of the said Act (*The Workmen's Compensation Act*, 1933, ch. 36 and amendments).

2. That the said injury was not caused by accident.

The respondent having obtained an order from a judge of the Supreme Court permitting her to appeal to the Appeal Division of the Supreme Court of New Brunswick on the question of law involved, that court unanimously allowed her appeal and on the application of the Board granted special leave to appeal to this court, Baxter C.J. dissenting as to the allowance of special leave.

Section 7 of the New Brunswick *Workmen's Compensation Act* reads 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, compensation shall be paid to such workman or his dependents, as the case may be, as hereinafter provided, unless such accident 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.

It will be seen from what I have already said that the only issue upon this appeal is as to whether the personal injury, which the applicant admittedly suffered in the course of her operating the machine, and which the Board expressly found *arose out of* and in the course of her doing so in her employment within the scope of Part I of that Act, was "a personal injury caused by accident within the meaning of the above section." In my opinion we are bound to hold that it was. That that injury consisted of the straining of the muscles of her back and the tearing of the ligamentous attachments to the eighth thoracic vertebra, causing pain and a distinct sore spot in that region, admits of no doubt. This was demonstrated beyond cavil by the operation which became necessary for its relief.

Decisions of the House of Lords in a long line of cases from 1903 to 1935, it seems to me, are conclusive that such an injury as that described is an accident within the meaning of the provisions of the English *Workmen's Compensation Act* and of the corresponding New Brunswick Act

imposing liability for "personal injury by accident arising out of and in the course of" the employment of the injured person.

In *Fenton* v. *Thorley* (1), it was held that the word "accident" in this enactment is used in the popular and ordinary sense, and means a mishap or untoward event not expected or designed, and that a workman who in the turning of the wheel of a machine during the course of his employment over-exerted himself and thereby sustained an internal rupture, suffered an injury by accident within the meaning of the statute. Lord Macnaghten in delivering the leading judgment in that case referred to a decision of the Scottish Court of Session in *Stewart* v. *Wilsons & Clyde Coal Co. Ltd.* (2), in which he said he agreed entirely. That was a case where a miner strained his back in replacing a derailed coal hutch and in which all the learned judges of the Court of Sessions held that it was an accident in the sense of the Act.

What the miner did in replacing the hutch (Lord Macnaghten said) he certainly did deliberately and in the ordinary course of his work. There was nothing haphazard about it.

Lord M'Laren of the Scottish Court said he considered that

if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in * * * this is accidental injury in the sense of the statute.

Lord Kinnear observed that the injury was not intentional and that it was unforeseen.

It arose (he said) from some causes which are not definitely ascertained except that the applicant was lifting hutches which were too heavy for him. If (he added) such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it.

Lord Macnaghten observed that Fenton was a man of ordinary health and strength; that there was no evidence of any slip or wrench or sudden jerk; and that it might be taken that the injury occurred while the man was engaged in his ordinary work and in doing or trying to do the very thing which he meant to accomplish. He also said that the Court of Appeal in sustaining the decision of the arbitrator that there was no injury by accident within the meaning of the Act had followed an earlier decision of that court in *Hensey* v. *White* (3), (which Lord

(1) [1903] A.C. 443. (2) (1902) 5 F. 120.
(3) [1900] 1 Q.B.D. 481.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Crocket J.

Macnaghten said was in its circumstances not distinguishable from the case he was then considering) that there was no accident because there was "an entire lack of the fortuitous element." This, he pointed out, was not necessary to constitute an accident, and he added:

> If a man in lifting a weight or trying to move something not easily moved, were to strain a muscle or rick his back or rupture himself, the mishap in ordinary parlance would be described as an accident.

Lords Shand, Davey, Robertson and Lindley all agreed that the decision of the County Court Judge and of the Court of Appeal refusing compensation for the internal rupture should be reversed, Lords Shand and Davey concurring in the reasons of Lord Macnaghten and Lords Robertson and Lindley delivering judgments of the same purport. The latter, referring to the Scottish decision in *Stewart* v. *Wilsons & Clyde Coal Co.* (1), said that the interpretation put upon the Act in Scotland in that case

> is to be preferred to the narrower construction occasionally adopted in this country.

Fenton v. *Thorley* (2) has ever since been treated as the leading case upon the meaning of the word "accident," as it appears in the *Workmen's Compensation Act.* The principles there enunciated have ever since been consistently recognized by the Law Lords of the House. They subsequently held that infection developing from the entry of a bacillus into the eye of a workman from wool he was sorting was an injury by accident, as in *Brintons Ltd.* v. *Turvey* (3); and that a strain suffered by a workman through exertion in the course of his employment is itself an accident, as in *Clover, Clayton & Co.* v. *Hughes* (4).

In *Glasgow Coal Co.* v. *Welsh* (5), a miner was bailing out water from the bottom of the pit, which necessitated his standing up to his chest in water for eight hours with the result that thereafter and for two or three days he felt great stiffness and cold and pain in his joints and contracted sub-acute rheumatism. The arbitrator in this case found that the rheumatism was caused by the extreme and exceptional exposure to cold and damp. Viscount Haldane and Lords Kinnear, Shaw of Dunfermlin, Parmoor and Wrenbury all held that it was a case of injury

(1) (1902) 5 F. 120.
(2) [1903] A.C. 443.
(3) [1905] A.C. 230.
(4) [1910] A.C. 242.
(5) [1916] 2 A.C. 1; 9 B.W.C.C. 371; 85 L.J. P.C. 130.

by accident. The first two Law Lords named distinctly held that the judgment in *Fenton* v. *Thorley* (1) was conclusive.

Innes or Grant v. *Kynoch* (2) was the case of a workman's death from blood-poisoning, caused by his becoming infected through an abrasion on his leg by noxious bacilli contained in bone-dust which the deceased handled in the course of his employment. It did not appear when or how he received the abrasion, and it was impossible to say with certainty when the infection occurred. Lord Birkenhead, L.C., and Lords Buckmaster, Atkinson, Parmoor and Wrenbury all held that the fortuitous alighting of the bacilli upon the abraded spot constituted an accident within the Act; that there was evidence upon which the arbitrator was entitled to find that the injury arose out of and in the course of the deceased's employment; and that the provisions of the Act as to fixing the date of the accident are satisfied, if, having regard to the nature of the particular injury alleged, the date of the occurrence of the accident is reasonably fixed so as to connect the injury with the accident.

In *Burrell* v. *Selvage* (3), a girl worked for the respondents at a lathe, finishing shell adaptors, and in the course of that work constantly sustained cuts and scratches on her hands. In March, 1918, she showed symptoms of blood-poisoning from the pus formed in gatherings caused by the cuts. She continued to work until April 27th, during which time further cuts and scratches were caused. By that time the poisoning had so got into her system that she had to stop work and became totally incapacitated from arthritis. The arbitrator found that the last cut of April 27th was an accident, and that the incapacity thus resulted from injury by accident arising out of and in the course of the employment. The Court of Appeal affirmed his decision and the employers appealed to the House of Lords. Lords Buckmaster, Sumner, Parmoor, Wrenbury and Carson all held that, although there was no evidence to support the finding that the incapacity resulted from the wound on April 27th, there was conclusive evidence that it resulted from the accumulative effect of the series

(1) [1903] A.C. 443. (2) [1919] A.C. 765.
(3) (1921) 14 B.W.C.C. 158.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Crocket J.

of accidents met with at her work, and that it was impossible to hold that because the incapacity was caused, not from a particular accident, but from a series of accidents, that that fact prevented the applicant from recovering compensation. In his reasons Lord Buckmaster said:

> In the present case there is no dispute that the disease from which the respondent suffered is a disease which distinctly arose out of the injuries that she received while in the course of her employment, and it cannot be disputed that her cut and abrased fingers were on each occasion what would be called an accident within the meaning of the statute. The only question, therefore, for consideration is whether, when the disease is due, not to one specific and definite accident, but to a series of accidents, though its actual influence on the resulting illness cannot be precisely fixed, the workman is disentitled to the benefit of the statute.
>
> My Lords, I cannot find any words in the statute which permit of such a construction. In the present case personal injury was suffered, it was suffered by accident, and the accident is no less accidental because it occurred on a series of occasions instead of on one; it follows that the claim to compensation was properly established.

I shall mention only one other of the House of Lords decisions, that of *Walker* v. *Bairds* (1). In this case the workman, who was employed as an underground fireman in a colliery, was cleaning out a sump into which water had collected and for which purpose it was usually necessary to stand in cold water about waist-deep. On coming out on one occasion it was noticed that he was shivering; he contracted a chill, which within a short time developed into broncho-pneumonia from which he died. The arbitrator drew the inference that the broncho-pneumonia was caused by a chill, which he contracted through exposure to cold and water but found that in law the death of the workman was not caused by accident arising out of and in the course of his employment. On these facts, as set forth in a stated case to the Second Division of the Court of Session, that court held that, since it was established that the chill, which caused the disease, had arisen out of and in the course of his employment, the workman's death from the disease was the result of an injury by accident within the meaning of the *Workmen's Compensation Act*, 1925. On appeal to the House of Lords, Lords Tomlin, Thankerton, Macmillan, Wright and Alness held that the Court of Session in Scotland was right in this conclusion. Lord Tomlin after reviewing the previous decisions from *Fenton* v. *Thorley* (2) in 1903 to *Partridge*

(1) [1935] 153 L.T.R. 322. (2) [1903] A.C. 443.

Jones and John Paton Ltd. v. *James* (1), said that these decisions inescapably led to the conclusion that upon the arbitrator's findings of fact the Court of Session was bound to hold that Walker's death was caused by personal injury by accident in the sense of the *Workmen's Compensation Act.*

The Compensation Board in the present case gave no reasons for its decision that the applicant's injury was not caused by accident, though it did specifically find that the injury "*arose out of* and in the course of" her operating the machine within the scope of Part I of the New Brunswick *Workmen's Compensation Act.* The learned counsel for the Board in his argument before us suggested that the decision proceeded on the ground that the injury was one which gradually developed during the period in which she was required to operate the machine, and was for that reason not the result of any one particular strain or any strain which it was possible to identify as having occurred on any particular day. If this were the basis of the Board's decision that the injury was not caused by accident, then I think with all respect for the reasons I have already indicated the Board misdirected itself as to the law.

It is true that there had been some decisions in the Court of Appeal since *Fenton* v. *Thorley* (2) to the effect that unless the injury be one of such a nature that its occurrence can be proved to have occurred at some definite time, it cannot properly be held to be an accident within the meaning of the statute in question. The learned counsel for the Board relied especially upon the decisions of the Appeal Court in *Steel* v. *Camell, Laird & Co.* (3) and *Walker* v. *Hockney Bros.* (4), but an examination of these cases shows that neither of them bears any analogy to the case now before us.

The *Steel* case (3) was the case of a caulker, who in the course of his employment had to use white and red lead which were smeared by him upon rope-yarn and worked in with the hands. He gradually accumulated lead in his system, with the result that he suffered from lead-poisoning, which produced partial paralysis and incapacity for work. Although the arbitrator found that personal injury

(1) [1933] A.C. 501.
(2) [1903] A.C. 443.
(3) [1905] 2 K.B. 232.
(4) (1909) 2 B.W.C.C. 20.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Crocket J.

by accident arising out of and in the course of the employment had been caused to the workman, Collins, M.R., in his reasons said he found that the injury to the applicant was lead-poisoning, which was brought about through the applicant being saturated with lead in consequence of his being in continuous contact with it and that in any case the result must have come about through long exposure to contact with the lead and gradually, not suddenly. He also said that it was not possible to indicate any precise time at which the mischief arose; and Cozens-Hardy, L.J., said the statute negatives the idea that it applied to a case like the one then under consideration, where the only suggestion was that the injury was due to some or all of a succession of accidents, and that injury by disease alone, not accompanied by an accident was expressly excluded, as pointed out by Lord Macnaghten in *Fenton* v. *Thorley* (1). In so far as the possibility of indicating the precise time, at which the mischief arose, is concerned, the dicta relied upon, I think, must now be taken as subject to the qualification indicated in the decision of the House of Lords in *Burrell* v. *Selvage* (1).

In *Walker* v. *Hockney* (2) the workman gradually acquired paralysis of his right leg through the strain of riding a heavy carrier tricycle for his employers during a period of about six years.

As to the dictum of Lord Birkenhead, L.C., in his speech in the House of Lords in *Innes* v. *Kynoch* (3), upon which the Board's counsel also relied, regarding the necessity of the accident taking place "at some one particular time," if the whole context, in which this statement occurs, is read, it will be found that His Lordship's view was that, although in order to constitute an injury by accident there must be some particular occurrence happening at some particular time, what that particular time was was "immaterial so long as it reasonably appeared that it was in the course of the employment," which is precisely the view adopted by the House of Lords in the *Burrell* case (1) of 1921.

Whatever may be said of the judgment of the Appeal Court in *Ormond* v. *Holmes* (4), no support whatever can

(1) (1921) 14 B.W.C.C. 158.
(2) [1935] 153 L.T.R. 322.
(3) [1919] A.C. 765, at 772.
(4) (1937) 2 All E.R. 795.

be found either in the reasons of Slesser, L.J. or Romer, L.J. or in those of Luxmore, J., for the proposition that a straining of any muscle or other organ of the human body cannot properly be held to constitute an accident within the meaning of the statute in any case where it appears that the incapacity for which compensation is claimed may have developed therefrom gradually, and not suddenly. Indeed as I read the several judgments their purport is quite to the contrary. The learned justices founded themselves entirely upon the specific findings of the arbitrator and in order that these may be clearly understood it should be explained that Ormond had been employed by the Holmes Company for a number of years as a blacksmith striker and had for a long time prior to 1935 been suffering from arterio sclerosis and very high blood pressure. While rising from his bed at home on the morning of September 27th, 1935, he had an attack of hemiplegia, commonly called a stroke, and was compelled to rest until October 9th, 1935, when he returned to his usual work against the advice of his doctor. On December 20th he started work at 7 o'clock, his usual time, but at 7.30 was observed to be looking ill, he was dragging his right foot and his mouth was drawn up on the right side. He also felt his right arm gradually losing power during the morning. Between 10 and 10.30 a.m., he collapsed from a second and severer stroke. Both attacks were due to thrombosis or clotting. In claiming compensation he alleged that his incapacity was caused by an accident which happened on December 20th, arising out of and in the course of his employment. The arbitrator found that the work upon which Ormond was actually engaged on December 20th neither caused nor contributed to nor accelerated the second stroke and that the thrombosis was coming on that morning and would have inevitably resulted in hemiplegia even if he had not done any work that day, but that all the work he had been doing since October 9th up to the time he began to work on December 20th, and indeed all muscular effort or exertion up to that time accelerated the second attack. Having stated that he could not associate the second attack with any particular work either on December 20th or on any particular day before then, and that in the circumstances he regarded the stroke as the final stage of a long standing disease accelerated by the general wear and tear

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Crocket J.

of previous work and all other strenuous exercises up to but not including any work done on that morning, he held that the workman had failed to prove an injury from any accident within the meaning of the Act.

The decision of the Appeal Court proceeded entirely on the ground that the second stroke on December 20th, which was the alleged injury and accident, was solely induced by the disease (arterio-sclerosis and high blood pressure) and was not caused or contributed to by anything Ormond did on that morning, and that, although the wear and tear of his usual work and all other strenuous exertions between October 9th and that morning may have accelerated this stroke, it was not possible to point to any particular strain or occurrence in the performance of his work during this period of more than two months, to which the change in his condition could be attributed. The case was therefore held not to fall under the House of Lords decisions in *Fenton* v. *Thorley* (1), *Brintons Ltd.* v. *Turvey* (2), *Clover, Clayton* v. *Hughes* (3), *Innes* v. *Kynoch* (4), or any of the other House of Lords decisions I have mentioned, the principle recognized and applied in all of which, as Romer, L.J., pointed out, was precisely the same. In the view of all three of the Appeal Justices, the case was rather one of an injury resulting from gradual wear and tear as in *Walker* v. *Hockney Bros.* (5) and *Steel* v. *Cammel, Laird & Co.* (6) and other similar cases. Both Slesser, L.J. and Luxmoore, J. particularly referred to the judgment of the Lord Justice-Clerk (Aitchison) in *Miller* v. *Carntyne Steel Castings Co. Ltd.* (7) in the Scottish Court of Session as illustrating the distinction between a *particular* cause limited in point of time and a *general* cause extending throughout a period. "When a workman," said the Lord Justice-Clerk,

> collapses under a *particular* strain it may be and in many cases probably is the climax of a *general* strain to which he has been subjected throughout many years of employment and without which no collapse would have occurred. Again, when a workman becomes incapacitated without any definite physiological injury or alteration of phase in the disease from which he suffers * * * it may, none the less, be a physiological injury, although it may not be medically possible to isolate and define it.

(1) [1903] A.C. 443.
(2) [1905] A.C. 230.
(3) [1910] A.C. 242.
(4) [1919] A.C. 765.
(5) (1909) 2 B.W.C.C. 20.
(6) [1905] 2 H.B. 232.
(7) [1935] S.C. 20.

There is one other passage which I think applies particularly to the present case I would like to quote from the reasons of Romer, L.J. It is as follows:

> But in the case of infectious diseases it is impossible as a rule to assert that there was any particular occasion on which the bacillus got introduced into the system. If it can be proved that an infectious disease was contracted at a particular time during the employment, even though the exact date cannot be specified, then on the principle of *Brintons, Ltd.* v. *Turvey* (1), the contracting of the disease may be an accident within the meaning of the *Workmen's Compensation Act* (see *Grant or Innes* v. *Kynoch* (2)).

Perhaps I should have mentioned the decision of the Court of Appeal in *McFarlane* v. *Hutton* in 1926 (3), where it was held that

> If it appears that the work being done has probably caused an internal strain on the heart or the system generally, resulting in a physiological injury, such an injury is one resulting from an accident within the meaning of the *Workmen's Compensation Act.*

I can find nothing in any of the judgments in the very recent case of *Fife Coal Co. Ltd.* v. *Young* (4), in the House of Lords, regarding which the respondent's counsel filed a special memorandum, that in any way detracts from the authority of its previous decisions in *Brintons Ltd.* v. *Turvey* (1), *Innes or Grant* v. *Kynoch* (2), *Burrell* v. *Selvage* (5) or *Walker* v. *Bairds* (6), or lends any support to the contention that compensation must be refused unless it is proved that the incapacity resulted, either from a particular strain, or the strain the applicant sustained on a particular day. The doctrine as to the necessity of dating the accident as having occurred on a particular day seems to have been founded on the provisions of the British Act regarding notice of the accident. No question as to the sufficiency of the notice arises in this case, as the findings of the Board on its original consideration and reconsideration of the respondent's application plainly show.

Where it is found that such an injury as Miss Theed sustained arose out of and in the course of her employment, as the Compensation Board has itself specifically found, and that injury is a physiological injury, as was incontrovertibly demonstrated by the operation which it necessitated, the injury itself constitutes an accident in

(1) [1905] A.C. 230.
(2) [1919] A.C. 765.
(3) (1927) 96 L.J. K.B. 357.
(4) (1940) 2 All E.R. 85.
(5) (1921) 14 B.W.C.C. 158.
(6) [1935] 153 L.T.R. 322.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Crocket J.

the sense of a mishap or untoward event not expected or designed, s. 7 of the New Brunswick Act makes the payment of compensation compulsory, unless the Board is of the opinion that such accident was wholly or principally due to intoxication or serious and wilful misconduct on the part of the applicant or to a fortuitous event unconnected with the industry in which he or she was employed, of which there is of course no suggestion in the present case. Whether such an injury or mishap results from a particular strain, as of a single muscle or group of muscles, or from the culmination of a general straining of the muscular and ligamentous attachments of the particular joint affected, makes no difference, when the injury is identified, as it has been in this case, as a definite physiological one arising out of and in the course of the applicant's employment. The mishap of course necessarily implies a particular occurrence at some particular time, but, as Lord Birkenhead put it in the *Kynoch* case (1), what that particular time was is immaterial so long as it reasonably appears that it was in the course of employment.

The evidence in the case before us clearly proves that Miss Theed operated the addressograph machine only on two occasions, first, for a period of two or three days about the middle of December, and again, two or three weeks later, for a second period of two or three days, and that she felt the symptoms of her injury the night after she first operated the machine.

The appeal should be dismissed with costs, against which costs the appellant shall be entitled on taxation to credit for any moneys which it may have paid to the respondent under the terms of the order granting special leave to appeal.

DAVIS J.—The point in this case is that the young woman sustained a definite physiological injury as the direct result of the work in which she was engaged; that is an accidental injury in the sense of the statute. The case comes clearly within the governing principle in the recent judgment of the House of Lords in *Fife Coal Co. Ltd.* v. *Young* (1).

(1) [1919] A.C. 765.

We are not concerned in this appeal with the difficult questions which arise where there is a progressive disease which has not been expressly made, by statute or regulation, an industrial disease. In the numerous authorities under the English *Workmen's Compensation Act* the judges have always been careful to abstain from lending colour to the suggestion (except in the case of certain industrial diseases which have been expressly provided for) that a mere disease which one cannot say with any precision was contracted at any particular time or at any particular place, was an accident which entitled a workman to compensation. Lord Atkin said in the *Fife Coal* case (1) at p. 489:

> Whether to constitute an accident each employment bacillus or flight of bacilli must have its own day, or whether the gradual effect of a succession of them in poisoning the system can be said to be injury by accident is the question reserved in this decision.

On the established facts in the case before us there was a definite physiological injury that can be traced without any doubt to the young woman operating by hand, in the ordinary performance of her work, a machine that was too hard for her to work. The particular days on which she worked the machine were very few and were proved with precision and the physical injuries suffered are clearly established to be the direct result of her working the machine. I can see no difficulty on the authorities in regarding this as an accidental injury within the meaning of the statute.

I agree that the appeal must be dismissed.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The respondent, Helen Elizabeth Theed, was a stenographer employed in general office work at Saint John, New Brunswick. While operating an addressograph or embossing machine in the course of her employment she tore certain ligaments in her back. A claim for compensation under *The Workmen's Compensation Act* of New Brunswick (chapter 26 of the Statutes of 1932 and amendments), made to the Workmen's Compensation Board, was disallowed, the Board's certificate stating that there was not sufficient evidence of injury by accident.

(1) [1940] A.C. 479.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Kerwin J.

Upon the respondent's application and in pursuance of certain provisions of the Act, the Board reconsidered its ruling and after the taking of oral evidence issued the following amended ruling:—

1. That the personal injury of which the applicant complains arose out of and in the course of her operating an embossing machine in an employment within the scope of Part 1 of the said Act.

2. That the said injury was not caused by accident.

The respondent obtained leave to appeal on a question of law, from the ruling, to the Appeal Division of the Supreme Court of New Brunswick, and the appeal was allowed. By special leave of that Court, the Board now appeals.

The question of law to be determined is whether the injury caused to the respondent was caused by accident within the meaning of the Act, and the determination of that question depends upon the proper construction of section 7, the relevant part of which is as follows:—

7. 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, compensation shall be paid to such workman or his dependents, as the case may be, as hereinafter provided, unless such accident 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.

In view of the reliance placed by the appellant upon certain decisions in England, there should also be noted the provisions of section 81. By virtue of the first subsection, presuming the necessary conditions were fulfilled, if the respondent's disability were a disease which had been declared by regulation of the Board to be an industrial disease, she would be entitled to compensation "as if the disease was a personal injury by accident and the disablement were the happening of the accident." Her disability has not been included in the list of industrial diseases, but by subsection 2:—

2. Nothing in this section shall affect the right of a workman to compensation in respect of a disease to which this section does not apply, if the disease is the result of an injury in respect of which he is entitled to compensation under this Part.

In the present case the respondent's disability is not a disease. Before the Board, Dr. Skinner testified as follows:—

Q. Would you explain to us just what the nature of the injury or trouble was?

A. Miss Theed had one of those soft tissue injuries that is really undefinable. For a lack of a better term, she would come under the group of sprains and strains. There was apparently constant tenderness and constant pain over the spine at the eighth thoracic vertebra. Dr. Shannon had previously demonstrated this numerous times and I found her condition just as he described it with the tenderness over this point on movement.

Q. Which side of the spine was this on?

A. Over the tip of the transverse process: both sides of the spine: ligaments and muscles. The maximum pain was right in the middle line. On operation there was nothing more than what one might call thickening of the fibrous tissue of the region: that is again one of the rather indefinite, undefinable things that we have to face in sprains and strains. Right over the spinous process the tissues were so thickened that one had a sensation of cutting through a definite bursa. Injury like this is described as tears in the ligaments. Dr. Shannon really instructed me to operate. Dr. McKay was in consultation and it was the sort of thing that one hesitates to plunge in on until everything has been done. The only way we could define it to ourselves before that was that the fibrous ligamentous attachments to that particular bone had been strained and in healing they had healed so as to give abnormal tensions, so with the idea of releasing those tensions we went in. We freed all the muscle and ligamentous attachments from that part of the bone and removed the spinous process itself. I am more than surprised at the agreeable result we got.

Q. Would you say the condition you found there, by your diagnosis and operation, could only result from injury?

A. Yes.

Q. Would you say that constant heavy work would cause it?

A. I do not think constant smooth work would cause that condition. I think there has got to be a stimulus to muscle spasm and I think it is a question of constant jolts, constant irritation of that nature, to keep the muscle in spasm so that one muscle is pulling on another.

* * *

Q. In your opinion, would you say that any one jolt would be the one that would cause it or the continuous jolting?

A. I cannot answer that question.

Q. What would be your opinion?

A. In operating a machine like that to the casual observer every operation is the same as every other operation and yet there are muscle actions in those operations that we cannot define and if she has thrown herself into a peculiarly tense position by the previous operation, she has made her muscles susceptible to injury.

Q. Would you say, from Miss Theed's evidence, that this happened at any one strike of that lever or continuous operation of the lever?

A. I think it is the continuous operation.

The respondent's disability being an injury, section 81 of the Act is really not relevant except to be borne in mind in considering the argument of the appellant.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Kerwin J.

The determination of the Board of questions of fact is, of course, final and reading its certificate in the light of all the evidence, I agree that it must be taken that the Board has found that the injury was not caused on any particular occasion on which the respondent used the machine. This being so, counsel for the Board argued that respondent's disability having gradually developed over a period of time, there was no injury caused by accident. Numerous cases decided in England under the various Workmen's Compensation Acts there in force from time to time were cited. I do not propose to mention all of these because it must be borne in mind that the English Act of 1897 did not mention diseases and that the judgments in many cases decided under that Act would have to be carefuly considered. It was not until the Act of 1906 that provisions similar to section 81 of the New Brunswick Act were enacted.

The outstanding pronouncement as to the meaning of the word "accident" in the English Act of 1897 is the speech of Lord Macnaghten in *Fenton* v. *Thorley & Co.* (1), where he states that it is "an unlooked for mishap or untoward event which is not expected or designed." That decision was subsequent to the decision in the Scotch case of *Stewart* v. *Wilson & Clyde Coal Co.* (2), where Lord M'Laren stated:—

> It seems to me that the question is, whether the word "accident" presupposes some external and visible or palpable cause (e.g., the breakdown of machinery) from which injury results to a workman, or whether there may be an accident when there is no derangement of the machinery or plant, or of the organization of labour, and when the injury is entirely personal to the sufferer. To limit the application of the statute to the first class of cases would be to exclude a very large number of occurrences which are usually known as accidents . . .
>
> * * *
>
> I think it is impossible so to limit the scope of the statute, and if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the statute.

Lord Kinnear put the matter thus:—

> It (the injury) was not part of the design or scheme of operation in which the man was engaged; it was not intentional; and it was unforeseen. It arose from some causes which are not definitely ascertained,

(1) [1903] A.C. 443. (2) (1902) 5 F. 120.

except that the appellant was lifting hutches which were too heavy for him. If such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it.

Both judges were quoted with approval by Lord Macnaghten in *Fenton's* case (1).

Now in neither of these cases was there any question of disease but *Clover, Clayton & Co. Ltd.* v. *Hughes* (2), decided under the Act of 1906, was a disease case. Lord Loreburn there refers to the fact that all the Lords who took part in the decision in *Fenton* v. *Thorley* (1) agreed in substance with Lord Macnaghten's definition of "accident" and Lord Macnaghten himself points out (at p. 248):—

> There (in *Fenton's* case) (1) the Court of Appeal had held that if a man meets with a mishap in doing the very thing he means to do, the occurrence cannot be called an accident. There must be, it was said, an accident and an injury: You are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation. It was held that "injury by accident" meant nothing more than "accidental injury" or "accident" as the word is popularly used.

There are subsequent decisions in the Court of Appeal, in cases where disease was involved, holding that injury by accident cannot be established unless the applicant can indicate the time, date, circumstances and place in which the accident occurred which occasioned the disease (other than an industrial disease) but the House of Lords states the rule to be that even in disease cases the injury by accident will be established if having regard to the particular injury alleged, the date and circumstances of the accident are reasonably fixed so as to connect the injury with the accident.

This appears from their Lordships' decisions in *Innis or Grant* v. *Kynoch* (3) and *Burrell* v. *Selvage* (4). During the course of his speech in the first case, Lord Birkenhead states at page 772:—

> It is no doubt the fact that in *Brinton's* case (5) a particular time was found as being that at which the contact had occurred. But all that is material is that the infection should have been the result of contact at some one particular time and that this one particular time should have been during the course of the employment. Some expressions, such as those referred to in the judgment of the Second Division, have

(1) [1903] A.C. 443.
(2) [1910] A.C. 242.
(3) [1919] A.C. 765.
(4) (1921) 14 B.W.C.C. 158.
(5) [1905] A.C. 230.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Kerwin J.

been from time to time used, but none of them are binding upon this House; and indeed when these various expressions are examined in connection with one another they appear to me to come to no more than this, that it must be established that the disease is due to some particular occurrence, otherwise it cannot be the result of accident. That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment.

In the second case, the circumstances were that a girl in the course of her work continually sustained cuts and scratches on her hands. In March, 1918, she showed symptoms of blood poisoning from the pus formed in gatherings caused by the cuts. She continued to work until April 27th, during which time further cuts and scratches were caused. By that time the poisoning had so got into her system that she had to stop work and became totally incapacitated from arthritis. Lord Buckmaster, speaking for the majority, if not all, of the peers, determined that whether the injury

arose by reason of definite cuts suffered by her towards the end of April or whether it arose by reason of a series of cuts extending over a longer period of time, in my opinion she is equally entitled to recover for the injury that she sustained.

At page 161 he continues:—

It has been decided by your Lordships' house in the case of *Grant* v. *Kynoch* (1), and also in *Brintons, Ltd.* v. *Turvey* (2), that disease arising out of and in the course of an employment may in certain circumstances be regarded as an accident within the meaning of the statute, and be made the proper subject-matter of a claim for compensation. In the present case there is no dispute that the disease from which the respondent suffered is a disease which distinctly arose out of the injuries that she received while in the course of her employment, and it cannot be disputed that her cut and abrased fingers were on each occasion what would be called an accident within the meaning of the statute. The only question, therefore, for consideration is whether, when the disease is due not to one specific and definite accident but to a series of accidents, each one of which is specific and ascertainable though its actual influence on the resulting illness cannot be precisely fixed the workman is disentitled to the benefit of the statute.

My Lords, I cannot find any words in the statute which permit of such a construction. In the present case personal injury was suffered, it was suffered by accident, and the accident is no less accidental because it occurred on a series of occasions instead of on one; it follows that the claim to compensation was properly established.

Counsel for the appellant referred to *Fife Coal Co. Ltd.* v. *Young* (3), the actual decision in which was that the

(1) [1919] A.C. 765; 12 B.W.C.C. 78.
(2) [1905] A.C. 230; 7 W.C.C. 1.
(3) [1940] 2 A. E.R. 85.

workman was entitled to compensation for dropped foot. Stress was laid, however, upon the following passage in the speech of Viscount Caldecote (with whom Lord Thankerton and Lord Russell of Killowen agreed) where, after referring to three cases decided by the Court of Appeal after the decision in the House of Lords in *Brintons Ltd.* v. *Turvey* (1), the Lord Chancellor states at page 88:—

> There is no reason to doubt the correctness of the decisions in the three cases I have last mentioned. In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases, the workmen failed, not because a disease is outside the purview of the *Workmen's Compensation Act* altogether, but because the burden of proof that there had been an accident was not discharged.
>
> When the workman's claim is in respect of a progressive disease, the difficulty of pointing to a definite physiological change which took place on a particular day is, in general, likely to be almost insuperable, and in 1906 Parliament, in the case of certain diseases, and later, by an enlargements of the schedule of industrial diseases, relieved the workman in the specified cases of this obligation. However, if the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that what is called a disease is different in principle from a ruptured aneurism, as in *Clover, Clayton & Co. Ltd.* v. *Hughes* (2), or heart failure, as in *Falmouth Docks & Engineering Co. Ltd.* v. *Treloar* (3).

Our attention was also called to Lord Atkin's quotation, at page 90, of the following words of Lord Fleming:—

> What happened to him on April 27th transformed him from a man who was not suffering from dropped foot into a man who was.

As to the extracts from the speech of Viscount Caldecote, it is to be noted that the first part of the quotation follows a statement in the same paragraph that each of the two cases in the Court of Appeal, referred to as subsequent to the decision in *Brintons* case (1), was decided in favour of the employer

> on the grounds that the injury was the inevitable result of work long continued and was not anything which could be described as having happened on a particular duty;

not, it will be noticed, as having happened on a particular day. And later the Lord Chancellor remarks:—

> The claimant sustained a definite physiological injury in the reasonable performance of his duties, and as the result of the work he was engaged in at the time of the injury. The fact that, in the course of his work for a month before the day when he first suffered from dropped foot, he had felt some loss of the power of dorsiflexion of the right foot seems to me in no way to affect his right to compensation.

(1) [1905] A.C. 230. (2) [1910] A.C. 242.
(3) [1933] A.C. 481.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Kerwin J.

As to the extract from the speech of Lord Atkin, it should be observed that he is careful to point out that while the distinction between accident and injury must be observed, it is hardly possible to distinguish in time between the two where a man suffered from rupture, an aneumism bursts, the muscular action of the heart fails, while the man is doing his ordinary work turning a wheel or a screw, or lifting his hand. In fact, as Lord Justice Atkin in *Williams* v. *Guest* (1), he had already said:—

> It also has to be remembered that the cumulative effect of a series of accidents may still entitle the workman to compensation, as in *Selvage* v. *Charles Burrell & Sons Ld.* (2), in which case the girl in the course of her employment contracted in the course of four months a series of small cuts or abrasions the effect of which was to cause an incapacity, and it was held that it was not necessary to be able to name and give evidence of the precise time at which the accident happened which had caused the incapacity.

The distinction referred to by Lord Atkin between accident and injury is emphasized in the New Brunswick Act and nowhere more particularly than in section 7. Until the amendment made in 1938 to the New Brunswick Act, the phrase "unless such accident was in the opinion of the Board intentionally caused by such workman, etc." used the word "injury" instead of "accident" but it is now an accident wholly or principally due, in the opinion of the Board, to a fortuitous event unconnected with the industry in which the workman was employed that may prevent the workman seeking compensation. It seems advisable to point out that the case of an aggravation of a disease existing prior to an injury is dealt with specifically in the New Brunswick Act by paragraph (*d*) of section 7.

These matters are referred to to indicate the necessity of taking into consideration the whole of the Act in coming to a conclusion as to whether, in the circumstances of the present case, the injury to the respondent was caused by accident. The history of the Act shows that the statute should be construed liberally in favour of all workmen within its purview. In the instant case the respondent, in operating the machine in the course of her employment, sustained a definite physiological injury and as the result of the work she was engaged in at the time of the injury. In operating the machine she did the very thing she meant to do but that she should tear the ligaments in her back

(1) [1926] 1 K.B. 497. (2) (1921) 14 B.W.C.C. 158.

was an entirely unpredictable result. It is not possible to distinguish in time between the respondent's actions of pulling the lever and the injury she sustained, and that injury, even though arising by reason of a series of operations of the machine, should be held to have been caused by accident.

The appeal should be dismissed.

HUDSON J.—The respondent, Miss Theed, made a claim for compensation for injuries caused by accident, under the *Workmen's Compensation Act* of New Brunswick. The Board, after hearing evidence, held (1) that the personal injury of which the applicant complains arose out of and in the course of her operating an embossing machine in an employment within the scope of Part I of the said Act; (2) that the said injury was not caused by accident.

From this decision of the Board an appeal was taken to the Supreme Court, Appeal Division, and her appeal was allowed. In concluding the judgment it was stated:

> The appellant undoubtedly sustained physical injury by accident and there seems no lack of definiteness about the time at which it occurred.

The facts are fully set out in the judgment of the court below. Briefly stated, Miss Theed, who was employed originally as a stenographer, was put to work on an addressograph machine. On the first night after she had operated this machine, she felt a sore spot in the middle of her back and complained about this to the manager. However, she continued to operate it for two days and then did not do it for two weeks and did it again for a couple of days. On the second period of operation, she says that she still felt the sore spot. She did not feel any snap or anything like that and the sore spot did not seem to get worse. After it got to a certain point it kept about the same. Eventually she was operated on by a Doctor Skinner. In giving his evidence he said:

> Injury like this is described as tears in the ligaments. The only way we could define it to ourselves was that the fibrous ligamentous attachments to that particular bone had been strained and in healing they had healed so as to give abnormal tensions, so with the idea of releasing those tensions we went in. We freed all the muscles and ligamentous attachments from that part of the bone and removed the spinous process itself.

Dr. Skinner says that the condition could only result from injury.

1940

THE WORKMEN'S COMPENSATION BOARD v. THEED.

Hudson J.

On the appeal coming before this Court, it was urged on behalf of the appellant that the injury sustained by Miss Theed was the result of continuous operations in the work on which she was employed and that it was impossible to point to any particular occurrence in point of time which gave rise to such injury. The case of *Innes or Grant* v. *G. & G. Kynoch* (1) was cited, and in particular the words of Lord Birkenhead at page 772:

> But all that is material is that the infection should have been the result of contact at some particular time and that this particular time should have been during the course of the employment—That it should have been some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it was in the course of the employment.

Many other authorities were cited, but most of these are referred to in the judgment of the court below and I do not think it is necessary to further discuss them.

I think it is clear from the evidence that the injury suffered by Miss Theed was initiated by her work on the first day that she started, and that on each succeeding day that she worked at the machine the amount of the injury was increased.

There is one case which I think is very closely in point, that is, *Burrell* v. *Selvage* (2). In this case a workgirl had received a series of scratches and cuts on her hands during her work, extending over a period of some months, the combined effect of which produced a septic condition incapacitating her from work. It was held by the House of Lords that this was an injury by accident for which she was entitled to compensation under the *Workmen's Compensation Act,* 1906, although the times and places of the several scratches and cuts could not be fixed and her condition could not be attributed to any one particular injury. Lord Buckmaster, in giving the judgment, said at pages 1341 and 1342:—

> The statute provides that, if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, in certain circumstances, be liable to pay compensation. The employer is bound to pay compensation. The employer is bound to pay compensation for the personal injury, the personal injury must be due to an accident, and the accident must arise out of and in the course of the employment.

(1) [1919] A.C. 765.

(2) (1921) 90 L.J. K.B. 1340.

It has been decided by your Lordships' House in the cases of *Innes* (or *Grant*) v. *Kynoch* (1), and *Brintons Ltd.* v. *Turvey* (2), that disease arising out of and in the course of the employment may in certain circumstances be regarded as an accident within the meaning of the statute, and be made the proper subject-matter of a claim for compensation. In the present case, there is no dispute that the disease from which the respondent suffered was a disease which distinctly arose out of the injuries which she had received in the course of her employment, and it cannot be disputed that the cuts and abrasions on her fingers were on each occasion what would be called an "accident" within the meaning of the statute. Therefore, the only question for consideration is whether, when the disease is due not to one specific and definite accident, but to a series of accidents, each one of which is specific and ascertainable, although its actual influence on the resulting illness cannot be precisely fixed, the workman is not entitled to the benefit of the statute. I cannot find any words in the statute which permit of such a construction. In the present case personal injury was suffered, it was suffered by accident, the accident is no less accidental because it occurred on a series of occasions instead of on one. It follows that the claim to compensation was properly established.

I think that the concluding words of Lord Buckmaster are directly applicable to the present case. Miss Theed suffered personal injury by accident and the accident was no less accidental because it occurred on a series of occasions instead of on one. I agree with the court below and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. J. F. Winslow.*

Solicitor for the respondent: *D. King Hazen.*

(1) [1919] A.C. 765.

(2) [1935] A.C. 230.

1940
* May 7, 8.
* June 29.

THE OWNER, MASTER AND MEMBERS OF THE CREW OF THE MOTOR VESSEL *SHANALIAN* (PLAINTIFFS) ... APPELLANTS;

AND

THE MOTOR YACHT *DR. BRINKLEY II* (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Yacht stranded—Refusal by owner of offer to haul it off the shore—Alleged contract with master of yacht to pull yacht off—Claim for salvage services—Whether yacht in imminent danger or distress—Liability of owner of yacht.

Respondent pleasure motor yacht, while on a cruise from Galveston, Texas, to Nova Scotia, stranded on the southwest coast four or five miles northeast of Yarmouth on a smooth ledge at approximately high tide; and at low tide, she was lying practically high and dry with but a foot or two of water under her stern. The owner of respondent yacht refused an offer made by the master of the appellant vessel to haul the yacht off the shore on the next tide for $1,000. Later on the same day, the managing owner of the appellant vessel went in to the respondent yacht to negotiate with the yacht's master, knowing that the owner was staying at a hotel in Yarmouth, and offered to tow the yacht off and look to the insurance underwriters for his compensation, with the understanding that he would not hold the owner or the master of the yacht responsible for any charge. The master of the yacht accepted this offer. Unknown to either the owner or the master of the yacht, the policy of insurance did not cover her while in Canadian Atlantic waters. The yacht was floated easily at high tide, was towed to Yarmouth and, some days later, proceeded under her own power to Halifax where it was found she had sustained practically no damage. The trial judge found that the respondent yacht was in distress and danger, that the services rendered by the appellant vessel were voluntary and in the nature of salvage and he awarded compensation to appellant. On appeal, the Exchequer Court of Canada held that the respondent yacht was not, at the time the services were rendered, in any imminent danger or distress, and dismissed the appellant's action.

Held that the dismissal of the appellant's action by the Exchequer Court of Canada ([1935] Ex. C.R. 181) should be affirmed. According to the facts and circumstances of the case as found by the President of the Exchequer Court of Canada, it has not been established that the respondent yacht was at the time the salvage services claimed by the appellants were rendered, in any imminent danger or distress within the meaning of the Admiralty rule; and, therefore, the appellants rendered no services which can properly be regarded as salvage services in the sense of that rule.

The Pretoria (5 Lloyd L.R. 112) disc.

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. President (1), reversing the judgment of Carroll J., District Judge in Admiralty for the Nova Scotia Admiralty District, and dismissing the appellants' action for compensation for salvage services.

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. J. Pottier K.C. and *D. J. Fraser* for the appellants.

F. D. Smith K.C. and *W. H. Jost* for the respondent.

The judgment of Crocket, Kerwin and Taschereau JJ. was delivered by

CROCKET J.—This appeal arises out of an action against the pleasure motor yacht *Dr. Brinkley II* for salvage services alleged to have been rendered to it by the plaintiffs appellants on Sunday, June 30th, 1935, at or near Chebogue Point on the southwest coast of Nova Scotia 4 or 5 miles northeast of Yarmouth.

The yacht having proceeded to Halifax from Yarmouth on the second day after the alleged salvage services had been rendered and there arrested and released on bail, the trial of the action was commenced on July 6th, 1935, before the late Mr. Justice Mellish, Local Judge in Admiralty for the Nova Scotia Admiralty District, when its owner, master, wireless operator and three other witnesess first gave their testimony. This comprised the whole of the defendant's case. The hearing was then stood over, no doubt on account of Mr. Justice Mellish's illness, and the action was retried before Mr. Justice Carroll as his successor in November, 1937, nearly two and one-half years later, when the managing owner and master of the *Shanalian* and one other witness were heard, and the evidence taken before the late Mr. Justice Mellish tendered and received with the consent of counsel.

The trial judgment was delivered on February 19th, 1938, and the formal entry thereof made on March 22nd. His Lordship held that salvage services had been rendered and made an award of $600 against the defendant yacht and its bail.

(1) [1939] Ex. C.R. 181.

1940

MOTOR VESSEL *Shanalian* v. MOTOR YACHT *Dr. Brinkley II.*

Crocket J.

The defendant appealed to the Exchequer Court of Canada, which set aside the trial judgment and dismissed the action with costs, the learned President having concluded upon his review of the evidence that the services claimed for were not in the nature of a salvage operation for the reason that at the time they were rendered the yacht was not in any imminent danger or distress within the meaning of the Admiralty rule. I am of the same opinion.

The yacht was a vessel of 211 tons with an overall length of 130 feet, equipped with two Diesel engines of 500 horse power each. While proceeding at slow speed in a dense fog and calm sea she ran ashore on a smooth ledge shortly after 9 a.m. at approximately high tide. Her engines were immediately reversed and worked full speed astern in an effort to free her, but without effect, and as the tide receded she gradually settled on the rock with a starboard list, so that two or three hours later she was lying practically high and dry with but a foot or two of water under her stern. Everything possible was done by her own master and crew to prevent any further listing or the yacht's being carried farther forward on the next incoming tide. To this end both bow anchors were put out, carried to within 30 or 40 feet of the stern and made fast to the largest available boulders on either side by the use of an electric windlass.

This was the situation when the master of the *Shanalian*, who had immediately motored to the scene from Yarmouth on learning of the stranding from the latter's managing owner, made his first offer during the forenoon to pull the yacht off on the next tide for $1,000—an offer which the owner of the yacht, who was himself present, as well as the yacht's master plainly gave him to understand they would not consider. They had already been informed by friendly neighbours, who had come to the shore, that they would have from one to three feet higher water on the night high tide, due around 10 p.m., and felt they would then require no assistance to get her out to sea again. Certainly everybody recognized, when the *Shanalian's* services were thus tendered during the forenoon, that it would be sheer folly for any tug boat to attempt to pull the yacht off the ledge before the night tide approached its highest level. That both the master and the managing owner of the *Shanalian* were fully aware of the intention

of the owner and master of the yacht to await the higher night tide and see if the yacht could not come away under her own power before arranging for the assistance of any tug boat can scarcely be doubted. At all events it is clear when they went aboard the *Shanalian* in the late afternoon and proceeded to Chebogue Point they did so entirely on their own initiative and in the hope of prevailing on the master of the yacht to accept the service of their motor tug. When they went in to the yacht in the motor launch to negotiate with the yacht's master, knowing that the owner was staying at the Grand Hotel in Yarmouth 4 or 5 miles away, and obtained the master's permission to bring a tow rope from their motor tug and fix it around the stern of the yacht upon the understanding that they would not hold the owner or the master of the yacht responsible for any charge, and look to the insurance underwriters for their compensation for any assistance the *Shanalian* might render in towing the yacht off the ledge, the yacht had righted herself on the rising night tide, and there is not a particle of evidence to show that she was in any such imminent danger or distress as to require the proffered assistance. The fog was still thick. The sea was admittedly still calm with nothing but the usual ground swell, which could not possibly cause any damage in view of the yacht's crew itself having taken the precautions already indicated to hold her fast against any further forward movement. There was no wind and no indication of any approaching storm.

It is the yacht's situation at the time the assistance is tendered, with reference to which the question of imminent peril or distress, I think, must be decided. The mere fact that the yacht was stranded does not place her in imminent danger or distress. As Mr. Justice Mellish suggested in his question to Captain McKinnon, a well known pilot of wide experience, during his examination before him, stranding is not an unusual thing at all. Captain McKinnon replied: "No, vessels very frequently strand all along the coast." The test, as I understand the cases, as to whether a ship is in such danger as to oblige the master to accept the service of another for its relief and safety is whether a prudent owner or master would have accepted the services of the other when proffered in the situation in which his ship is found at that time. Upon my examination

1940

MOTOR VESSEL *Shanalian* v. MOTOR YACHT *Dr. Brinkley II.*

Crocket J.

of all the testimony bearing upon this point, I entirely agree with the view of the learned President that it was quite within the right of the owner at the time in question here to prefer his own means of releasing the *Brinkley* and reject the services of the *Shanalian,* if her aid in his judgment was not urgent and if the yacht was not then in fact in any real or sensible danger. The proffered service of the *Shanalian* was admittedly accepted upon the distinct understanding I have already mentioned, viz.: that the owner and master of the yacht would not be held responsible. While it is true, as Dr. Lushington put it in the case of *The Charlotte* (1), that it is not necessary, in order to create a liability for salvage, that the distress should be actual or immediate, or that the danger should be imminent and absolute—a dictum, which was approved by the Judicial Committee of the Privy Council in *The Strathnaver* (2), and upon which Carroll, L.J.A., based himself in the case now before us, there must at least be some danger, which was apparent or probable at the time the services were rendered. Sir Robert Phillimore, who delivered the judgment in the case of *The Strathnaver* (2), immediately after quoting and approving Dr. Lushington's dictum, proceeded to say:

> Their Lordships are of opinion that there was neither actual nor imminent probable danger at the time these services were rendered.

The Pretoria (3) affords I think a striking illustration of the application of the governing principle in a case of this kind. That ship was caught in the Thames Estuary by a sudden squall on the morning of April 15th and was laid on her beam ends. She shot her deck cargo. Her hatch covers were carried away and she shipped much water. Her anchor with 15 fathoms of cable was laid out. She settled down on the bottom of sand and mud, and her hull became wholly submerged, as the tide made. Her crew took to the boat and on arrival ashore telegraphed to Faversham, where the *Pretoria* was owned, that the barge had sunk off Warden Point. On the ebb-tide her crew returned and worked at the pumps but could not free her sufficiently to get her afloat, and when water flowed over her again on the evening tide they went ashore. On the

(1) (1848) 3 W. Rob. 68, at 71. (2) (1875) 1 App. Cas. 58, at 65.
(3) (1920) 5 Lloyd, L.R. 112.

morning of April 16th they went to Faversham and reported the position to C., a director of the owning company, who at once gave orders for the manning and fitting out of another barge (the *Bertie*) with pumps and sufficient men to pump out the disabled *Pretoria*. The *Bertie* was ready to go out that evening but did not do so, the wind being unfavourable. In the meantime the plaintiffs had seen the mast and top of the mizzen of the *Pretoria* while she was submerged and went out in a motor trawler, and tested the pumps, which they found in working order but nothing further could be done at that state of the tide. They telephoned C., reporting what they had done, and were informed that C. was sending another barge down and would lighten the *Pretoria* in the morning and that the plaintiffs' offer of assistance was therefore declined. Notwithstanding this, the plaintiffs returned to the *Pretoria* late in the evening, and in the early morning of April 17th when the tide was ebb, they pumped her out and towed her ashore. Hill, J., who tried the case, sitting with two of the Elder Brethren of Trinity House, found that the plaintiffs got the *Pretoria* off on the morning of April 17th, whereas the defendants would not have got her off until the evening of that day. He asked the Elder Brethren whether there was anything in the weather of April 17th, which made it important that she should be got off early on that day and they both said "No." He also asked the Elder Brethren whether, having regard to the circumstances of the case and what might be anticipated at the time of year and in the locality an owner of reasonable prudence would have refused the assistance of the plaintiffs. Both answered "Yes" and gave it as their opinion that C. was acting with prudence in preferring his own means of recovering the *Pretoria* and in rejecting the offer of the plaintiffs. His Lordship entirely agreed and therefore dismissed the plaintiffs' claim with costs.

I may add that, following the conversation between the owner and master of the *Shanalian* and the master of the *Brinkley* Sunday night, a tow-rope was in fact brought over from the *Shanalian* to the yacht, fastened around her stern, and carried to the tug boat. All hands then waited on the rising tide and at about 9.45 p.m.—about half an hour before full high tide—the yacht came off the ledge

1940

MOTOR VESSEL *Shanalian* v. MOTOR YACHT *Dr. Brinkley II.*

Crocket J.

with the port engine of the yacht running full speed astern and both engines of the *Shanalian* running full speed ahead and was towed to a dock at Yarmouth.

Whether the yacht came off under its own power, or whether the *Shanalian* rendered any real service in bringing her off—a question regarding which there was some conflict of evidence—is, in my view of the case, quite immaterial. The operation in bringing her off seems in any event to have occupied but a few minutes at most. When she backed out the tow-line was shifted from the stern of the yacht to the bow and she proceeded with the *Shanalian* ahead to Yarmouth and there docked. She remained in Yarmouth on Monday, where the crew that day tried her out with the owner aboard, and, having been found perfectly seaworthy, left Yarmouth about noon Tuesday under her own power and proceeded to Liverpool and Halifax. On being dry-docked at Halifax a few days later it was found she had sustained no damage beyond a slight bending of one of the blades of her propeller shaft, which had caused some vibration on the operation of her port engine.

Having regard to the admitted and undisputed facts above referred to, I have concluded with all respect that the plaintiffs rendered no services which can properly be regarded as salvage services in the sense of the Admiralty rule, and that the learned President of the Exchequer Court of Canada upon that ground alone had no other recourse under the authorities than to order the dismissal of the action as he did.

With regard to the contention that the appeal to the Exchequer Court of Canada was barred by the limitation prescribed by Admiralty Rule 172, not having been brought within 30 days from the day when the judgment was pronounced, I think the learned President has correctly interpreted the rule as providing a limit of 30 days in the case of a judgment or order in any matter which is not "an action," and a limit of 60 days in the case of any judgment or order in a proceeding which is an action, and that the 30 days limitation runs from the date when the judgment or order is pronounced and the 60 days period from the date when the judgment is formally perfected. The appeal, though brought after the expiration of 30

days from the delivery of the trial judgment, was brought before the expiration of 60 days from its formal entry on March 22nd, and was therefore in time.

The appeal must, therefore, be dismissed with costs.

DAVIS J.—The appellants' case was mainly rested before us on the contention that the right to salvage is in no way dependent on contract and that a salvage contract only goes to amount. That may be so and no doubt is under certain circumstances but here the owner of the private yacht in question was on board himself at the time she got into difficulties. He did not consider the position of the yacht as one of any real danger and he definitely declined the assistance that the appellants offered him on certain monetary terms. In any event I agree with the conclusion of the learned President of the Exchequer Court, whose judgment is in appeal before us, that the evidence does not establish that the yacht was, in the practical sense, in any imminent danger or distress or that her position was so critical as to make it unreasonable for her owner to decide upon an attempt to float the ship by her own means at high tide, before seeking or accepting the assistance of a tug.

The services rendered by the appellants were not only declined by the owner of the yacht but were not rendered in such circumstances that they ought to have been accepted. See *The Pretoria* (1), *The Flora* (2).

I would dismiss the appeal with costs.

HUDSON J.—This action was brought for salvage and, in order to succeed, it was necessary for the plaintiff to prove that the ship to which services were rendered was in imminent danger or distress. Mr. Justice Carroll at the trial held that it was, but he was not assisted by a nautical assessor, nor did he himself hear the evidence given on behalf of the defendant. A court of appeal is, therefore, more free to review his finding of fact than would otherwise be the case. Mr. Justice Maclean in the Exchequer Court of Canada has done so and come to the conclusion that the ship was not, at the time the services were rendered, in danger or distress.

(1) (1920) 5 Lloyd, L.R. 112. (2) (1929) 34 Lloyd, L.R. 172.

1940

MOTOR VESSEL *Shanalian* v. MOTOR YACHT *Dr. Brinkley II.*

Hudson J.

After careful review of the evidence, I am satisfied that Mr. Justice Maclean has come to the correct conclusion and I am also satisfied that the assistance given to the ship was given without the authority of Doctor Brinkley, the owner, and contrary to his specific instructions, to the knowledge of the plaintiff.

Under these circumstances, I do not think that the plaintiff is entitled to succeed. The discussion between the two captains as to insurance does not, even accepting the plaintiff's version, assist him, if the ship was not in danger. The relevant authorities have already been adequately discussed by my brother Crocket.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *V. J. Pottier.*

Solicitor for the respondent: *C. J. Burchell.*

1940

* Feb. 7, 8, 9.
* June 29.

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA, AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS, AND PETER MAYEWSKY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Churches—Status of Voluntary Associations—Incorporation of religious body by Federal Parliament—Powers—Jurisdiction of Courts—Ukrainian Greek Orthodox Church of Canada—Expulsion of priest by Church Court—Refusal of congregation to recognize sentence—Action for injunction—Spiritual jurisdiction of corporate body over congregations—Antimins—Return of it by expulsed priest to corporation.

The respondent Mayewski was since 1931 a priest of the Congregation of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress in Winnipeg. He was tried in 1937 by a church court on charges

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

of broadcasting services in defiance of the consistory's ruling and of acts of disloyalty and disobedience to the archbishop. The court sustained the charges, whereupon the archbishop as bishop of the Ukrainian Greek Orthodox Church of Canada excluded the respondent priest from the priesthood, of and membership in, the said church. The Congregation ignored the sentence and the respondent priest continued to act as such. An action was then brought in the name of the appellant, the Ukrainian Greek Orthodox Church of Canada and of two individual, co-appellants before this Court, who claim to be members of the respondent Congregation and to sue on behalf of a minority of these members who are opposed to the continuance of the ministry of the respondent priest. The appellant corporation was incorporated by a special Act of the Parliament of Canada in 1929 (19-20 Geo. V, c. 98) for the purposes "of administering the property and other temporal affairs connected with the spiritual jurisdiction of the said Corporation." All the congregations, parishes, missions of the Ukrainian Greek Orthodox Church of Canada "which are now included and are a part thereof, and which may at any time in the future become a part thereof" were by the Act constituted the Corporation. The respondent trustees are a body corporate registered under the Manitoba *Church Lands Act* (R.S.M., 1913, c. 31); they hold title to the church lands for the Congregation, by whom they are appointed for that purpose; but they have nothing to do with the appointment or maintenance of the clergy, nor do they exercise any spiritual jurisdiction or have any corporate concern with the ecclesiastical functions of the bishop or the church court. The appellants' claim in the action was for an injunction restraining the respondent Mayewsky from officiating any longer or conducting any further services as a priest of the appellant corporation or as a priest of the respondent congregation or parish or otherwise in the Cathedral; an injunction restraining the respondent trustees from procuring or permitting such officiating or conducting by the respondent Mayewsky; the return and delivery to the appellant corporation of what is called the antimins and an injunction restraining the respondent Mayewsky from wearing and using the said antimins. The antimins (a singular word) is a piece of linen about the size of a handkerchief which was given into the possession of the respondent Mayewsky at the time of his ordination as a priest of the appellant corporation for use in the ministration of the sacraments of the church. A counter-claim was brought by the respondent Mayewsky asking a declaration that he was a priest in good standing and that the purported disposition or expulsion of him as a priest was illegal, null and void, and for damages and other relief. The trial judge granted the injunction prayed for by the appellants and ordered the delivery of the antimins to the corporate appellant or to its Board of Consistory; and he also dismissed the counter-claim. The Court of Appeal, reversing that judgment in part, dismissed the appellants' action, but maintained the dismissal of the counter-claim. Both parties appealed to this Court by way of appeal and cross-appeal.

Held that the appeal should be dismissed with costs; and that the cross-appeal should also be dismissed, but without costs, subject to the terms of an agreement between counsel as to variation of the order of the Court of Appeal, so as to provide that the dismissal of the counter-claim shall not be deemed an adjudication on any of

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

the issues raised thereby other than those adjudicated upon in the main action. Davis and Hudson JJ. dissenting in part and holding that the respondent Mayewsky should be ordered to deliver up the antimins to the appellant corporation.

Per Crocket J.—It was not intended by the federal statute of 1929 (by which the appellant corporation has been constituted) that the unincorporated church organization with all its congregations, priests and missions, together with their trustees as incorporated under provincial laws, should be merged in or absorbed by the corporate appellant, and the latter's so-called statutory charter has not deprived the trustees of the Cathedral of St. Mary the Protectress of its rights to hold the Cathedral property as trustees for the congregation, or the congregation of its right to manage its own temporal affairs. The antimins, having no substantial monetary value, the mere demand for their delivery to the Board of Consistory as the property of the corporate plaintiff would not, apart from all other considerations, be sufficient to justify the Manitoba Court in taking action by way of injunction. The manifest and sole purpose of this claim, as that of the whole action, was to enforce obedience to a purely ecclesiastical sentence or decree.

Per Davis J.—Under all the circumstances of this case, this Court should not interfere with the expulsion order of the Church Court by enquiring into the proceedings against the respondent priest, examining the nature of the charges and the character of the evidence and then setting aside such order. But it has not been proved that the Cathedral congregation at Winnipeg ever signified its intention to become a part of the appellant corporation as stipulated in the statute, or that the Consistory ever issued a certificate admitting such congregation to the corporation. That being so, the congregation never became a part of the corporation, and the corporation therefore has no legal right to interfere with the congregation in continuing the services of its present pastor. Nor has the appellant corporation the right to restrain the respondent Mayewsky from officiating in the charge of that congregation or from officiating elsewhere, so long as he does not officiate "as a priest of the appellant corporation."—As to appellant corporation's claim to the antimins: the property in it has at all times been in the appellant corporation, and the latter is entitled to the return forthwith of the same. Therefore, this Court should issue an order directing the respondent Mayewsky to deliver up forthwith the antimins to the appellant corporation and granting injunction against the respondent Mayewsky restraining him from officiating or conducting any services in Canada "as a priest of the appellant corporation" unless and until he may become reinstated in good standing as a priest of the said corporation, and, otherwise, the appellants' action should be dismissed.

Per Kerwin J.—The minutes of the meetings of the several councils of the unincorporated Ukrainian Greek Orthodox Church of Canada, held from 1918 to 1929 established that that Church never had any jurisdiction over the lands owned by the several congregations, the title to which, so far as concerns the Cathedral congregation, is vested by virtue of the provincial enactment in trustees; and, moreover, the terms of several sections of the Act of incorporation of 1920 indicate that the Federal Parliament did not ever purport to vest these lands in the Corporation; nowhere in the Act is there

any grant of spiritual jurisdiction to the Corporation over the several congregations; the statute limits the power of the Corporation to temporal affairs over which alone it has any jurisdiction. Furthermore, while the respondent Mayewsky is a priest of the unincorporated Church, he never was a priest of the appellant Corporation as he never became a "part" of it or a "member" as defined in section 5 of the Act of 1929; and neither a declaration made to the Consistory of the Church by the respondent priest on September 17th, 1931, on his arrival in Canada nor the certificate issued to the priest the same day under the seal of the appellant corporation can confer upon the Corporation a power or jurisdiction that, according to the Special Act, it did not possess and was incapable of assuming; it was not legally competent to the respondent Mayewsky to give, or to the appellant corporation to accept or exercise, the jurisdiction claimed by the appellant corporation. Therefore, the appellants' action must fail. As to the question of the return and the delivery to the Corporation appellant of the antimins, the obligation of the priest in the undertaking was to return it to the Consistory of the unincorporated church in case he ceased to be a priest of that church; and that event not having occurred, the claim must also fail.

Per Hudson J.—The Cathedral congregation, respondent, never became a part of the corporate body, appellant, or subject to its control, either temporal or spiritual. As to the appellants' claim to prohibit the respondent Mayewsky from continuing to act as a priest of the congregation, it amounts to no more than a claim to have the Court enforce what is a purely ecclesiastical decree; no property right is involved so far as the appellants are concerned and the corporation makes no contribution to the salary of the priest, nor to the maintenance of the Cathedral Church. Moreover, this action is solely based on the powers of the appellant corporation, which is not shown to be vested with any authority to enforce spiritual discipline over priests or to disqualify them or to restrain any particular priest from officiating or any congregation from accepting his ministrations.—The appellant Corporation is entitled to the return to it of the antimins, irrespective of the validity or invalidity of the decree of excommunication.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Manitoba (1) reversing in part the judgment of the trial judge, Donovan J., dismissing the appellants' action and maintaining the dismissal of a counter-claim.

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.

Fred. Heap K.C. for the appellants.

J. S. Lamont K.C. and *Wasyl Swystun* for the respondents.

(1) [1939] 1 W.W.R. 481.

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Rinfret J.

RINFRET J.—The appeal should be dismissed with costs and the order of the Court of Appeal should be confirmed, except that the counter-claim should be disposed of in accordance with the agreement arrived at between the parties.

CROCKET J.—This appeal arises out of an action, which the plaintiffs brought in the month of May, 1937, in the Court of King's Bench of the Province of Manitoba, praying for an injunction against the defendant Mayewsky, restraining him from officiating any longer or conducting any further services as a priest of the plaintiff corporation or as a priest of the congregation or parish of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress in the City of Winnipeg, and also an injunction restraining the trustees of the said Cathedral from permitting the said priest to so officiate as well as for the return and delivery to the corporation plaintiff's Board of Consistory of antimins worn or used by him as such priest.

The learned trial judge, Donovan J., granted the injunction prayed for and also ordered the delivery of the antimins to the corporate plaintiff or to its Board of Consistory. The defendants appealed to the Court of Appeal, which dismissed the plaintiffs' action as well as a counter-claim of the individual defendant, which he had entered for damages against the corporate plaintiff and nine individuals, including the bishop, his administrator and other members of the corporate plaintiff's Board of Consistory.

So far as the plaintiffs' action is concerned, a perusal of the statement of claim shows that it is entirely founded upon two main pretensions: first, that the defendant corporation acquired the Cathedral in the year 1925 in trust for a congregation or parish of the unincorporated body known as "The Ukrainian Greek Orthodox Church of Canada" and was made a component part of the plaintiff corporation by the latter's Act of Incorporation, ch. 98 of the Statutes of Canada, 1929, and subject to the lawful jurisdiction of the latter, and that the defendant Mayewsky thus became a priest of the latter corporation; and, second, that the corporate plaintiff, acting by and through its Board of Consistory, Archbishop, General Council and Church Court and having power and authority in that behalf from and under its charter and certain by-laws,

decisions, canons and resolutions duly passed thereunder, duly expelled the said individual defendant from its priesthood. If the first of these pretensions is not made good the action cannot properly be maintained, for it is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order.

If there is any legal basis for the corporate plaintiff's assertion of civil or temporal jurisdiction over the Cathedral Church, there is no other source in which it can be found than the federal statute of 1929, by which it was constituted. The plaintiffs in this regard rely mainly on s. 2 of that statute. This section reads as follows:

> All the congregations, parishes, missions, of the Ukrainian Greek Orthodox Church of Canada, which are now included and are a part thereof, and which may at any time in the future become a part thereof, are hereby constituted a corporation, public and politic under the name of "The Ukrainian Greek Orthodox Church of Canada," hereinafter called "the Corporation" for the purposes of administering the property, and other temporal affairs connected with the spiritual jurisdiction of the said Corporation.

It will be observed that while this section purports to embrace all congregations, parishes and missions, which were included in the unincorporated body of the church at the time of the enactment of the federal statute, as well as those which might at any time in the future become a part thereof, in the new corporation as a body "public and politic," the functions of that body are expressly limited to "the purposes of administering the property and other temporal affairs connected with the spiritual jurisdiction of the said corporation." The section does not of course purport to confer spiritual jurisdiction upon the new corporation, nor does it purport to vest in it any property whatsoever.

Having regard to its constitutional limitation in relation to property and civil rights in the Provinces, it is scarcely conceivable that Parliament could have intended to legislate into the corporation thus constituted the whole membership of all the individual autonomous congregations and missions of an unincorporated body of Christians without their consent, together with all the property held in trust for them under provincial laws. That there was no

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Crocket J.

such intention appears conclusively to my mind from sections 4 and 6 (1) of the Act. Section 4 provides that the objects of the corporation shall be * * * to administer in Canada

> such of the property, business and other temporal affairs of the said Ukrainian Greek Orthodox Church of Canada as may be entrusted by the said Ukrainian Greek Orthodox Church of Canada to the corporation.

Sec. 6 (1) enacts that

> Any congregation or mission of the Ukrainian Greek Orthodox Church of Canada, whether now in existence or which may be formed at any time in the future, shall signify its intention to become a part of the Corporation by a resolution passed at a duly called meeting thereof according to the constitution thereof.

The record discloses that no such resolution was ever passed by the congregation of the Cathedral Church. Each of these sections plainly visualizes the existence and continuation of the Ukrainian Greek Orthodox Church of Canada as an unincorporated body or denomination of Christian people professing and adhering to its own recognized creed, polity, forms of worship, etc., and both seem to me unmistakeably to negative the proposition that the statute itself merges that church organization and all its congregations, missions and trust properties in the new corporation, whether the latter be regarded as a purely religious or a combined religio-civil corporation. The apparently studied obscurity and ambiguity of the language of par. 4 of the statement of claim would seem to indicate the hesitancy and doubt with which the corporate plaintiff itself puts forward the claim that the suggested merger or absorption of the unincorporated church with all its congregations and trust property was effected by the federal statute. It alleges that

> upon (or shortly after) the incorporation of the corporate plaintiff the unincorporated body of the same name * * * became (and it has ever since been) absorbed in and by the former (treating itself as so absorbed and being treated by the plaintiff as so absorbed).

One can only conjecture as to the purpose of the brackets, whether they are intended to indicate that the words contained within them may be eliminated at one's option. If one chooses to pass them over, it is perhaps possible to spell out of the truncated paragraph an allegation that the unincorporated church organization became incorporated in the corporate plaintiff in virtue of the enactment of

chapter 98. If, however, one is disposed not to do this but to read the whole paragraph precisely as it is set out, it would seem to me to be reasonably capable of no other meaning than that the pretended merger or absorption of the unincorporated church in and by the corporate plaintiff was achieved, not by the latter's statutory incorporation, but by the very dubious and seemingly incomprehensible fact of the whole unincorporated denominational body comprising all its varied member congregations, and the corporate plaintiff itself having mutually assumed that it had been so absorbed irrespective of the provisions of the federal Act. It is therefore not surprising that the plaintiff corporation in bringing its action thus shrank from definitely relying upon the suggested statutory merger, inasmuch as the obvious result of the acceptance of such a proposition would be to place itself in the anomalous and impossible position of bringing an action against a corporation, which it was claiming was merged in itself and therefore non-existent, viz.: the trustees of the Cathedral Church.

For my part I have no hesitation in holding that it was never intended by the federal statute that the unincorporated church organization with all its congregations, priests and missions, together with their trustees as incorporated under provincial laws, should be merged in or absorbed by the corporate plaintiff, and that the latter's so-called statutory charter has not deprived the Trustees of the Cathedral of St. Mary the Protectress of its right to hold the Cathedral property as trustees for the congregation, or the congregation of its right to manage its own temporal affairs.

As to the antimins, which it is explained are consecrated linen or lace napkins used by a priest in the celebration of masses, and are alleged to belong to the corporate plaintiff, the claim against the defendant Mayewsky for the return and delivery of these to the plaintiff corporation's Board of Consistory depends entirely upon the allegation that he received them as a priest of the plaintiff corporation and his alleged expulsion as a priest thereof. This is clearly shown, I think, by par. 14 of the statement of claim. It rests, therefore, on precisely the same foundation as the claim for an injunction against the Trustees of the Cathedral and Mayewsky, viz.: that both the

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Crocket J.

defendant corporation and its officiating priest had become absorbed in and by the corporate plaintiff in virtue of its incorporating Act of 1929, and must necessarily in my opinion stand or fall with it.

In any event the antimins, although of the highest importance as a badge and symbol of priesthood, have no substantial monetary value, as pointed out by Dennistoun, J.A., and I agree with him that the mere demand for their delivery to its Board of Consistory as the property of the corporate plaintiff, would not, apart from all other considerations, be sufficient to justify the Court in taking action by way of injunction. The manifest and sole purpose of this claim, as that of the whole action, is to enforce obedience to a purely ecclesiastical sentence or decree. For that reason I am of opinion that the Court of Appeal was fully justified in dismissing the plaintiffs' action.

The appeal should be dismissed with costs.

As to the cross-appeal from the dismissal of the counter-claim, counsel consented that this should be limited to such issues as are finally adjudicated upon in the main action and that its dismissal should be taken to be without prejudice to any action that might hereafter be brought in respect of any of the issues not so determined. Subject to the terms of this agreement, the order of the Court of Appeal, in so far as it concerns the counter-claim, should also be confirmed. There should be no costs on the cross-appeal.

DAVIS J.—The appellant corporation was incorporated by a special Act of the Parliament of Canada in 1929 (19-20 Geo. V, ch. 98) under the name of "The Ukrainian Greek Orthodox Church of Canada" for the purposes "of administering the property and other temporal affairs connected with the spiritual jurisdiction of the said Corporation." All the congregations, parishes, missions of the Ukrainian Greek Orthodox Church of Canada, "which are now included and are a part thereof, and which may at any time in the future become a part thereof" were by the Act constituted the corporation.

The trustees of the Cathedral church in Winnipeg (who were registered under the Manitoba *Church Lands Act*) together with the parish priest Peter Mayewsky, are the

respondents (defendants). Two individuals joined with the corporation as plaintiffs (and are co-appellants); they claim to be members of the Cathedral congregation and, while admitting they are in a minority in their opposition to the continuance of the ministry of the present priest, they assume to sue on behalf of the other members of the Cathedral congregation "excepting such majority." The appellants' claim in the action was for an injunction restraining Mayewsky from officiating any longer or conducting any further services as a priest of the appellant corporation or as a priest of the congregation or parish or otherwise in the said Cathedral; an injunction restraining the respondent trustees, or officers, servants or agents, from procuring or permitting such officiating or conducting by the respondent Mayewsky; the return and delivery to the appellant corporation of what is called the antimins, and an injunction restraining the respondent Mayewsky from wearing and using the said antimins.

The basis of the appellants' action was that the respondent priest Mayewsky had become a priest of the appellant corporation in 1931 but that in 1937 he had been duly expelled from its priesthood and forbidden any longer to officiate as a priest of the appellant corporation or in the Winnipeg Cathedral; the appellant corporation claiming to have acted by and through its Board of Consistory, Archbishop, General Council and Church-court, having power and authority, it was alleged, in that behalf under the statute and certain by-laws, decisions, canons and resolutions. The antimins (said to be a singular word) was described to us as a piece of linen about the size of a handkerchief which was given into the possession of the respondent priest at the time of his ordination as a priest of the appellant congregation for use in the ministration of the sacraments of the Church.

There was a counter-claim by the respondents (?) asking a declaration that the respondent Mayewsky is a priest in good standing of The Ukrainian Greek Orthodox Church of Canada and that the purported deposition or expulsion of him as a priest of the said Church and as a member thereof was and is illegal and null and void; and other relief.

1940

THE UKRAINIAN GREEK CHURCH OF CANADA ORTHODOX ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Davis J.

Both the action and the counter-claim stand dismissed by the judgment of the Court of Appeal for Manitoba and both parties appealed to this Court by way of appeal and cross-appeal.

Two issues may be disposed of at once. The cross-appeal from the dismissal of the counter-claim merely asked that its dismissal

> shall not be deemed to be an adjudication upon any of the issues raised in the said counter-claim, except to the extent that any of the said issues are finally adjudicated upon in the main action, and that the dismissal of the respondent's counter-claim is to be without prejudice to any action that may hereafter be brought in respect of any of the issues not so finally adjudicated upon.

Counsel for the appellant consented to this variation and the cross-appeal should therefore be allowed.

The other item is the antimins. Like most church quarrels, there is obviously much bitterness on both sides and the parish priest has gone so far by his counsel as to refuse on somewhat technical grounds to return to the appellant corporation the antimins, although at the time he sought and obtained ordination from the appellant corporation he acknowledged in writing to that corporation the receipt of the antimins as having been received from the Archbishop through the Consistory of the appellant corporation and he declared that the said antimins "is and shall remain to be the property of" the appellant corporation,

> and as such shall be returned by me to the Consistory of the said Church in case I cease to be a priest of the Ukrainian Greek Orthodox Church of Canada.

It is argued that the respondent Mayewsky has never ceased to be a priest of the Church at large as distinguished from the church corporation; that in any event he was never properly expelled from the appellant corporation; and, thirdly, that the intervention of the Court cannot be sought for the return of the article because it has little or no money value. The property in the antimins clearly has at all times been in the appellant corporation, and it is entitled to the return forthwith of the same, and to this extent at least the appellant corporation should succeed against the respondent Mayewsky.

We may now consider the claim of the appellant corporation to restrain the respondent priest from officiating as a priest of the appellant corporation. It is perfectly

plain on the evidence that he took ordination and accepted a certificate of good standing from the appellant corporation. He has been expelled after charges have been heard by the Church Court of the appellant corporation and unless the expulsion order can be set aside as asked, the appellant corporation is entitled to the injunction sought in so far as acting as a priest of its corporation is concerned.

We are invited to enquire into the proceedings against the priest and to examine the nature of the charges and the character of the evidence and to set aside the order of the Church Court. It is contended that the charges were frivolous and that the expulsion should not be recognized by the civil courts. But the charges in substance were insubordination in an effort to undermine the authority and position of the Archbishop; it is not suggested that there was any dishonesty or lack of good faith on the part of the Church Court. The priest was duly notified of the charges and of the hearing by the Church Court but failed to appear. He had under the church law a right to appeal but he did not take advantage of it. Under these circumstances the Court cannot go behind the expulsion order of the domestic tribunal.

There then remains the larger question. The congregation of the Cathedral, obviously by a large majority, stand by their pastor and resist the effort of the appellant corporation to expel him from the charge. One difficulty is that the congregation as such is not before the Court. The respondent trustees are merely those individuals in whose names as trustees the title of the property stands by registration under the local provincial law, the Manitoba *Church Lands Act*. If, however, the congregation as such was a component part of the Church as incorporated, it might well be unnecessary that the congregation as such should be made a party. The evidence, I think, makes it abundantly plain that the congregation acted in many respects as if it were a part of the incorporated Church; but the evidence is quite insufficient to establish the proposition upon which the main claim in the action rests, that is, that the Cathedral congregation was strictly a part of the incorporated Church body. It is not shown that the

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Davis J.

congregation or parish joined in the petition for incorporation. The statute itself provides that all the congregations, parishes and missions "which are now included and are a part * * * and which may at any time in the future become a part" of the Ukrainian Greek Orthodox Church of Canada, constitute the incorporated body. (Sec. 2.) Any congregation or mission "whether now in existence or which may be formed at any time in the future" may signify its intention to become a part of the Corporation by a resolution passed at a duly called meeting thereof, according to the constitution thereof. (Sec. 6 (1).) The copy of such resolution shall be certified by the chairman and the secretary of the said meeting, and shall be sent to the Consistory of the Corporation, and the Consistory may then issue a certificate admitting such congregation or mission to the Corporation. (Sec. 6 (2).)

That there is a difference between the Ukrainian Greek Orthodox Church of Canada and the corporation is shown by sec. 4 of the statute, which defines the objects of the corporation:

> * * * and to administer in Canada such of the property, business and other temporal affairs of the said Ukrainian Greek Orthodox Church of Canada as may be entrusted by the said Ukrainian Greek Orthodox Church of Canada to the Corporation.

It is not proved that the Cathedral congregation at Winnipeg ever signified its intention to become a part of the corporation as stipulated in the statute, or that the Consistory ever issued a certificate admitting such congregation to the corporation. That being so, the congregation never became a part of the corporation, and the corporation therefore has no legal right to interfere with the congregation in continuing the services of its present pastor. Nor has the appellant corporation the right to restrain the respondent Mayewsky from officiating in the charge of that congregation or from officiating elsewhere, so long as he does not officiate "as a priest of the appellant corporation."

The appellants fail on their main ground of appeal but should succeed in part. The judgment of the Court should in my opinion be

(1) An order directing the respondent Mayewsky to deliver up forthwith the antimins to the appellant corporation.

(2) An injunction against the respondent Mayewsky restraining him from officiating or conducting any services in Canada "as a priest of the appellant corporation" unless and until he may become reinstated in good standing as a priest of the said corporation.
(3) Subject to aforesaid, the action is dismissed.
(4) On the cross-appeal in the counter-claim, the order as asked goes by consent.

The question of costs presents some difficulty. Upon the whole, I think the appellants should have one-third of their costs of the action and of the appeals in the action but there should be no costs to either party of the counter-claim or of the appeals in the counter-claim.

KERWIN J.—The appellants, The Ukrainian Greek Orthodox Church of Canada, Joseph Bohonos and George Bugera, were the plaintiffs in an action instituted in the Court of King's Bench in Manitoba against the respondents, The Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress, in the city of Winnipeg, in the province of Manitoba, and Reverend Peter Mayewsky. The Ukrainian Greek Orthodox Church of Canada, one of the appellants, is a corporation incorporated by a Special Act of the Dominion Parliament, 19-20 George V, chapter 98, assented to May 1st, 1929. The two individual appellants are members in good standing of the congregation of The Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress. The respondents, the trustees, are a body politic and corporate by virtue of a resolution of the congregation of the Cathedral and of the provisions of *The Church Lands Act,* being chapter 31 of the Revised Statutes of Manitoba, 1913. The exact status of the other respondent, Reverend Peter Mayewsky, is one of the main issues in the appeal, the appellants claiming that he had been a priest of the appellant corporation but that he had been removed as such by proper proceedings; the respondents, on the other hand, contending that while he was and is a priest of the unincorporated spiritual body known as The Ukrainian Greek Orthodox Church of Canada, he never was a priest of the appellant corporation.

By the trial judgment, Reverend Mayewsky was restricted from officiating any longer or conducting any further

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Kerwin J.

services in the cathedral or otherwise; he was further restrained from wearing or using the antimins used by him in officiating in the cathedral, and he was ordered to forthwith deliver the antimins to the appellant corporation or its Board of Consistory; and the respondents the trustees, their officers, servants and agents were restrained from procuring or permitting such officiating or conducting by Reverend Mayewsky. A counter-claim by the present respondents was dismissed. On appeal to the Court of Appeal for Manitoba both the action and the counter-claim were dismissed. The plaintiffs now appeal by leave of the Court of Appeal. A notice of cross-appeal from that part of the order which dismissed the counter-claim was given but, on the argument, it was agreed between counsel that, whatever disposition might be made of the appeal, the counter-claim should stand dismissed without costs but such dismissal should not be deemed an adjudication upon any of the issues raised in the counter-claim except to the extent that any of those issues are finally adjudicated upon in the appeal, and that the dismissal of the counter-claim should be without prejudice to any action that may hereafter be brought in respect of any of the issues not so finally adjudicated upon.

In order to understand the respective contentions of the parties, it is necessary to commence with a meeting at Saskatoon on July 18th and 19th, 1918, of one hundred and fifty representatives of what are termed "the Ukrainian Settlers in Canada." The minutes of that meeting and most of the documents appearing in evidence are in a foreign language but translations into English have been agreed upon between the parties, and it is to such translations that reference will be made. According to the minutes just mentioned, it is recited in a resolution passed at the meeting:—

> Whereas the head of Ruthenian Greek Catholic Church of Canada demands complete transfer of property of church congregations, without reservation, to the corporation of Ruthenian Greek Catholic bishop, in which according to the Act of Incorporation the bishop is the sole corporation and all Ruthenian Greek Catholic parishes, missions, are under sole management and are solely represented by the bishop himself.
>
> Whereas in accordance with this Act of Incorporation the Ruthenian Greek Catholic parishes are deprived of all right to manage the properties of congregations;

And whereas the said bishop denies spiritual jurisdiction to the Ukrainian married priests in Canada (which denials is contrary to the rights and privileges of our church rite), and in substitution establish a celibacy, that is to say, unmarried priests.

The resolution concludes:—

Therefore we the representatives of various Ukrainian settlements and communities in Western Canada resolve as follows:—

To establish Ukrainian Greek Orthodox Church of Canada upon the following principles:

(*a*) This church shall be in communion with other Eastern Orthodox Churches and shall adhere to the same dogmas and to the same church rites.

(*b*) The priests shall be married.

(*c*) The church property shall belong to the congregations and such congregations shall manage it.

(*d*) All bishops shall be elected by general church council, composed of priests and delegates representing church congregations and brotherhoods.

(*e*) The congregations shall have right to engage and discharge priests.

The 1918 meeting was apparently considered the first meeting or convention of The Ukrainian Greek Orthodox Church of Canada as the minutes of the next meeting referred to are headed "Minutes of the Second Ukrainian Greek Orthodox Church Convention at Saskatoon, December 11, 1919." In these minutes appears the statement:—

Our intention was and is to unite our regenerated Ukrainian Greek Orthodox Church with the Kiev Metropolia. The Holy War, however, which our people is waging in Europe, does not allow as yet wider relations between us and Kiev, which are demanded by the union of our church with the Mother Church. As our church is unthinkable and impossible to exist with a bishop's supervision because we, once we came back to the Orthodox Church, have to adhere to her principles—we thought that before the time of the union of our Church with the Kiev Metropolia, we shall keep our own bishop for a short time and go under a temporary protectorate of the Syrian metropolitan Germanos. We could go under the protectorate of the Greek bishop Alexander in the United States, Metropolitan Germanos, however, is adherent of democratic principles to such an extent that he left the Church administration in the hands of parishes, the brotherhood, our consistory and our Council so that we could not find a better protector for a short while.

The references to Kiev are, of course, to the city of that name in Ukraine.

Presumably the second convention was adjourned to Winnipeg as in the minutes of what is called the second annual council held in that city on December 27th, 1919, appear the following resolutions, numbers 3 and 8:—

3.—that all Ukrainian Greek Orthodox parishes and priests submit themselves from this date under temporary spiritual jurisdiction of Metropolitan Germanos, who undertakes to fulfill all the duties and

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Kerwin J.

requirements of the bishop of the Ukrainian Greek Orthodox Church and supervise the spiritual side of the church life until the election and ordination of Ukrainian Orthodox bishop, with this reservation that the administrative right of the church remains with the church council, the brotherhood, consistory and the parishes.

* * *

8.—Be it resolved by this council that from now on the Consistory of the Ukrainian Greek Orthodox Church of Canada and the United States be formed with its temporary headquarters at Saskatoon and that such Consistory be composed of three priests and four lay members, president of the Brotherhood and of Church Council.

For reasons that will appear later, attention is here called to the "Brotherhood" mentioned in these minutes and in the minutes of later meetings.

At the third council, held in Winnipeg, Saskatoon and Edmonton on November 11th, 18th and 25th, 1920, it was decided that the Brotherhood and Consistory of the Church enter into an organic union with the Kiev Metropolia "as soon as conditions of communication will permit." On December 24th and 25th, 1921, at a joint meeting of the executive of the Brotherhood and the Consistory, it was resolved that it was necessary to secure a Ukrainian Bishop for Canada as well as three Ukrainian priests.

The fourth council was held on July 16th and 17th, 1924, and in what is stated as the introduction in the minutes of this meeting appears the following:—

> The year 1924 shall become noted in the history of the Ukrainians in Canada for the reason that this year the Ukrainian Greek Orthodox Church of Canada obtained its Ukrainian bishop and thus united with all Ukrainian Orthodox Autocephalous Church which is under the leadership of old Ukrainian Metropolitan in Kiev Wasyl Lypkiwski.

Reference was then made at that meeting to the decision arrived at in 1919 that while

> the Ukrainian Greek Orthodox Church of Canada considers itself part of the Ukrainian Greek Orthodox Church in Ukrainia,

there would be no opinion until the latter became autocephalous, that is, independent from the Russian or any other church. It was then pointed out that certain Ukrainians in the United States had succeeded in coming to an understanding with Kiev and had obtained a Ukrainian bishop from the Ukraine, namely, Archbishop John Theodorovich. The latter became the bishop of the newly

formed Canadian Church and in September, 1925, at a conference of priests and the executive of the Brotherhood, the thanks of the meeting were expressed

to His Grace Archbishop John Theodorovich for his care over the Ukrainian Orthodox Church in Canada and declares to him their attachment as their head in America, at the same time the conference declares their unflinching allegiance to the Ukrainian Autocephalous Church with His Grace Metropolitan Wasyl Lupkiwsky.

Turning now to the position of the congregation of the Cathedral in Winnipeg, we find that it was organized in 1923 as a parish of the Ukrainian Greek Orthodox Church in Canada, the meetings of whose council we have been considering. From time to time communications were sent out on behalf of the congregation, asking for contributions from Ukrainians wherever they might be in Canada, and particularly those who considered themselves adherents and members of the Ukrainian Greek Orthodox Church, in order to commence the building of a cathedral " that would become the centre of the Ukrainian Orthodox Church of Canada." It is admitted that the first constitution of the congregation, although not produced, was adopted in 1924 and was handed, for revision, to Reverend Samuel W. Sawchuk, the first priest of the congregation. On September 13th, 1925, a resolution was passed at a meeting of the congregation which, while worded as if the congregation itself were to be constituted a body politic and corporate, was undoubtedly passed under the provisions of *The Church Lands Act* (R.S.M., 1913, c. 31). A copy of the resolution was filed within the prescribed time in the office of the Provincial Secretary, and by section 4 of the provincial enactment the trustees and their successors in office (not the congregation) became a body politic and corporate under the name of the

Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress, in the City of Winnipeg, in the Province of Manitoba,

and

and have perpetual succession and a common seal, and by such name shall have all the powers and privileges possessed by or given to trustees under this Act, and under said name may sue and be sued, plead and be impleaded, answer and be answered in all courts and places whatever, and the said corporation shall have all the powers of corporations under *The Manitoba Interpretation Act.*

Title to the land upon which the cathedral was being erected was immediately taken and recorded in the names of the trustees.

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Kerwin J.

The revision of the congregation's first constitution being accomplished, what is known as the second constitution was adopted in March, 1926. By it:—

> The parish shall adhere to the dogmas and the rites of the Ukrainian Greek Orthodox Church of Canada and shall be under a joint spiritual supervision and jurisdiction of the Archbishop and the Consistory of the said Church to the same extent as all other parishes forming the component part of the Ukrainian Greek Orthodox Church of Canada.
>
> * * *
>
> Spiritual leadership in the matters concerning services and church discipline is in the hands of Cathedral parish priest, which shall be appointed by the Archbishop and the Consistory of the Ukrainian Greek Orthodox Church of Canada upon understanding with the executive of the parish.
>
> * * *
>
> The church property belongs to the parish but the right of management of same shall be in (certain classes of members of) the parish.

The executive of the parish is to consist of the chairman, vice-chairman, recording secretary, financial secretary and treasurer (who are also the trustees) and two members of the executive and three members of the audit committee,— to be elected by a majority vote of certain classes of members present at a general meeting properly called in that behalf.

In 1929 was passed the special Act incorporating the plaintiff corporation.

The preamble recites that a petition has been presented on behalf of the congregations and parishes of the Ukrainian Greek Orthodox Church of Canada praying that it be enacted as thereinafter set forth.

By section 1 the Church declares that its faith and dogma are the same as that of the various already existing Greek Orthodox Churches and it adheres to the faith and dogma adopted by the first seven ecumenical councils of the Christian Church.

By section 2

> all the congregations, parishes, missions, of the Ukrainian Greek Orthodox Church of Canada, which are now included and are a part thereof, and which may at any time in the future become a part thereof, are hereby constituted a corporation, public and politic, under the name of "The Ukrainian Greek Orthodox Church of Canada," hereinatfer called "the Corporation" for the purposes of administering the property and other temporal affairs connected with the spiritual jurisdiction of the said Corporation.

Section 4 details the objects of the Corporation, i.e.,

> the maintenance and carrying on of charities or missions, erection, maintenance and conduct of churches, cemeteries, schools, colleges or orphanages and hospitals in any of the provinces of Canada, the advancement

in other ways of education, religion, charity and benevolence, and to administer in Canada such of the property, business and other temporal affairs of the said Ukrainian Greek Orthodox Church of Canada as may be entrusted by the said Ukrainian Greek Orthodox Church of Canada to the Corporation.

Section 5 is a definition section. "Member" means any person who adheres to the faith, dogma and rite of the Church and who submits to the rules and regulations of the Corporation. "Congregation" means a group of members of the Corporation who already have organized and built a church which is officiated by a regular priest of the said church. "Mission" means a group of members of the Church who have declared themselves of the faith and dogma of the Church and who are in the process of formation of a congregation and have no church building. "Parish" means congregation or a group of congregations or missions officiated by one priest of the said Church.

By subsection 1 of section 6, any congregation or mission of the Church, whether now in existence or which may be formed at any time in the future, shall signify its intention to become a part of the Corporation by a resolution passed at a duly called meeting thereof, according to the constitution thereof. By subsection 2

the copy of such resolution shall be certified by the chairman and secretary of the said meeting and shall be sent to the consistory of the Corporation, and the Consistory may then issue a certificate admitting such congregation or mission to the Corporation.

By section 7,

only persons of the Ukrainian descent and of the faith dogma and rite of the Ukrainian Greek Orthodox Church of Canada shall be eligible for the office of priests, bishops, metropolitans, or other spiritual and administrative offices of the Corporation.

By section 8 the Corporation is to be managed by a Board of Consistory of at least five members, composed of even numbers of clergy and laity, and the head bishop of the Church, if resident in Canada, shall be the president of the Board. In the absence of the head bishop, the administrator who must be a clergyman, elected at the last general council, shall act as the president of the Board. The supreme power in all temporal matters of the Corporation shall be vested in the General Council of the Corporation to be held and called according to the rules and by-laws hereinafter referred to. Each congregation, mission or parish shall have the right of representation

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Kerwin J.

at such General Council of the Corporation, subject to the said rules and by-laws. Every clergyman of any rank in good standing in the said Church shall have the right to be present at the General Council and vote and take part in the proceedings thereof.

By section 9 the Corporation is given power to make by-laws for the appointment, subject as provided in the Act, of a Board of Consistory for the administration, management, and control of property, business and other temporal affairs of the Corporation.

It is clear from the meetings of the several councils of the unincorporated Ukrainian Greek Orthodox Church of Canada, held before 1929, that that Church never had any jurisdiction over the lands owned by the several congregations, the title to which, so far as concerns the Cathedral congregation, is vested by virtue of the provincial enactment in trustees. It is also clear from the Act of incorporation itself that Parliament did not even purport to vest these lands in the Corporation. There were meetings of a Council held after the Act came into force, and the minutes of those meetings continue the numerical designations adopted prior to May 1st, 1929. It is contended that the meetings subsequent to the Act were really meetings of the Board of Consistory of the Corporation only and indicate that the unincorporated church became absorbed in the appellant corporation. With this contention I find it impossible to agree.

Section 2 of the Act refers to "the spiritual jurisdiction of the said Corporation" but nowhere in the Act is there any grant of spiritual jurisdiction; so that we may take it that none exists in the Corporation. My construction of the Act leads to the conclusion that what is meant in section 2 is really the spiritual jurisdiction of the unincorporated church, that that church exists side by side with the Corporation, that the latter is endowed with authority over temporal affairs only, and that the phrase "other spiritual and administrative officers of the Corporation," in section 7, is used to describe the administrative officers who have dehors the Act some spiritual jurisdiction.

Several considerations point to this as being the proper construction. First, the "Brotherhood," many references to which appear in the minutes of the earlier councils, is not mentioned in the Act. Second, the concluding part of

section 4 includes, among the objects of the Corporation, the administration in Canada of such of the property, business and other temporal affairs of the Church as might be entrusted by the Church to the Corporation. Third, subsection 5 of section 8 provides that every clergyman of any rank in good standing in the said Church shall have the right to be present at the General Council of the Corporation and vote and take part in the proceedings thereof. Fourth, if the Board of Consistory referred to in sections 8 and 9 has jurisdiction over temporal affairs only (as I think is clear) does that not infer that the Board of Consistory provided for by the General Councils of the Unincorporated Church should continue? In my opinion the Board of Consistory of the church did continue, with authority to exercise such spiritual jurisdiction as might, by consent have been conferred upon it. I construe subsection 3 of section 8:—

> (3) The supreme power in all temporal matters of the Corporation shall be vested in the General Council of the Corporation to be held and called according to the rules and by-laws hereinafter referred to.

as really limiting the power of the Corporation to temporal affairs over which, alone, it has any jurisdiction.

Considerable time was devoted to the question as to whether the Cathedral congregation was a "part" of the Corporation. The proper determination of this question is rendered difficult because of section 2 of the Act enacting that all the congregations, etc., of the Church, which are now included and are a part thereof, are constituted a corporation, and section 6, providing for the signification of the intention of "any congregation or mission of the Ukrainian Greek Orthodox Church of Canada, whether now in existence or which may be formed at any time in the future" to become a part of the Corporation, by a resolution to be passed at a meeting of the congregation, and by the provisions of subsection 2 of section 6 that the Consistory "may then issue a certificate admitting such congregation or mission to the Corporation." Counsel for the respondents argued vigorously that the Cathedral congregation took no part in the application for the Act of Incorporation and it may be that the general statement of Reverend Samuel W. Sawchuk, that the congregation did take part in such

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Kerwin J.

application, although not contradicted, cannot be accepted in the absence of any record of such action in the minutes of the meetings of the congregation.

It is unnecessary to express any opinion upon the point. Even if it be conceded that the congregation is a part of the Corporation, I have already indicated that in my opinion the latter acquired no spiritual jurisdiction. Furthermore, in my view, while the respondent Mayewsky is a priest of the unincorporated Church he never was a priest of the Corporation. While "member" is defined in section 5, nowhere in the Act is any liability imposed or right conferred upon a member; so that while Mayewsky is a person "who adhered to the faith, dogma and rite of the Church," he did not submit to the rules and regulations of the Corporation.

The declaration signed by him on September 17th, 1931, and the certificate issued by the appellant corporation on the same day have not been overlooked. Attention should first be directed, however, to two letters addressed to Mayewsky in Galicia, from Reverend Samuel W. Sawchuk, who had by that time become "President of Consistory." In the first of these, dated June 14th, 1930, it is stated:—

> His Grace Archbishop John Theodorovich handed over to me your letter to him of the 18/5, 1930, and requested to make arrangements to bring you to Canada as a priest of the Ukrainian Orthodox Church. This they cannot be in United States of America owing to American immigration regulations.
>
> New priests and candidates for priests with us are accepted by the conference of priesthood which will take place this year at the end of the month of July.

and in the second letter, dated September 11th, 1930:—

> The governing body of the Ukrainian Greek Orthodox Church in Canada, favorably considered your application to accept you into the ranks of the Ukrainian Orthodox priests in Canada and instructed me to take necessary steps to bring you to Canada.

From these letters it appears that "new priests * * * with us are accepted by the conference of priesthood"; and that was the practice followed in the case of Mayewsky, who ultimately became the officiating priest of the Cathedral congregation. Nowhere in the Act of Incorporation of the appellant corporation is there any reference to a "conference of priesthood" so that the writer of the letter could not have been referring to the appellant congregation.

Reverend Mayewsky arrived in Canada in 1931 and on September 17th of that year signed the following declaration:—

To the Honourable Consistory of The Ukrainian Greek Orthodox Church of Canada,
Winnipeg, Manitoba.

Declaration

I, the undersigned priest Peter Mayewsky hereby declare that I will honestly and conscientiously fulfill the duties as a priest of The Ukrainian Greek Orthodox Church of Canada. That I will obey the Bishop and the Consistory of the said Church and will work for its welfare and development. I also declare that holy antimins which I have received from His Grace Archbishop John Theodorovich, through the Consistory of the Ukrainian Greek Orthodox Church of Canada, is and shall remain to be the property of The Ukrainian Greek Orthodox Church of Canada and as such shall be returned by me to the Consistory of said Church in case I ceased to be a priest of The Ukrainian Greek Orthodox Church of Canada.

Dated Winnipeg, Manitoba, this 17th day of September, 1931.

(Sgd.) Rev. Peter Mayewsky.
Signature of the priest.

Witness: S. W. Sawchuk.

On the same date a certificate was handed to him, reading as follows:—

Consistory of the Ukrainian Orthodox Church of Canada
Rev. S. W. Sawchuk, President,
479 Andrews St.,
Winnipeg, Canada.

Certificate

This will certify that Reverend Peter Mayewsky is a priest of The Ukrainian Greek Orthodox Church of Canada in good standing and as such is authorized to conduct Church services and to administer Holy Sacraments in accordance with the dogmas, teachings and rites of the said Church.

Dated at Winnipeg, Man., this 17th day of September, A.D. 1931.
Consistory of The Ukrainian Greek Orthodox Church of Canada.
Rev. S. W. Sawchuk, President.
Myr. Stechishin, Asst. Secretary.
(Seal reading: The Ukrainian Greek Orthodox Church of Canada.)

It is principally upon these documents that the appellant corporation bases its contention that in 1931 Mayewsky became one of its priests. As to the declaration, I merely observe that it refers, in my opinion, to the unincorporated Church. Reverend Mayewsky never became a "part" of the Corporation, he never became a "member" as defined in section 5 of the Act, and the declaration

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Kerwin J.

merely calls upon him to obey the Bishop and Council of the unincorporated Church. The certificate is under the seal of the appellant corporation but the granting of such a certificate and the retention thereof by Reverend Mayewsky cannot alter the fact that he was a Ukrainian Orthodox priest, that he was accepted as a priest of the unincorporated Greek Orthodox Church of Canada by the conference of priests of that church, and that no certificate issued by the appellant corporation and accepted by him could alter his status. In short, neither the declaration nor the certificate can confer upon the appellant corporation a power or jurisdiction that, according to the Special Act, it did not possess and was incapable of assuming.

On this point it is sufficient to refer to *In the Matter of the Petition of Complaint of the Right Rev. John William Colenso, D.D., Lord Bishop of Natal,* a decision of the Judicial Committee of the Privy Council (1). The particular extract to which I desire to draw attention is set out in *Merriman* v. *Williams* (2). That also was a decision of the Judicial Committee, in which their Lordships referred to a still earlier judgment in *Long* v. *Grey* (3). In the last mentioned case the judgment adopted the opinion of the Colonial Court that certain letters patent which had been issued after the establishment of constitutional government were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony. In the case of the *Lord Bishop of Natal* (1), Lord Westbury declared that it was quite clear that the Crown had no power to confer any jurisdiction or coercive authority upon the Metropolitan over the suffragan bishops, or over any other person, and the question then arose whether the Bishop of Natal had, by contract, given the jurisdiction claimed by Bishop Gray. It was on this point that Lord Westbury said in the extract referred to:—

> Even if the parties intended to enter into any such agreement (of which, however, we find no trace), it is not legally competent to the Bishop of Natal to give, or the Bishop of Cape to accept or exercise, any such jurisdiction.

(1) (1864) 3 Moore P.C. (N.S.), 115, at 155.

(2) (1888) 7 App. Cas. 484, at 503.

(3) (1863) 1 Moore P.C. (N.S.), 411.

Similarly, in this case it was not legally competent to Reverend Mayewsky to give, or to the appellant corporation to accept or exercise, the jurisdiction claimed by the appellant corporation. It need only be added that once it is admitted that the power of the corporation is confined to temporal affairs, no estoppel can, of course, be raised by reason of the congregation being represented, and Reverend Mayewsky being present, at meetings of the Consistory or Council after May 1st, 1929; and this is so whether those bodies be considered as consistories or councils of the unincorporated church or of the appellant corporation. In view of this conclusion, it is unnecessary to refer to the charges made against Mayewsky, except to state that they were heard by what is termed a church-court of the appellant corporation, upon whose findings was promulgated the sentence of expulsion, and that the charges involved no variation in faith or dogma on the part of Mayewsky from that of the unincorporated church.

The Corporation also asked for the return and delivery to its Board of Consistory of the antimins mentioned in the declaration of September 17th, 1931. We were told that this word, while plural in form, really denotes a consecrated napkin of linen or lace, without which there could be no celebration of Mass. Upon this point my view is that the obligation in the undertaking is to return the antimins to the Consistory of the unincorporated church in case Reverend Mayewsky ceased to be a priest of that church. That event not having occurred, this branch of the claim must fail.

It is beyond question that none of the appellants can have any valid claim against the respondent trustees. The provincial statute is clear that these trustees are a corporation merely to take and hold title to land, and the constitution of the Cathedral congregation is plain that the latter did not even purport to entrust that body with any power of management.

Whatever may have been argued below, in this Court reliance was placed upon the fact that the individual appellants, Bohonos and Bugera, "join in this suit not only on their own behalf but also on behalf of the other members" of the Congregation, except the majority thereof. In fact the appellants divided the claim made against Reverend Mayewsky into two branches. The appellant

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Kerwin J.

corporation makes the only claim against him with respect to the antimins but, on the other hand, in respect of the other branch of the case (as to Reverend Mayewsky officiating in the Cathedral), the two individuals, it is stated, are the real plaintiffs. It is not admitted that the corporate plaintiff might not be also (or in the alternative) entitled to relief against the officiating in the cathedral but emphasis was placed upon what was alleged to be the undoubted right of the two individuals to succeed on that branch. From what has already been said, it is evident that there has been no departure by the congregation or Reverend Mayewsky from the belief and dogma of the unincorporated church, and for this reason, the claim of the individual appellants also fails.

It is perhaps advisable to point out that the Bishop is not a party to the claim and that the appeal fails to be decided on the basis of the claim advanced by the appellants. The alternative defence of the respondents, that if Reverend Mayewsky had ever been a priest of the appellant corporation, he was never legally expelled, need not be considered.

The appeal should be dismissed with costs and the order of the Court of Appeal confirmed, except that paragraph 3 thereof, dismissing the counter-claim without costs, should be amended so as to include the agreement with respect thereto, arrived at between the parties. There should be no costs of the cross-appeal.

HUDSON J.—In this action the plaintiff asked for, and at the trial before Mr. Justice Donovan, recovered a judgment as follows: (1) restraining the defendant Mayewsky from officiating any longer or conducting any further services in the cathedral in question in this action (namely, the Cathedral Church of St. Mary the Protectress in Winnipeg) as a priest of the plaintiff corporation or as a priest of the said congregation or parish for which the defendant corporation (trustees) holds the said Cathedral, or otherwise: (2) that the defendant trustees, its officers, servants and agents be restrained from procuring or permitting such officiating or conducting as aforesaid by the defendant Mayewsky; (3) ordering that the defendant Mayewsky be restrained from wearing or using the antimins used by him in officiating in the said cathedral, and that he do forth-

with deliver the said antimins to the corporate plaintiff or its Board of Consistory. There was a further order dismissing a counter-claim by Mayewsky.

On appeal to the Court of Appeal for Manitoba, the appeal was allowed, the judgment at the trial set aside and the action dismissed with costs, and it was further ordered that the counter-claim be dismissed without costs.

There was a cross-appeal to this court in respect to the dismissal of the counter-claim which might be disposed of at once. It merely asked that it be provided that such dismissal shall not be deemed to be an adjudication upon any of the issues raised in the said counter-claim, except to the extent that any of the said issues are finally adjudicated upon and, in the main action, that the dismissal of the respondent's counter-claim is to be without prejudice to any action that may hereafter be brought in respect of any of the issues not finally adjudicated upon. Counsel for the appellant consented to this variation and that the cross-appeal should therefore be allowed to this extent.

The defendants, the trustees of the Cathedral, are title holders of the Cathedral property in the city of Winnipeg under the provisions of the *Church Lands Act* of Manitoba and, subject to the provisions of that Act, are trustees for the congregation of the Cathedral. They hold a certificate of title therefor dated the 29th December, 1925. The congregation had before that time been organized and still continues as an active religious body.

The defendant trustees have no right to interfere in connection with the selection and maintenance of the priest of the Cathedral, nor the financial affairs of the congregation other than those arising out of ownership of the property.

The congregation itself is not made a party to this action by representation or otherwise.

I am satisfied that no right of action exists against the defendant trustees because they have no right to remove the defendant Mayewsky and no right to represent the congregation before the court in this action. I would say at once that on this ground alone the action should be dismissed as against these defendants.

At the time the defendant trustees acquired title to the Cathedral property, the congregation adhered and still adheres to the dogmas and rites of the Ukrainian Greek

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Hudson J.

Orthodox Church of Canada, a voluntary church body having as its members similar congregations in various parts of Canada.

The defendant Mayewsky is a duly ordained priest adhering to the same faith and doctrines and was duly appointed and installed as a priest of the congregation and still retains that position, with the approval of all of the members of the congregation except the individual plaintiffs. So far as appears, Mayewsky has not been guilty of any heretodoxy.

The plaintiff corporation was organized under the authority of a special Act of the Parliament of Canada, 1929, chapter 98. The objects of the corporation are set forth in section 4 which reads:

> The objects of the Corporation shall be the maintenance and carrying on of charities or missions, erection, maintenance and conduct of churches, cemeteries, schools, colleges or orphanages and hospitals * * * the advancement * * * of education, religion, charity and benevolence, and to administer in Canada such of the property, business and other temporal affairs of the said Ukrainian Greek Orthodox Church of Canada as may be entrusted by the said Ukrainian Greek Orthodox Church of Canada to the Corporation.

This section recognizes the continued existence of the voluntary body as a spiritual church as distinguished from the statutory body which it proceeded to incorporate. Under section 6 congregations might by resolution affiliate with the statutory church if they cared to do so. If they chose to remain outside the corporate church, they were not affected by the statute. They retained their name and their spiritual and temporal rights unchanged.

The congregation of the Cathedral Church of St. Mary the Protectress never did by resolution become part of the Dominion corporation and although their representatives have on many occasions collaborated with the officers and representatives of the corporation, I can find nothing to justify holding that the Cathedral congregation ever became a part of the corporate body or subject to its control, either temporal or spiritual.

The corporation in effect sues to enforce a decree of excommunication of the defendant Mayewsky on grounds of insubordination. There were no charges made against his private character or orthodoxy. The charges against him were heard before a church court and the proceedings there have been fully discussed and criticized in the court

below but, in the view I take of this case, it is unnecessary for me to come to any conclusion as to the validity of the trial or the sentence.

The individual plaintiffs claim to be members of the Cathedral congregation and at least one of them has been accepted as such. They rest their case on the position taken by the corporate plaintiff and their claim must stand or fall with it.

In respect of the claim to prohibit the defendant Mayewsky from continuing to act as a priest of the congregation, it seems to me that this amounts to no more than a claim to have the court enforce what is a purely ecclesiastical decree. No property right is involved so far as the plaintiffs are concerned. The corporation makes no contribution to the salary of Mayewsky, nor to the maintenance of the Cathedral Church. For this reason, I think that the action fails to this extent. Moreover, I agree with the statement of Mr. Justice Robson in the court below that:

> This action is solely based on the powers of this corporation. I do not see where this plaintiff corporation is vested with any authority to enforce spiritual discipline over priests or to disqualify them or to restrain any particular priest from officiating or any congregation from accepting his ministrations. In my view we cannot go beyond the statement of claim and ascertain whether Rev. Mayewsky could have been excluded under the general canons or rules of the church. Even if it might in fact possibly be the case that disciplinary action of some kind would be in order, it is my view from a perusal of the statute, that this corporation was not established to see to the enforcement of such sentences.

There remains to be considered the question of the antimins. The "antimins" (singular) is a linen cloth of little monetary worth but of some special sacerdotal value. From the evidence, it appears to have been entrusted to the defendant Mayewsky by the corporate plaintiffs. It remains their property. The defendant does not profess obedience to the corporate body as distinguished from the voluntary church. The corporate body has demanded its return and I think is entitled to succeed on this part of its claim, irrespective of the validity or invalidity of the decree of excommunication. The mere fact that it has little monetary value is not sufficient to deprive the court of jurisdiction. Its sacerdotal value is something which can be estimated only by the ecclesiastical bodies concerned.

1940

THE UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA ET AL. v. THE TRUSTEES OF THE UKRAINIAN GREEK ORTHODOX CATHEDRAL OF ST. MARY THE PROTECTRESS ET AL.

Hudson J.

My conclusion of the whole matter is that the judgment below should be amended by directing the return of the antimins to the proper representatives of the corporate body, that the dismissal of the counter-claim should be subject to the provision heretofore mentioned, and otherwise the appeal should be dismissed.

As to costs, I would allow nothing in respect of the antimins nor of the counter-claim. The general costs of the appeal I would award to the respondent.

Appeal dismissed with costs.

Cross-appeal dismissed without costs.

Solicitors for the appellants: *Heap, Arsenych & Murchison.*

Solicitors for the respondents: *Lamont, Layton & Swystun.*

1940

* May 7.
* June 29.

MARITIME TELEGRAPH AND TELEPHONE COMPANY LIMITED..... APPELLANT.

AND

THE MUNICIPALITY OF THE TOWN OF ANTIGONISH ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Assessment and taxation—Telephone company—Personal property in town—"Actual cash value"—Basis on which assessors must estimate—Rule 2 of section 17 of The Assessment Act, N.S. Statute of 1938, chapter 2.

The appellant company provides telephone service throughout the province of Nova Scotia, including the respondent town. This appeal involves the municipal assessment of that town for 1939 in respect of the personal property of the appellant company within the municipality. The personal property consisted of certain central office equipment, switch board and testing apparatus, telephone poles, wires, cables, etc., some 300 telephone stations in residences and business places and equipment of various kinds. The total cost as installed from time to time amounted to $32,505.67. The *Assessment Act*, chapter 2 of the Nova Scotia Statutes of 1938 enacts by section 17, rule 2, that "all property liable to taxation shall be assessed

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

at its actual cash value, such value being the amount which in the opinion of the assessor it would realize if offered at auction after reasonable notice." The assessors of the municipality fixed the value of the personal property in question at $10,800. Then the appellant company, pursuant to section 28(2) filed a sworn statement "of the actual cash value" of the property at a sum of $3,200 and the assessors, by section 29, were bound to adopt such valuation. But the municipal clerk, as entitled by the statute, appealed to the "Assessment Appeal Court," which restored the assessors' valuation of $10,800. The appellant's appeals, first to the County Court and later to the Supreme Court of Nova Scotia *en banc,* were dismissed, the latter Court holding that in assessing the personal property of a telephone company within a town the "actual cash value" thereof was to be estimated on the value of the property as it stands, an integrated system ready to operate within the town, dissociated from the rest of the company's system outside the town, and not at "scrap-iron" value. By special leave of the last mentioned Court, granted on terms, the appellant appealed to this Court.

Held, affirming the judgment of the Supreme Court of Nova Scotia *en banc* (14 M.P.R. 387), that the appeal should be dismissed and that the assessment fixed by the assessors at $10,800 which had been confirmed by all the Courts below, should be maintained.

Per Crocket and Taschereau JJ.—The property should be assessed as it stands and not as discarded junk. Moreover, the decision of the assessors should not be disturbed, as it has not been shown that they made their valuation without fully appreciating their duty under the statute.

Per Davis J.—Although it has always been a difficult problem to fix the value of such personal property as part of a telephone system within a given municipality, the three municipal assessors in this case were practical men engaged in assessment work for many years; and when their valuation has been confirmed by three successive courts the assessment should not be disturbed unless it has been plainly demonstrated to the Court that some error in principle has been applied and has resulted in an excessive amount; and this has not been shown.

Per Kerwin and Hudson JJ.—There is some evidence that the appellant's personal property has been assessed at its actual cash value in accordance with rule 2 of section 17 of the *Assessment Act.* That value must be fixed without considering the property as an integral part of the appellant's system, and there is evidence from two witnesses that they had fixed the value on that basis. Therefore there should be no interference with the assessment.

APPEAL, by special leave to appeal granted on terms, from the judgment of the Supreme Court of Nova Scotia, *en banc* (1), affirming the judgment of the County Court, MacDonald (Allan) J., and maintaining an assessment made under the provision of the *Assessment Act* of certain property belonging to the appellant company.

(1) (1940) 14 M.P.R. 387.

1940

MARITIME TELEGRAPH AND TELEPHONE CO. v. MUNICIPALITY OF THE TOWN OF ANTIGONISH.

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

J. G. Rutledge K.C. and *C. B. Smith K.C.* for the appellant.

J. S. Roper K.C. for the respondent.

The judgment of Crocket and Taschereau JJ. was delivered by

CROCKET J.—The main ground, upon which the judgment of the Supreme Court of Nova Scotia *en banc* has been challenged on this appeal, is that the impeached assessment was not made on the basis of the break-up or sale and removal value of the constituent parts making up the personal property in question, in accordance with the principle of assessment laid down in *Bell Telephone Co.* and *The City of Hamilton* (1), over 40 years ago. All the five judges of the Nova Scotia Court, sitting *en banc*, agreed that the Ontario so-called "scrap-iron" rule was not applicable to the assessment of the appellant's poles, wires, cross-arms, cables, etc., comprised in the appellant's telephone system within the Town of Antigonish, under the provisions of rule 2 of s. 17 of the Nova Scotia *Assessment Act*. This section provides as follows:

> All property liable to taxation shall be assessed at its actual cash value, such being the amount which, in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice, but in forming such opinion the assessor shall have regard to the assessment of other properties of its class in the Town or Municipality.

I think the Nova Scotia Court was right in so holding and dismissing the appellant's appeal from the judgment of the County Court Judge of the District (Judge Allan MacDonald), who, on appeal from the Municipal Assessment Appeal Board of the Town, confirmed the assessment of $10,800, made by the assessors of the town in respect of the appellant's personal property therein.

The above rule presents no difficulty when considered in its application to the assessment either of real estate or personal property in the sense in which these classes of property are ordinarily understood. There can be no doubt that it was intended to apply to both in the same

(1) (1898) 25 O.A.R. 351.

way, though it makes no mention of either real property or personal property. Its opening words are "All property liable to taxation shall be assessed," etc. No one has suggested that any of the property of the appellant company within the limits of the Town of Antigonish, real or personal, is not liable to taxation. The whole difficulty here arises from the fact that the assessed property, including poles, fixed in the ground, and the cables, wires, etc., attached thereto, connecting with their telephone instruments in stores, business and private houses, were all part of the integrated system extending to and operated by the appellant company throughout many other municipalities in the Province under its franchise, and that the appellant itself in the inventory of its property, which it produced on the hearing before the County Court Judge, listed and valued these as personal property on the footing of their having been completely severed from its system and discarded as mere junk. If the rule applies at all to the assessment of such property—and it has not been contested that it does—it is impossible, I think, reasonably to spell out of its language an intention that the local assessors, when determining its value for assessment purposes, must regard it, not in the form or condition in which the property then exists, but as though all the poles, cables, etc., had first been removed and stripped of all value except that which it might possess as a collection of junk.

While this rule unmistakeably makes the amount, which in the opinion of the assessors the property (whatever it may be) would realize in cash if it were offered at auction, the criterion for determining its "actual cash value" for assessment purposes, it lays down no other principle for the guidance of the assessors in determining that amount than that they "shall have regard to the assessment of other properties of its class in the town or municipality." If there be no other property of the same class in the town or municipality, as all the judges below seem to have held in the present case, the assessors in forming their opinion as to what any particular property would realize on such a hypothetical auction are left perfectly free to consider any and all factors or elements which their own common sense dictates to them as likely to influence the auction price obtainable therefor. This may

1940

MARITIME TELEGRAPH AND TELEPHONE CO. v. MUNICIPALITY OF THE TOWN OF ANTIGONISH.

Crocket J.

seem to be a very uncertain and unsatisfactory standard for the determination of the "actual cash value" of any property for municipal assessment purposes, especially when it has to be applied to the poles, cables, etc., forming part of an integrated telephone or telegraph system covering a number of municipalities; but it is the only standard the Legislature has prescribed. In doing so it apparently could do nothing else than leave the determination of the amount likely to be realized on such a hypothetical auction to the judgment of the local assessors, unhampered by any other principle than that of the exercise of their own common sense.

If it be true that the property must be assessed as it stands, and not as discarded junk, as I think it must be and as all the Judges below thought it must be, the decision of the Board of Assessors cannot to my mind well be disturbed unless it is clearly shown that they made their valuation without fully appreciating that it was their duty to do so upon the basis of what they honestly believed the property would realize if it were offered for sale at such an auction. There is nothing in the record which even suggests that the Board had not a clear conception of its duty in this respect. The fact that in determining that amount the assessors regarded the property as an integral part of the appellant's entire provincial system, as it was then being operated, affords no ground for setting aside the assessment. Indeed with all respect, I cannot for my part see how the assessors, in appraising the property as it stood, could well do otherwise than regard it as such, for surely it was their duty to consider the existing condition of the property to be offered for sale, as well as all other matters which they might reasonably expect to affect its auction value.

For these reasons I would dismiss the appeal with costs.

DAVIS J.—The appellant is a joint stock company which provides telephone service throughout the province of Nova Scotia, including the town of Antigonish. This appeal involves the municipal assessment of the town of Antigonish for the year 1939 in respect of the personal property of the appellant situate within the municipality. The personal property in question consists of certain central office equipment, switch board and testing apparatus, telephone

poles, wires, cables, etc., some 300 telephone stations in residences and business places and equipment of various kinds. The total cost of the materials as installed from time to time amounted to $32,505.67.

The *Assessment Act,* now consolidated without material change as ch. 2 of the Nova Scotia Statutes of 1938, provides by sec. 17, rule 2, that

> All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties of the like class in the town or municipality.

The assessors of the municipality fixed the value of the personal property in question at $10,800 and they gave notice in writing to the appellant corporation, as required by sec. 28 (1), "of the value at which they estimate" the personal property of the appellant. If such valuation is objected to, then by sec. 28 (2) the managers or agents of the corporation may within fourteen days furnish to the assessors a written statement under the oath of such managers or agents "of the actual value" of the property assessed. By sec. 29 the assessors shall then adopt the valuation sworn to and such valuation shall be binding, subject only to appeal by the clerk of the municipality under the provisions of the Act.

What purported to be, and appears to have been accepted as, a sworn valuation on behalf of the appellant as permitted by the statute was furnished by the appellant to the assessors. The amount given was $3,200. The municipal clerk, as entitled by the statute, appealed to the municipal appeal body constituted under the statute to hear assessment appeals and known as the "Assessment Appeal Court." That Court restored the assessors' valuation of $10,800. The appellant then appealed to the County Court. That appeal was dismissed. The appellant then appealed to the Supreme Court of Nova Scotia *en banc.* That appeal was also dismissed by the decision of the majority of that Court. By special leave of the last mentioned Court, granted on terms, the appellant appealed to this Court.

Counsel for the appellant sought before us to appeal against the condition of the order granting it leave to appeal (that the appellant should pay in any event to

1940

MARITIME TELEGRAPH AND TELEPHONE CO. v. MUNICIPALITY OF THE TOWN OF ANTIGONISH.

Davis J.

the respondent its costs of and incidental to the appeal to this Court) but the appellant took advantage of the order and cannot now object to the condition on which the order was granted.

It is to be observed, at the outset, though the point does not appear to have been taken, that the manager's sworn statement was not a compliance with the statute. It was not a written statement under oath "of the actual value" of the property. It was a statement guardedly limited to the oath of its maker "that the actual cash value of the personal property . . . is, for the purpose of taxation as defined in the *Assessment Act*, the sum of $3,200." However no objection was taken.

It is always a difficult problem to fix the value of such personal property as part of a telephone system within a given municipality. But the three municipal assessors were practical men engaged in assessment work for many years and when their valuation has been confirmed by three successive courts an appellant has a formidable task in seeking to escape from the assessment; it must be plainly demonstrated to the Court that some error in principle has been applied and has resulted in an excessive assessment. This has not been shown, in my opinion, and I would therefore dismiss the appeal with costs.

KERWIN J.—I would dismiss the appeal with costs. I agree with the Chief Justice of Nova Scotia that there is some evidence that the appellant's personal property has been assessed at its actual cash value in accordance with rule 2 of section 17 of *The Assessment Act*:—

> All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other porperties of the like class in the town or municipality.

That value, as stated by the Chief Justice, is to be fixed without considering the property as an integral part of the appellant's system. There being evidence from two witnesses who had fixed the value on that basis, we should not interfere with the assessment.

HUDSON J.—The appellant's personal property in the town of Antigonish was assessed for $10,800. From this assessment the appellants appealed to the Judge of the

County Court for District No. 6 and such appeal was dismissed. The appellants then appealed from that decision to the Supreme Court of Nova Scotia *en banc* and that Court also dismissed the appeal.

The assessment was made under the authority of rule 2 of section 47 of *The Assessment Act,* as amended, which reads as follows:

> All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash is offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties of the like class in the town or municipality.

The appellant provides telephone service throughout the province of Nova Scotia, including the town of Antigonish, and it has in the town a building used as a central station from which the telephone system is operated. The assessment of the building is separate and does not come into this controversy.

The contention of the appellant is that on a proper valuation its assessment would be the actual cash value of its poles, wire, cables and other items of a similar character, wholly dissociated as an integrated part of the whole plant and that when so dissociated the personal property is of a very inconsiderable value.

The value of this plant in the books of the company is placed at $32,505.67 but, due to depreciation through the years, this value has now been reduced by the company to somewhat over $3,000 and the company contends that this is the only amount for which it could properly be assessed.

The appeal before the County Court judge was in the nature of a hearing *de novo.* After taking evidence the learned County Court judge came to the conclusion that the assessment was proper. As to the argument on behalf of the company, he stated:

> It is only such personal property of appellant as is situated within the town that may be assessed. But I think consideration of appellant's provincial franchise as excluding the right of a purchaser to operate, or of its earning or non-earning capacity within the town are beside the question in determining assessable value under the Act. And although there is some evidence on these matters I think the proper basis of valuation is to consider what should be the sale value of the personal property as it stands as an integrated system having a definite object and purpose and not taken apart with value limited to each constituent

1940

MARITIME TELEGRAPH AND TELEPHONE CO. v. MUNICIPALITY OF THE TOWN OF ANTIGONISH.

Hudson J.

part. An auomobile, for example, would be so valued. To constitute personal property it is not necessary that it should be reduced to its constituent parts.

It may thus be regarded as a going concern not, indeed, in the ordinary commercial sense where goodwill in a purchase is an element to be considered, but as a system built for a definite purpose and capable of subserving that purpose.

A majority of the Court *en banc* consisting of Chief Justice Chisholm, Smiley and Carroll JJ. were substantially of the same opinion as the County Court judge, although Chief Justice Chisholm was careful to point out that he gave his judgment

> because I find in the case some evidence that the value of the personal property of the appellant company has been rated at the cash value as defined in rule 2 of section 17 of the *Assessment Act*, namely, the actual value which in the opinion of the assessors it would realize in cash if offered at auction after reasonable notice. Two of the witnesses fixed that value without considering the property as an integral part of the whole system of the company. Only on that basis, in my opinion, should the assessment be made. If it were intended to assess the property as part of a larger system, one would have to look for a more definite statutory direction.

Mr. Justice Graham agreed in the main with the views expressed by the majority of the Court but was of the opinion that the evidence did not show the value of the property and that the matter should be sent back for rehearing. On this point Mr. Justice Archibald concurred with Mr. Justice Graham.

It seems to me that the learned County Court judge and the learned judges in Appeal are correct in their interpretation of this section, always bearing in mind the considerations mentioned above by Chief Justice Chisholm.

On the point of adequacy of the evidence, I do not feel that this Court should now interfere with the concurrent findings of the trial judge and the majority of the Court *en banc*. For this reason, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. E. Rutledge.*

Solicitor for the respondent: *J. S. Roper.*

UNION ESTATES LIMITED (DEFENDANT) ..... } APPELLANT;

AND

JOHN A. KENNEDY AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1940
*April 29, 30.
*June 29.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Customers of recreation resort injured by collapse of bench, while attending concert—Concert not put on by proprietor of resort but with his permission—Liability of proprietor of resort—Relationship between customers and proprietor—Invitee, licensee with interest or bare licensee.

The respondents, while attending an open-air concert at an island summer resort and recreation grounds which were operated by the appellant for profit, were injured through the collapse of a wooden bench on which they were seated, the uprights of the bench having rotted. The concert was not provided by the appellant but by one S. with the permission of the appellant. A steamship company, a "sister" or subsidiary company of the appellant, which was transporting passengers to the resort, issued to the public an illustrated folder depicting and enlarging upon the attractions to be found on the grounds; and in it was a list of the recreations available and included in that list was a paragraph entitled "Open-air entertainment" with a detailed description of same. The area, known as the "Shell" area and comprised within the above No. 1 Picnic Grounds hereafter referred to, on which the concert was held, was free to the public and S's revenue was from collections which he took up from the audience. The appellant supplied the wooden benches and its employees placed them in position daily, but the appellant did not charge S. for the use of the stage or share in the collections, and S. was not an officer or employee of the appellant. The respondents were members of a picnic party composed mainly of employees of a company in Vancouver and were transported to the island by the steamship company. At their request, made some time previous to the latter, a small area known as No. 1 Picnic Grounds referred to in the folder had been set aside for their exclusive use as a common centre. No fee was charged the public for entrance to the resort: appellant's revenue was obtained from sale of food, hotel accommodation and boating, bathing and amusement facilities, although there was no evidence that respondents paid anything to the appellant for the use of such privileges. The trial judge held that the respondents were invitees of the appellant and awarded them damages; and that judgment was affirmed by a majority of the appellate court.

*PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Taschereau JJ.

1940

UNION ESTATES LTD. v. KENNEDY.

Held, affirming the judgment of the Court of Appeal ([1940] 1 W.W.R. 209), that there was evidence to support the finding of the trial judge that in respect of the "Picnic Grounds No. 1" the respondents were "invitees" and that the appellant, who was the owner in possession of that property, was responsible for the invitation; that there was also sufficient evidence to support his finding that the locus of the mishap in which the respondents were injured was within the locality to which the invitation extended; and, further, that that was sufficient evidence to support his finding, concurred in by the majority of the Court of Appeal, that the appellant failed in its duty to keep the bench reasonably safe for the purpose for which the respondents and other "invitees" were intended to use it.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of the trial judge, Fisher J., and maintaining the respondents' action for damages.

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

C. H. Locke K.C. for the appellant.

H. R. Bray for the respondent.

The judgment of the Chief Justice and of Davis J. was delivered by

THE CHIEF JUSTICE—The appeal should in my opinion be dismissed with costs.

There is evidence to support the finding of the learned trial judge that in respect of "the picnic grounds no. 1" the respondents were "invitees" and that the appellants, who were the owners in possession of that property, were responsible for the invitation. There was also sufficient evidence to support his finding that the locus of the mishap in which the respondents were injured was within the locality to which the invitation extended—"the picnic grounds no. 1."

The passage in the judgment of Lord Selbourne in *Walker* v. *Midland Railway Co.* (2) cited by Lord Buckmaster in *Mersey Docks* v. *Procter* (3) is, I think, apposite. So far as pertinent it is in these words:

* * * the duty is limited to those places to which a person may reasonably be supposed to be likely to go in the belief, reasonably entertained, that he is invited * * * to do so.

(1) [1940] 1 W.W.R. 209.
(2) (1886) 55 L.T. 489, at 490; 2 T.L.R. 450, at 461.
(3) [1923] A.C. 253, at 256.

The folder is evidence against the appellants as well as against the steamship company. In the examination of the manager of the appellants on discovery this occurs:

82. Q. I understand the whole thing is all your property? A. The whole thing is all our property.

83. Q. What was bothering me is you see your advertisement under the heading of recreation in this document marked 2, it says that the stage or whatever it is, or the shell, is on No. 1 ground. You don't quarrel with that at all? A. No, you can call it No. 1 ground.

There was sufficient evidence also in support of the finding that the appellants failed in their duty to "keep" the bench "reasonably safe" (*Letang* v. *Ottawa Electric Railway Co.*) (1) for the purposes for which the respondents and other "invitees" were intended to use it.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—On July 3rd, 1938, Catherine L. Kennedy, Gladys McLeod and Sarah Brooks were injured by the collapse of a bench on which they were seated. They, and the husbands of the first two mentioned women, sued Union Estates Limited for damages for the injuries sustained and for the ensuing expenses. They succeeded before the trial judge, Mr. Justice Fisher, and, on appeal, the judgment was sustained by the Court of Appeal for British Columbia with two of the judges dissenting. By special leave of that Court, the defendant now appeals.

The accident occurred while the respondents, as members of a picnic party, were on that portion of Bowen Island, near Vancouver, in the province of British Columbia, owned and occupied by the appellant. It there operated a hotel, a cafeteria, a store, and provided facilities for picnics, boating, fishing, swimming, tennis, dancing, lawn bowling, and horseback riding. The usual rates were, of course, charged to anyone staying at the hotel and using certain of the recreational facilities but no charge was made for the use of the picnic grounds. The appellant also arranged for open air entertainments on a specially designed platform known as a concert shell but no fee was demanded from those who desired to listen to the programs, the entertainers relying upon voluntary donations for their recompense.

(1) [1926] A.C. 725, at 732.

1940
UNION ESTATES LTD. v. KENNEDY.
Kerwin J.

Union Steamships Limited, not a party to this action, owned and operated a steamship plying, for hire, between Vancouver and Bowen Island. While that company and appellant are both subsidiaries of a third company, and while there is in evidence an agreement between the two whereby the shipping company agreed to pay the appellant, each year, such sum as should be mutually agreed upon by the directors and managers of each in respect of the use, by the shipping company and its passengers, of the appellant's wharves, terminal facilities, summer resorts and pleasure grounds at Bowen Island or elsewhere, the point is unimportant as undoubtedly the businesses of the two companies were operated jointly for their mutual advantage. While Mr. Rushton, to be referred to later, the traffic assistant of Union Steamships Limited, was not an officer or employee of the appellant, the latter's manager testified that Mr. Rushton "devotes a good deal of his time to Union Estates," and that the three companies "all work together." Even Mr. Rushton admitted that there was an arrangement between the appellant and the Steamship Company whereby the latter might allocate recreational facilities on the Island for such organizations as might desire them.

Under these circumstances, there can be no question as to the admissibility in evidence of an illustrated folder depicting and enlarging upon the attractions to be found on the Island, and this, notwithstanding the fact that it does not appear that any of the respondents ever saw the folder. In it is a list of the recreations available and included in that list appears the following:—

Open-air Entertainments—Frequent amusing shows, concerts and vaudeville entertainments are arranged in the evenings at the Bowen Island Concert Shell on no. 1 grounds. Other facilities include Children's swings, softball and outside checker-board.

Picnic Facilities—Plenty of hot water (free) and stoves are always available for large or small basket picnic parties and family groups, with covered tables under shade trees.

Five separate picnic grounds are available for reservation by organized parties, replete with modern equipment; running tracks for field sports, and splendid accommodation for softball and games.

Light refreshments, lunches, tea, coffee and sandwiches, etc., any time at the Pavilion Cafeteria. All meals are also available for visitors at Bowen Island Inn. Supplies of all kinds can be obtained at the artistic general store.

In one corner of the folder it is stated:—

For information regarding all sailings, picnic reservations, accommodation at Bowen Island Inn and summer cottages.
enquire
Union Steamships Ltd., Vancouver, B.C., Union Pier, foot Carrall street, phone Trinity 1321, or City Office, 793 Granville street, phone Seymour 9331, or E. A. Vosper, Superintendent Union Estates Ltd., Bowen Island, B.C.

On April 14th, 1938, Ida Mary Scott, a stenographer and switchboard operator of the International Harvester Company of Canada, Limited, applied to Mr. Rushton to secure a picnic ground at the Island for the Harvester Company's picnic, to be held on July 3rd, 1938. In accordance with the arrangement between the Steamship Company and appellant, and without reference to any of the appellant's employees, Mr. Rushton designated for the purpose no. 1 Picnic Grounds, referred to in the folder, and notified the appellant's Island Superintendent of the allotment. Tickets for the return trip between Vancouver and the Island were issued by the Steamship company and were sent and charged to the Harvester company. On the day appointed the picnickers journeyed to the Island, among them being the respondents. I deem it irrelevant whether the latter were, or were not, employees of the Harvester company and whether each of the respondents paid for his or her ticket, although in fact it appears that one of them was such an employee and that another testified that she purchased her ticket. The ticket for each respondent was paid for by someone and there can, I think, be no doubt that no. 1 Picnic Grounds were reserved for all those who might attend the Harvester company's picnic, whether employees of that company or not. It need only be added that there is no evidence that respondents paid anything to the appellant by way of purchase of goods or for the use of any of the privileges of the Island.

The picnic was held, some of the picnickers returned to Vancouver on the Steamship company's boat about six o'clock in the evening and others remained on the Island until a later boat. Several people, including the respondents, sat upon one of the benches provided for the purpose by the appellant, to watch an entertainment on the concert shell. The fact that the entertainers neither received anything from, nor paid anything to, the appellant, but relied upon voluntary donations has no significance, nor

1940

UNION ESTATES LTD. v. KENNEDY.

Kerwin J.

is it important that the respondents, or some of them, contributed to the collection. They were seated for ten to twenty minutes when one end of the bench collapsed, causing the injuries complained of.

The principal contention before us was that the respondents were licensees and not, as found by the trial judge and the majority of the Court of Appeal, invitees, or, at least, licensees with an interest. Counsel for the appellant agreed that if the respondents had, for instance, gone into appellant's store to make a purchase, they would be invitees, but contended that they could not be so considered when on the picnic grounds for the use of which they paid no fee direct to the appellant. In my opinion that contention is unsound. The appellant was operating the resort as a commercial venture and the Steamship company must be taken as the agent of the appellant to invite (as that expression is used in the cases) the respondents to use the facilities provided on the Island. It is not necessary that there should be any contractual relationship between the appellant and respondents. It suffices that the respondents were upon premises owned and occupied by the appellant, on the business of the appellant, and with a common interest with it. It is true that in my view of the matter nothing was received by the appellant for the use of the picnic grounds but I agree with Mr. Justice M. A. Macdonald when he states:—

> Whether patrons were attracted to tea rooms, the boat house, tennis courts, etc., or the "Concert Bowl," one common purpose was served, viz.: profit for appellant and advancement for its commercial interests. Attractions of a varied character in their combined effect would induce the public to visit the Island, repeat the visit and cause others to do so. A patron might promote appellant's interest, even though no money was spent by him except payment of his fare.

It was also contended that the accident did not happen on the picnic grounds. Upon a review of the evidence, I have concluded that that submission is not well-founded but, even assuming that it is, the appellant was interested in the picnickers remaining on the Island as long as possible in the hope that they would make purchases or use the facilities for which a fee was charged. The principle of *Indermaur* v. *Danes* (1) applies, and the terms of the invitation by appellant to respondents did not restrict the latter to the picnic grounds.

(1) (1866) L.R. 1 C.P. 274.

The accident arose by reason of the fact that one of the tenons that mortised the leg to the seat of the bench had decayed and rotted. The trial judge in effect so found although it is suggested that he was influenced by certain evidence admitted by him in reply. Scott, the director of the entertainment, was a witness for the appellant and in cross-examination denied having made a statement that he had previously warned the appellant of the condition of the benches generally. The evidence called in reply that he had made such a statement was not admissible to show that any such warning was actually given. However, disregarding it, there remains ample evidence to justify the finding of the trial judge, concurred in as it was by the majority of the Court of Appeal. With this established, I think it is beyond question that while the appellant did not set a trap for the respondents, its employees made no proper inspection of the bench and such an inspection would have disclosed the decayed condition.

The appeal should be dismissed with costs.

HUDSON J.—The plaintiffs in these consolidated actions were injured through the collapse of a bench upon which they had been sitting. This bench was under the control and supervision of the defendants and on property owned and occupied by them. It was alleged that the bench was in an unsafe and dangerous condition, due to the negligence and default of the defendants, and further that being in such condition it was in the nature of a trap.

The action was tried before Mr. Justice Fisher, without a jury. He found as a fact that the bench when it collapsed was in an unsafe and dangerous condition and that the defendants were negligent and responsible for this. He further held that the plaintiffs were under the circumstances of the case invitees of the defendants. On appeal, verdicts in favour of the plaintiffs were sustained.

There was evidence to support the findings of fact of the learned trial judge and, affirmed as they have been by the Court of Appeal, I think there is no reason why those findings should be disturbed.

The real question to be considered is whether or not the plaintiffs were "invitees" of the defendants under the circumstances.

1940
UNION ESTATES LTD. v. KENNEDY.
Hudson J.

The bench in question was on recreation grounds of the defendants on Bowen Island, about an hour's journey by sea from Vancouver. On this island the defendants had various attractions provided for visitors, including, according to advertisements, swimming, boating and fishing, tennis, lawn bowling, dancing, open air entertainments and picnic facilities as well as an inn and a cafeteria. It is quite apparent that these sources of recreation were not provided by the defendants out of philanthropic considerations. Doubtless they derived revenues from charges which were made to visitors for services rendered on the island. In addition to this, there were indirect considerations which entered into the matter. The entire stock of the defendant company called Union Steamships of British Columbia, Limited, and this company in turn owned the capital stock of another company called Union Steamships Limited which operated a line of steamships, some of which ran between Vancouver and Bowen Island. The Union Steamships Company and the defendants have the same executive, the same office, the same directors and the same shareholders. A folder was put in evidence advertising the attractions of Bowen Island and purporting to be issued by Union Steamships, making it quite obvious that Union Steamships Limited and the defendants were engaged in a common enterprise for the benefit of both.

The plaintiffs' visit to the island on the occasion in question was in consequence of arrangements made by a Miss Scott, who represented some of the plaintiffs among others. Miss Scott had interviews and correspondence with the Union Steamships Company with a view of arranging for a picnic to be held at Bowen Island and, as a consequence, she received a letter which read as follows:

Dear Miss Scott,

We wish to thank you for confirmation of the Annual Picnic of the International Harvester Company of Canada to be held at Bowen Island this year on Sunday, July 3rd, and take pleasure in advising we have duly reserved our No. 1 Grounds for your exclusive use.

As advised we will make a special net quotation as last year, namely, 80c for adults and 40c for children five years of age and under twelve (under five free).

A plentiful supply of hot water and all facilities will be immediately available on arrival and we would also mention that full course luncheons and dinners are served at Bowen Island Inn and light refreshments at the Pavilion Cafeteria for anyone desiring this service.

Steamer will leave Union Pier at 10 a.m. and 2 p.m. and returning will leave Bowen Island at 6 and 9.15 p.m.

Regarding tickets, we will be glad to arrange a supply as last year, if you will kindly get in touch with us when convenient, nearer to the date.

Thanking you and wishing you a very enjoyable outing.

Yours very truly,

G. A. Rushton,
Traffic Assistant.

Following this letter, the plaintiffs and a considerable number of other people went to Bowen Island and were accommodated on picnic grounds no. 1. Towards evening of the day of the picnic they took their seats on the bench which collapsed. This bench was at a place called the "bowl," where open air entertainments were provided, and some question has been raised as to whether the place where these benches were formed part of picnic grounds no. 1 or not.

In the advertising circular of the Steamships Company it is stated:

Open-air entertainments—Frequent amusing shows, concerts and vaudeville entertainments are arranged in the evenings at the Bowen Island Concert Shell on No. 1 grounds.

The manager of the defendant company, when the question was raised, answered: "You can call it no. 1 ground." It is certain that the "bowl" was, if not actually on the picnic ground, immediately adjacent thereto and indistinguishable therefrom so far as the plaintiffs were concerned.

The fares of the plaintiffs were paid either by them or on their behalf. The business of conveying passengers to the Island and providing entertaining attractions for them there was really in the nature of a joint enterprise for the ultimate benefit of both companies. The evidence shows that nothing was paid by the plaintiffs for the actual use of the benches in question, and that the entertainment provided at the bowl was not given by the company, but the benches in question were under the supervision of the defendants, placed there and taken away from time to time by their employees.

The question then is whether or not these facts bring the case within the rule set up in *Indermaur* v. *Dames* (1). Counsel for the defendants urged strongly that there was

(1) (1866) L.R. 1 C.P. 274.

1940
UNION ESTATES LTD. v. KENNEDY.
Hudson J.

no common interest as between the defendants and the plaintiffs in respect of the use of this bench and that, for that reason, the defendants were under no liability. I am of the opinion that this contention cannot be sustained. As stated in Pollock on Torts, 14th Edition, page 410, it is not necessary that there should be any direct or apparent benefit to the occupier from the particular transaction, and here there were indirect benefits coming to the defendant company. I cannot distinguish between the situation of the defendants and a storekeeper whose customers may come into the store with the expectation of buying things and the storekeeper under the *Indermaur* v. *Dames* (1) rule is liable, whether or not the customer makes a purchase.

The defendants were looking forward to getting, and possibly did get, benefits from the presence of the plaintiffs on the Island, directly from money which they spent in respect of amusements there and, in any event, the Steamship Company was getting the money from the plaintiffs' fares and the defendants were providing the attractions which induced the plaintiffs to take the trip.

Reference might be made to *Smith* v. *London & St. Katharine Docks* (2); *Holmes* v. *North Eastern Railway* (3).

The fact that the benches in question were owned and under the direct control and supervision of the defendants' employees distinguishes the case from that of *Humphreys* v. *Dreamland* (4).

I am of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Lane.*

Solicitor for the respondent: *H. E. M. Bradshaw.*

(1) (1866) L.R. 1 C.P. 274. (2) (1868) L.R. 3 C.P. 326.
(3) (1869) L.R. 4 Ex. 254; (1871) L.R. 6 Ex. 123.
(4) (1931) 100 L.J. K.B. 137.

STANLEY A. RICHARDSON (PLAINTIFF) ..... } APPELLANT;

AND

ELDON R. TIFFIN (DEFENDANT) ..... RESPONDENT.

1940

* March 6, 7.
* June 29.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Physicians—Arrangement between plaintiff and defendant, both physicians, for defendant to purchase practice of third physician (retiring) with moneys furnished by plaintiff and to practise for fixed time and pay share of profits to plaintiff—Subsequent contracts for further periods of practice and division of profits—Restrictive covenants against defendant practising within certain time and area—Validity, severability, of the restrictive covenants—Plaintiff suing for an accounting—Nature of the agreements—Consideration—Statute of Frauds (R.S.O., 1937, c. 146), s. 4—Question as to application of ss. 47, 50, of Medical Act (R.S.O., 1937, c. 225), in view of plaintiff becoming disentitled to practise.

Plaintiff and defendant, both physicians, arranged that defendant should in defendant's name purchase from C., a physician retiring from practising in the same town in which plaintiff practised, C.'s practice and certain equipment, plaintiff furnishing to defendant the money for the purpose; and this was done. Plaintiff and defendant entered into an agreement whereby defendant was to "practise for" plaintiff for three years, plaintiff to pay to defendant $300 each month and expenses of the practice and 10% of the net proceeds of the practice (determined after deducting expenses including defendant's said "monthly salary"). Defendant carried on the practice in the office formerly occupied as tenant by C., the building containing it having been purchased by plaintiff. Said three-year period began on May 1, 1930. On April 17, 1933, plaintiff and defendant entered into a second agreement whereby defendant agreed to continue the practice "for and on behalf of" plaintiff "and in his own name and with the same good will and co-operation between the parties as has existed in the past" to May 1, 1936, defendant to receive 50% of the net profits. On September 6, 1935, plaintiff and defendant entered into a third agreement in terms similar to those of the second agreement, the period of the third agreement to last until May 1, 1939. Each of the agreements contained a covenant by defendant not to practise within a certain area within a certain time. On certain settlements of accounts, defendant gave to plaintiff two promissory notes dated respectively January 1, 1934, and May 1, 1935. In October, 1935, plaintiff's name was struck from the register under the *Medical Act* (R.S.O., 1937, c. 225). About September, 1937, defendant refused to recognize any claim of plaintiff on the promissory notes or under the agreements. Plaintiff sued for payment of the notes and an accounting. Defendant pleaded that the second and third agreements were *nuda pacta* and failed wholly (as did also the promissory notes) for

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1940

RICHARDSON v. TIFFIN.

want of any consideration, and that he had more than fully paid all moneys payable under the first agreement; he also attacked the agreements by reason of the restrictive covenants, and also pleaded the *Medical Act* aforesaid and the *Statute of Frauds*. At trial, McTague J.A. ([1939] O.R. 444) gave judgment to plaintiff for an accounting. This judgment was reversed by the Court of Appeal for Ontario (*ibid*), which dismissed the action. Plaintiff appealed.

Held (*per* Rinfret, Davis and Kerwin JJ.; the Chief Justice and Crocket J. dissenting): Plaintiff's appeal should be allowed and the judgment at trial restored.

Per Davis J.: Whether or not the restrictive covenants made by defendant in the agreements are unenforceable, they are clearly severable; in any case there was nothing in the evidence to support the contention that either the second or third agreement was made by defendant because of any thought or fear of enforcement of the restrictive covenant. While it cannot be said that a trust was created by the first agreement, there was consideration for all the agreements, and the court is not concerned with the adequacy thereof. The plain intention of the parties, and it was fully carried out, was that defendant would practise by himself and in his own name, and it was only in the sense of sharing with plaintiff the earnings of the practice that the rather loose language in the agreements as to defendant practising "for" or "for and on behalf of" plaintiff were used. As to the *Medical Act*, plaintiff's name was not struck from the register until October, 1935, and in any case it was the earnings from defendant's practice, carried on by himself and in his own name alone, which were covered by the agreements.

Per Kerwin J.: As to the second agreement, whereby defendant was to continue the practice "for and on behalf of" plaintiff for three years, defendant's contention that, if any consideration existed, it did not appear in the written document and thus the agreement was not enforceable by virtue of s. 4 of the *Statute of Frauds* (R.S.O., 1937, c. 146), is sufficiently met (apart from other items of consideration suggested) by plaintiff's promise therein to pay defendant 50% of the net profits. By entering into the first agreement, defendant undertook in effect that he would at its expiration turn over to plainiff the practice which he had been enabled to commence with plaintiff's money, unless some new agreement was entered into. The new agreement being valid to the extent indicated, defendant is bound to account to plaintiff in accordance with its terms. Plaintiff did not contravene ss. 47 and 50 of the *Medical Act* and is not prevented because of those enactments from compelling an accounting. The validity of the restrictive covenants is not material in determining the present case.

Per the Chief Justice and Crocket J. (dissenting): Plaintiff is not entitled to any rights as between himself and defendant on the footing that, in defendant's contract of purchase from C., plaintiff was the principal contracting through defendant as his agent, or that defendant's rights under that contract were held by him in trust for plaintiff; the contract between C. and defendant was a personal contract—C.'s patients were to be introduced to defendant (as to the true nature of the pith and substance of such a contract, *May* v. *Thomson*, 20 Ch. D. 705, at 718, referred to); further, it was well known to plaintiff and defendant that C. contracted in the full belief that defendant

was contracting as principal and in particular in the full belief that defendant was not contracting as plaintiff's agent, and, in the circumstances, plaintiff could not have enforced the contract as a principal (*Ferrand* v. *Bischoffsheim*, 4 C.B., N.S. 710, at 717); further, the proposition of plaintiff's rights upon the footing aforesaid was really based on the assumption that plaintiff and defendant were inducing C. to enter into the contract by industrious concealment in circumstances which imparted to that concealment the character of misrepresentation; and it is not open to plaintiff to base his case upon his own wrong; he cannot set up a relationship in support of his claim which rests upon fraud upon third parties (*Jackson* v. *Duchaire*, 3 Term Rep. 551, and other authorities cited). It was definitely understood between plaintiff and defendant that the arrangement between them should be kept secret. The agreement between them did not contemplate the establishment of any such relationship as that of a partnership or that of principal and assistant. The patients treated by defendant in the course of his practice were his patients. If there was any *vinculum juris* which plaintiff could have invoked against defendant's resistance, it was that of debtor and creditor. The restrictive covenants were void in law; such a covenant in gross would be contrary to public policy and unenforceable; and such a covenant is not valid and enforceable as subsidiary to the contract between plaintiff and defendant—a contract merely binding defendant to practise for three years and pay to plaintiff a share of the earnings. There was no consideration to defendant for his second and third agreements with plaintiff; at the expiration of the period of the first agreement, plaintiff had nothing to give to defendant. It was not competent in this action to go outside the writing to find consideration for defendant's promise, the agreement being within s. 4 of the *Statute of Frauds*. The promissory notes, which were given in settlement of moneys supposed to be payable under the second and third agreements, do not advance the matter. Though their production establishes a *prima facie* right, a presumption of valid consideration, yet the facts are all before the court and the only possible consideration was money supposed to be owing under defendant's promises given without consideration. A promise to pay money, unenforceable because not supported by a valuable consideration, can, itself, be no consideration for a promise to pay these sums, whether in the form of a promissory note or in any other form. Putting the point in another way: the direct and immediate cause of the making and delivery of the notes and the whole basis of the agreement embodied therein was the mistaken belief, common to both parties, that the amounts thereof were due and owing; and the notes are unenforceable because, by reason of such mistaken belief, they were void. The mistake was one in respect of particular private rights involving the application of general principles of law to the facts; a mistake due to ignorance in respect of a right which both parties supposed to exist. On the principle of *Cooper* v. *Phibbs* (L.R. 2 H.L. 149) and cases which have followed it, such a mistake vitiates the contract or the instrument under which it is given. (This sort of mistake is not the basis of a right to recover back money as paid under a mistake of fact, for there the mistake must be one of pure fact and not of mixed fact and law).

1940

RICHARDSON v. TIFFIN.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of McTague J.A. at trial (2)) dismissed the action.

The action was brought for an accounting from defendant (and payment of moneys found due thereon) under three agreements entered into between the plaintiff and defendant, both physicians, in respect of the practice of medicine by defendant in the town of Wallaceburg, Ontario, and for payment of the amount of two promissory notes made by the defendant in favour of the plaintiff. The material facts of the case are dealt with in the reasons for judgment in this Court now reported, and also in the reasons for judgment in the Courts below. The trial judge, McTague J.A., gave judgment to plaintiff for an accounting. This was reversed by the Court of Appeal (Henderson J.A. dissenting in part), which gave judgment dismissing the action. Plaintiff appealed to this Court, asking that the judgment at trial be restored. The appeal to this Court was allowed and the judgment of the trial judge restored with costs throughout (the Chief Justice and Crocket J. dissenting).

J. R. Cartwright K.C. for the appellant.

D. L. McCarthy K.C. and *K. G. Morden* for the respondent.

The judgment of the Chief Justice and Crocket J. (dissenting) was delivered by

THE CHIEF JUSTICE—With great respect for the learned trial judge, I agree with the Court of Appeal that the appellant is not entitled to any rights as between himself and the respondent on the footing that in the contract of the 5th of November, 1929, he was the principal contracting through the respondent as his agent with Dr. Cowan.

Dr. Cowan and the appellant had been practicing medicine in Wallaceburg for many years. Dr. Cowan was about to retire from practice and the appellant conceived the design that he would have the respondent step into Dr. Cowan's place and take over his patients and his practice

(1) [1939] O.R. 444; [1939] 3 D.L.R. 301.

(2) [1939] O.R. 444, at 444-448.

under an arrangement by which the appellant would receive the lion's share of the profits of the practice. It is plain from the evidence that it was essential to the success of the scheme that Dr. Cowan should be ignorant of any connection between the appellant and Dr. Cowan's successor. He knew that Dr. Cowan would have no dealings with him, or anybody associated with him. The respondent was a young man who had just finished his medical education and had been practising for some months in a place called Merlin, not far from Wallaceburg, and he was selected by the appellant as a suitable person to step into the shoes of Dr. Cowan. On the 31st of October, 1929, the appellant and the respondent entered into an agreement on the following terms:—

Stanley A. Richardson, M.D.
Wallaceburg.

Memorandum of agreement made this 31 of October, 1929. Between S. A. Richardson of the Town of Wallaceburg, physician herein called the party of the first part AND Eldon R. Tiffin hereinafter called the party of the second part.

Witness that in consideration of Ten Thousand Eight Hundred Dollars paid in 36 equal monthly instalments of Three Hundred Dollars each by the party of the first part along with necessary expenses entailed while practicing for the party of the first part, also ten per cent. of all monies received from practice done by party of the second part after payment of all expenses of the said practice including his monthly salary, the party of the second part agrees to practice for the party of the first part to the best of his ability for a period of three years.

The party of the second part agrees to furnish his own car and all its upkeep except gasoline and oil used in practice.

The party of the second part also agrees not to practice in or within twenty miles of the town of Wallaceburg without the consent of the party of the first part under penalty of $10,000 as liquidated damages before May 1, 1939.

The respondent's agreement with Dr. Cowan is as follows:—

AGREEMENT made this 5th day of November in the year one thousand nine hundred and twenty-nine, BETWEEN R. D. Cowan of the Town of Wallaceburg, in the County of Kent in the Province of Ontario, Physician, hereinafter called the vendor of the First Part AND E. R. Tiffen, Physician, hereinafter called the Purchaser of the Second Part;

WHEREAS the Vendor has for several years past exercised his profession of Physician and Surgeon at the said Town of Wallaceburg, and is now desirous of retiring from his practice in the said Town of Wallaceburg, and the purchaser is desirous of establishing himself as a Physician and Surgeon at the said Town of Wallaceburg.

NOW THIS AGREEMENT WITNESSETH that the Vendor agrees to sell and the purchaser agrees to purchase all drugs and medicines now used therein exclusive of all medical books, private papers, medical

1940

RICHARDSON v. TIFFIN.

Duff C.J.

bags and instruments (which said excepted articles shall be removed by the Vendor) also said practise and the good-will and benefits thereof from May the First, 1930, for the said sum of Twelve Hundred and Fifty Dollars ($1,250).

THE VENDOR HEREBY delivers over to the purchaser the said practice or business and the good-will thereof for his absolute use and benefit; and likewise the full and uninterrupted possession of the office in which the said practice now carried on by him together with the effects hereinbefore mentioned and described as being covered hereby.

THE VENDOR COVENANTS that he will not practise either as a Physician or a Surgeon or act directly or indirectly as partner or assistant to or with any other physician or surgeon either at the said Town of Wallaceburg or elsewhere within twenty miles thereof, under penalty of $5,000.

Subsequently, some months after the execution of this agreement, Dr. Cowan insisted that the respondent should take over the furniture and equipment in his office and this was accordingly done and the respondent paid $250. These two sums of $1,250 and $250 were paid by the appellant to the respondent in order to enable the respondent to carry out the arrangement.

It was held by the learned trial judge that the appellant was the principal in the agreement between the respondent and Dr. Cowan and that the respondent's rights under that agreement were held by him in trust for the appellant, and it is upon that position that the respondent's counsel based his case in the argument before this Court. In considering this subject it is necessary to take account of the true nature of the pith and substance of an agreement such as that between Dr. Cowan and the respondent. It was discussed by Sir George Jessel in a case, *May* v. *Thomson* (1), and it is convenient, I think, to reproduce his words now:—

I pause there to consider what there was to sell. The main subject of the sale was, as I have said, a medical practice: the lease and furniture were only an adjunct of the practice. What is the meaning of selling a medical practice? It is the selling of the introduction of the patients of the doctor who sells to the doctor who buys: he has nothing else to sell except the introduction. He can persuade his patients, probably, who have confidence in him to employ the gentleman he introduces as being a qualified man, and fit to undertake the cure of their maladies; but that is all he can do. Therefore, when you talk of the sale of a non-dispensing medical practice—of course, when a man keeps what is called a doctor's shop there is a different thing entirely to sell—you are really talking of the sale of the introduction to the patients, and the length, the character and duration of the introduction, the terms of the introduction, are everything. And there is something more, according to my experience, in cases

(1) (1882) 20 Chancery Division 705, at 718.

of the sale of medical practices—I do not know how the evidence is with regard to it in this case—there is always a stipulation that the selling doctor shall retire from practice either altogether or within a given distance. It is so always, and there is also sometimes a stipulation that he shall not solicit the patients, or shall not solicit them for a given time. They are both very important stipulations as regards keeping together the practice for the purchasing doctor.

As it seems to me, it is quite obvious, apart altogether from the exceptional circumstances to which I am about to refer, that an agreement of this kind is a personal agreement in this sense, that the introduction is to be an introduction to the purchaser, to the person who is the party to the agreement. It was thought by two great judges, Lord Eldon and Lord Langdale, that any agreement by one doctor to sell for money a recommendation of his patients to another was not compatible with the policy of the law (see Allan on Goodwill, p. 49). In 1803, however, a case of this kind was referred by Lord Eldon to the Court of King's Bench in the case of an attorney and that Court certified to the Lord Chancellor that the agreement was valid (*Bunn* v. *Guy* (1)). It seems plain that the judges in dealing with this subject were influenced by the circumstance that a contrary decision would have upset a great many arrangements which people made and acted upon. I have seen no case, however, in which it has been held that the law would sanction an agreement between a physician "A" with a physician "B" that he, "A," would recommend his patients in consideration of a sum paid to him to any physician that "B" might name. However that may be, in my opinion this contract was a personal contract. The purchaser contracts *ex facie* as the real and only principal and there is nothing in the context to indicate a contrary intention. Furthermore, the circumstances of the case preclude the appellant from asserting that he was entitled to enforce the respondent's rights under the contract. It was well known to both of them that Dr. Cowan entered into the agreement in the full belief that the respondent was contracting with him as the only principal, and in particular in the full belief that he was not contracting as the agent of the appellant. In the circumstances, the appellant could not have enforced the contract as a principal (*Ferrand* v. *Bischoffsheim* (2)).

(1) (1803) 4 East 190.

(2) (1858) 4 C.B., N.S., 710, at 717.

1940

RICHARDSON v. TIFFIN.

Duff C.J.

Still again, the proposition we are considering is really based on the assumption that the appellant and the respondent were inducing Dr. Cowan to enter into the contract by industrious concealment in circumstances which imparted to that concealment the character of misrepresentation. It is not open to the appellant to base his case upon his own wrong; he cannot set up a relationship in support of his claim which rests upon fraud upon third parties (*Jackson* v. *Duchaire* (1)).

Some attempt was made to draw a distinction between the contract of the 5th of November, 1929, and the subsequent agreement to pay $250 for office furniture and equipment. What I have said applies equally to both agreements.

It should, perhaps, be added that Dr. Cowan's patients were introduced and recommended to the respondent by Dr. Cowan; that they were never introduced or recommended to the appellant, and, moreover, it was definitely understood between them that it was an essential condition to the success of the plan that the arrangement between the appellant and the respondent should be kept secret. The appellant insisted upon this more than once in his evidence and there can be no possible doubt about it. The patients whom the respondent treated in the course of his practice were his patients. Both parties agreed that it was most important that no suspicion should arise that the appellant had any connection with the respondent's practice. Under the agreement of the 31st of October, therefore, the appellant acquired the right to be paid the respondent's earnings from his practice in Wallaceburg during the period mentioned less ten per cent. of the proceeds, after the deduction of $300 a month for the respondent and the expenses of the practice, the appellant guaranteeing the allowance of $300. The sole consideration for this agreement that the appellant should be paid the net proceeds of the practice was, in fact, the sum of $1,500 subsequently paid by him to the respondent to enable the respondent to acquire Dr. Cowan's practice and the equipment of his office. The respondent has not desired to raise any question as to the appellant's right to be paid the net proceeds of his practice during the

(1) (1790) 3 Term Reports 551.

term of this first agreement and it is, therefore, unnecessary to consider whether the appellant acquired any enforceable right in this respect.

As to the covenant not to practise for ten years without the sanction of the appellant in the area mentioned, the validity of which is disputed, I shall discuss that in a moment. Mr. Cartwright argued that the covenant by the respondent to "practise for" the appellant for the specified period made the practice of the respondent that of the appellant in the sense, at all events, that the appellant was entitled at the expiration of the period to call upon the respondent to introduce and recommend his patients to him.

Now it is not disputed, and it is overwhelmingly evidenced by the conduct of the parties, that they did not in entering into this agreement contemplate the establishment of any such relationship between them as that of a partnership; that is to say, what is ordinarily understood as a partnership between medical men, or that of principal and assistant. It is a common enough thing for a doctor to have an assistant who is known to the world as his assistant, and the patients expect and take the consequences of that relationship, and so with regard to partnership. I am unable to agree, however, that the agreement now before us contemplates any such relationship between the parties. The agreement must be read in the light of the circumstances just mentioned, the necessity for secrecy with regard to the arrangement between them, the fact that this arrangement had been concealed with great care from Dr. Cowan, the manifest and admitted intention, because this was essential to the success of the appellant's design, that the respondent should appear before the world as the rival practitioner of the appellant. Obviously a secret arrangement between the respondent and the appellant by which as servant, or agent, or partner, or contractor, the appellant had any right to exercise any control over the respondent in his manner of practising medicine and, above all, to possess himself of the confidences acquired by the respondent from his patients in the course of and in connection with his practice would be a base fraud upon the respondent's patients, some of whom, it is highly probable to the knowledge of the parties, would have been shocked at the possibility that

1940

RICHARDSON v. TIFFIN.

Duff C.J.

their doctor had any such relationship with the appellant. The truth is that the appellant was only concerned about one thing and that is the profits from the practice. The respondent was to practise " for " him in a very real sense, that is to say, to enable him to acquire the pecuniary benefits provided for by the agreement. I am satisfied that the relation of principal and agent, or trustee and *cestui que trust,* never arose. The relationship was one of debtor and creditor. If there was any *vinculum juris* which the appellant could have invoked against the resistance of the respondent, it was that of debtor and creditor. The respondent agreed with the appellant that he should practise medicine in Wallaceburg for three years and that the earnings received by him should be divided in the manner therein provided for.

Turning then to the covenant, with which the agreement concludes, it is in these words:—

> The party of the second part also agrees not to practise in or within twenty miles of the town of Wallaceburg without the consent of the party of the first part under penalty of $10,000 as liquidated damages before May 1st, 1939.

It is, of course, well settled law that such a covenant as this in gross would be contrary to public policy and unenforceable. It seems equally clear that such a covenant is not valid and enforceable as subsidiary to the contract of the 31st of October when properly understood as a contract; that is to say, binding the respondent to practise medicine for three years and to pay to the appellant a share of his earnings, there being no contract of partnership, no relationship of master and servant, no contract of sale and purchase, nothing but a payment of $1,500 by the appellant in consideration of which the respondent is bound to practise for three years and pay the appellant ninety per cent. of his net earnings. The purpose of the appellant is, of course, plain. At the expiration of the three-year period the respondent would be in his clutches and could only continue to practise in Wallaceburg upon any terms the appellant might dictate, and so on at the expiration of any and every further period.

As regards the agreement we have been considering, the respondent, as already observed, does not deny his responsibility under it. The Court of Appeal has held that all moneys owing have been paid.

The appellant sues on two other agreements, dated respectively the 17th of April, 1933, and the 6th of September, 1935. It is well, perhaps, to note in passing that the appellant sues on these two written agreements as well as on two promissory notes, dated respectively the 1st of January, 1934, and the 1st of May, 1935. The promissory notes were given in settlement of moneys supposed to be payable under these agreements. It seems very plain to me that there was no consideration for either of the agreements. The covenant not to practise without consent of the appellant in the agreement of 1929 was void in law for the reasons mentioned. At the expiration of the three-year period under that agreement, the appellant had nothing to give the respondent. The moneys paid to the respondent to pay Dr. Cowan were paid in order to get rid of Dr. Cowan, pursuant to the appellant's design. Dr. Cowan's covenant was personal to the respondent, and the appellant, for the reasons given, cannot get the benefit of that covenant by alleging the fraud on Dr. Cowan in order to establish a trust. The respondent was free to practise in Wallaceburg.

I agree with the Court of Appeal that the agreement whereby fifty per cent. of the respondent's net earnings were to go to the appellant was entirely without consideration.

The covenant not to practise without the consent of the appellant is void in law for reasons similar to those already given in respect of the covenant in the first agreement.

Mr. Cartwright contends that there is consideration on four grounds: (1) Tiffin had his office rent free. (2) He had the use of the equipment. (3) He got his medicines paid for out of the receipts from the practice during the first three years. (4) At the termination of the first contract there was a compromise of a doubtful claim in respect of the respondent's right to practise. And he also argues that the respondent is estopped from denying the existence of consideration.

As to the estoppel, it is based upon payments made by the respondent when ignorant of his rights. I am quite unable to discover here the elements of estoppel. The respondent no doubt thought that the second and third agreements were legally binding upon him when he made

1940

RICHARDSON v. TIFFIN.

Duff C.J.

those payments, as probably the appellant also did, but it is going a little too far, I think, to suggest that the appellant was in any way misled by what the respondent did, or that anything the respondent did in any way affected the appellant's course of conduct. The appellant acted, I have no doubt, entirely upon his own view of his own rights. There was mutual mistake, which is not without its bearing upon one point in the appeal, although, as Mr. Justice Middleton points out, it is not a mistake of such a character as entitles the respondent to recover back moneys already paid, because there the rule which distinguishes between the mistake of law and the mistake of fact is rigorously applied and mistake of law, or of mixed law and fact, is not sufficient, even although it is mistake as to particular private rights. That disposes of point number five on this matter of consideration.

As to point number four, there was no compromise of a doubtful claim; no such claim was made and no dispute arose of which there could be a compromise.

As to the equipment and the medicines taken over from Dr. Cowan, the appellant is precluded from alleging they were his for the reasons given, and at the trial no point was made as to their existence at the date of the second agreement. As to the medicines purchased subsequently, as well as equipment, they were the respondent's, being paid for out of his earnings.

As to the office, as well as the furniture and equipment, the evidence is that the whole building was rented by the respondent at a rent of $42 a month and partly sub-let by him, as the appellant admits.

Q. Or about the time of second agreement; early in May, 1933?—A. I can't tell you the date.

Q. Just about the time the first agreement expired?—A. Yes.

Q. And about that time he took over the whole building and paid you $42 a month for it, from that time after?—A. Yes.

Indeed the appellant admits that the rent of the office would be chargeable to expenses under the first agreement. There is nothing in either of the agreements sued upon as to the occupation of the office. There is not a word about it in the documents, and the transaction by which the respondent rented the whole building at $42 a month must be taken to be an independent transaction. In my view of these documents, there is nothing in them by

which the appellant had legal right to control the respondent in the selection of his office. There is an express stipulation that the respondent is to continue the practice of medicine in Wallaceburg, but there is not a word about the situation of his office. Furthermore, these agreements state explicitly what the consideration is and the net result of the stipulations is that the respondent is to pay to the appellant his net earnings from the practice of medicine in Wallaceburg for the period mentioned, after deducting all necessary expenses.

In an action on this agreement by one party against the other it is not competent to go outside the writing to find consideration for the promise relied upon. The agreement is within the fourth section of the *Statute of Frauds* and the memorandum in writing must show the consideration. The agreement, therefore, cannot be supported by any consideration which does not sufficiently appear from the memorandum. The action is upon the written agreement and there is no suggestion of *quantum meruit* in the pleadings. Part performance has obviously no application to an agreement such as this.

As to the promissory notes, they do not advance the matter. The appellant's position is that he sues upon a promise given without consideration by the respondent to pay moneys to him. The production of the promissory notes establishes undoubtedly a *prima facie* right in the appellant to recover on those notes; that is to say, there is a presumption they were given for a valid consideration. But the whole of the facts are before us and the only possible consideration was money supposed to be owing to the appellant by the respondent under his promises given without consideration. A promise to pay money unenforceable because not supported by a valid consideration can, itself, be no consideration for a promise to pay these sums, whether in the form of a promissory note, or in any other form.

There is another way in which the point can be put. There can be no doubt that both parties believed that the amounts mentioned in the promissory notes were at the dates of those notes, respectively, due and owing by the respondent to the appellant. This mistaken belief was the direct and immediate cause of the making and delivery of the promissory notes by the respondent to the appellant.

1940

RICHARDSON v. TIFFIN.

Duff C.J.

It was the common mistake of both parties and it was the whole basis of the agreement embodied in the promissory notes. This belief, as will appear from what has been said, was a mistaken belief, and the promissory notes are unenforceable, because by reason of this belief they were void. The mistake was a mistake in respect of particular private rights involving the application of general principles of law to the facts; a mistake due to ignorance in respect of a right which both parties supposed to exist. On the principle of *Cooper* v. *Phibbs* (1), and cases which have followed it, such a mistake vitiates the contract, or the instrument under which it is given (Pollock, p. 445; 23 Halsbury, 2nd edition, p. 131). This sort of mistake is not the basis of a right to recover back money as paid under a mistake of fact, for there the mistake must be one of pure fact and not of mixed fact and law (Halsbury, p. 166; Pollock, p. 460).

Returning to the allegation that the respondent in contracting with Dr. Cowan was contracting as his agent:

> Where it appears that the object of such contract or transaction was to defraud third persons, whether specific individuals, or the public in general, or a class or section of the community,

the Court will treat the transaction as void (23 Halsbury, 2nd edition, p. 124).

In *Farmers' Mart Ltd.* v. *Milne* (2), Lord Dunedin says:—

> Now taking it upon Scotch authority first, before coming to English authority, I find that the matter is very clearly dealt with, as it always is, by Mr. Bell in his "Principles." After stating that there are such things as illegal and immoral contracts, he deals in s. 37 with contracts void at common law. He first sets forth contracts properly immoral, *contra bonos mores,* then certain rules as to *pactum illicitum,* and so on, and then he says this: "Contracts for indecent or mischievous purposes or considerations, or prejudicial or offensive to the public or to third parties, or inconsistent with public law or arrangements are invalid." * * * My Lords, I have so far kept only to Scotch authority. In English authority the matter is dealt with in precisely the same way. I note in the admirable work on Contracts by Sir Frederick Pollock, 8th ed., p. 292, that he expresses the matter in almost the same terms as Mr. Bell, where he says, "An agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates any civil injury to third persons."

(1) (1867) L.R. 2 H.L. 149. (2) [1915] A.C. 106, at 112, 113.

Leake on Contracts, p. 593:

> Contracts made for the purpose of defrauding or injuring third parties are illegal and void; as a contract to publish a book with a title-page containing a false statement of the authorship, in fraud of the public; the sale of a fictitious patent right, the buyer to promote a company to work it, as being a fraud upon the intended shareholders; or the sale of mining and other properties at fictitious prices for the purpose of forming companies to buy them; or an agreement between two or more persons by means of fictitious purchases to induce intending buyers, contract to the fact, to believe that there is a market for shares, and that the shares are of greater value than is really the case.

The principle of these passages is not limited to contracts. "The Court will not interfere to protect the use of a deceptive trade mark" on the principle *ex turpi causa non oritur actio.* (Kerly on Trade Marks, p. 486).

The appeal should be dismissed with costs.

RINFRET J.—I would allow the appeal and restore the judgment at the trial with costs to the appellant throughout.

DAVIS J.—I would allow the appeal and restore the judgment at the trial with costs to the appellant throughout. As I differ somewhat from the grounds upon which the learned trial judge reached his conclusion, I shall state as briefly as I can my view of the case.

The respondent, Dr. Tiffin, a duly qualified physician, graduated from Queen's University in 1928 and after doing interne work until some time in the middle of 1929 (he was then only twenty-five years of age), went to Merlin, a small place in western Ontario (near the town of Wallaceburg) where he had been as an undergraduate in the summer of 1928. Shortly thereafter he was induced by the appellant, Dr. Richardson, who had been admitted to practice in 1913 and who had been practising the last ten years in Wallaceburg, a place of about 5,000 population, to take up practice there. A third doctor, a Dr. Cowan, was retiring from practice in Wallaceburg (he had been in practice there for seven or eight years and had a very extensive practice) and Dr. Richardson suggested to the young Dr. Tiffin that he take over Dr. Cowan's practice in Wallaceburg. Dr. Richardson had had an assistant with him up until July of 1929. Just what the motive was that led Dr. Richardson to induce Dr. Tiffin to go to

1940
RICHARDSON
v.
TIFFIN.
Davis J.

Wallaceburg and take over Dr. Cowan's practice is not shewn other than it was expected that it would result to their mutual advantage.

There may be something in the suggestion that Dr. Cowan would not have sold his practice to Dr. Richardson; there may have been some unfriendliness between the two doctors. At any rate the young doctor, the respondent, apparently had no money and Dr. Richardson gave him the money to buy "the practice," together with the office equipment and medical supplies, steel operating table, desk, safe, chairs for the wating room, stove—"all that you would use in the way of ordinary equipment and for an office, and a considerable quantity of medicines," from Dr. Cowan. That took a sum of $1,500. It is not suggested that this sum was as such a loan or as such to be repaid. (The agreement between Dr. Cowan and Dr. Tiffin was dated November 5th, 1929.)

Now the location of Dr. Cowan's office in Wallaceburg was obviously of real importance to any young doctor taking over the practice. The office was in residential property; but Dr. Cowan did not own the property—he had been a tenant. And so Dr. Richardson purchased the property from its then owner so as to have the same office available for Dr. Tiffin. Counsel informed us that the price was about $5,000. The evidence is not explicit on the point but apparently it was a dwelling house that had been made into two living apartments separate from the doctor's office.

The young doctor had pressed Dr. Richardson in their negotiations in October, 1929, to what would appear to be a very good financial arrangement for a very recent graduate in medicine of twenty-five years of age. Dr. Tiffin asked and obtained a definite guarantee of $300 a month over and above expenses, together with ten per cent. of earnings in excess of the salary and the expenses. Even gasolene and oil for use in his motor car were included in expenses. A memorandum of the arrangement between them was put in writing on October 31st, 1929. It was for three years from the time Dr. Tiffin could take over Dr. Cowan's practice, which was anticipated as it actually happened to be, May 1st, 1930. Dr. Tiffin at the trial was asked as to the character of his practice during the first couple of years. He said that in a financial way it

was very small. Asked as to how near he got to $300 a month and expenses during the first two years, his answer was, "Well, I was beginning to approach it at the end of the second year."

The arrangement was carried out for the three years and at its expiration another memorandum of agreement was made between Dr. Richardson and Dr. Tiffin. This was on April 17th, 1933. By this memorandum Dr. Tiffin agreed to continue the practice of medicine in Wallaceburg to May 1st, 1936 (another three-year period) "in his own name and with the same good will and co-operation between the parties as has existed in the past." The prior arrangement for a fixed salary and expenses and a ten per centum share of net earnings gave way to a fifty per cent. division of the net profits. At the date of the making of this second agreement the two doctors went over the books and settled the balance then due to Dr. Richardson, on the basis of the actual moneys that had come in, up to that time, at $816.53. The second agreement had provided that all moneys that might be paid in thereafter by the patients from time to time were first to be applied on accounts owing by them up to May 1st, 1933, and were to be divided on the basis of the share division which governed the first agreement.

Dr. Tiffin after the second agreement made monthly returns to Dr. Richardson regarding the earnings of the practice and from time to time made payments of money on account to Dr. Richardson. The payments did not equal the amounts to which Dr. Richardson was entitled, as shewn by the returns, and on January 1st, 1934, the doctors went over the accounts and made a settlement. There was a balance of over $3,000 in favour of Dr. Richardson, and Dr. Tiffin handed over to him some shares of stock in the Dominion Sugar Company of a then value of $1,185, and to cover the balance gave Dr. Richardson his demand note for $2,108.10. Subsequently, on May 1st, 1935, the doctors again settled their accounts and at that time there was a further balance owing to Dr. Richardson amounting to $1,368.16 (over and beyond the $2,108.10 note that had not been paid) and Dr. Tiffin gave Dr. Richardson at that time another promissory note for the balance as then settled upon, $1,368.16.

1940

RICHARDSON v. TIFFIN.

Davis J.

The second agreement would not have expired until April 30th, 1936, but on September 6th, 1935, the doctors made another agreement. The written memorandum was in exactly the same language as the second memorandum except that the period for the continuance of the arrangement was fixed until the 1st of May, 1939, which would be three years from the expiration of the then existing agreement. Dr. Tiffin again agreed to continue the practice of medicine "in his own name and with the same good will and co-operation between the parties as has existed in the past." Dr. Tiffin continued under these arrangements year after year from May 1st, 1930, until at least September, 1937. He kept making his monthly returns to Dr. Richardson regularly up to May 31st, 1937; the last payment was made June 19th, 1937. Dr. Tiffin, asked by the trial judge:

Q. Why did you stop making payments in 1937?

replied:

Dr. Richardson's daughter went away for the summer, and before she was available again to make any more, Dr. Richardson came back himself in September, at which time I had a conversation with him, but we were not able to reach a settlement, and I got legal advice at that time.

Then follow in the evidence these questions and answers under cross-examination:

Q. When Dr. Richardson did come back in September, 1937, he did go to see you and asked you to make a settlement with him, didn't he?

A. Yes.

Q. Did he not mention at that time the fact you owed him these two notes?

A. At that time I think so, yes; he mentioned the whole thing.

Q. And he asked you for payment of the notes, along with balances due for these payments?

A. Yes.

The evidence is not precise as to how long Dr. Tiffin continued to carry on his practice in the building that Dr. Richardson had acquired and in which Dr. Cowan had had his office, but it is plain that Dr. Tiffin moved in on May 1st, 1930, and continued there until about July, 1937. It must be said that Dr. Tiffin, with much loyalty to Dr. Richardson, lived up to the terms of the agreements for over seven years and there is no suggestion on his part that Dr. Richardson did not give him at the same time the good will and co-operation agreed upon. Dr. Richardson at the trial stated that he had assisted and

co-operated with Dr. Tiffin in the latter's working up of the practice; that he turned over patients from time to time to Dr. Tiffin and to him alone; that in cases such as confinements, after a certain period he would turn them over to Dr. Tiffin. There is not the slightest evidence from Dr. Tiffin that that was not so. It seems to me to have been a pity that Dr. Tiffin was legally advised, if he was as he so states, in September, 1937, to repudiate the agreements and the promissory notes and to deny any liability to Dr. Richardson. But whether he was given any such legal advice or not, he refused thereafter to recognize any claim of Dr. Richardson either on the promissory notes or under the agreements. Accordingly Dr. Richardson issued the writ in this action, on November 7th, 1938, claiming payment of the two notes with interest, and an accounting.

Dr. Tiffin pleaded that the second and third agreements (those of April 17th, 1933, and September 6th ,1935) were *nuda pacta* "and fail wholly for want of any consideration" and that he had paid Dr. Richardson more money than he was entitled to under the first agreement. Dr. Tiffin further pleaded, with respect to the second and third agreements, that Dr. Richardson's name had been stricken off the Registry under the *Medical Act* (the date was October, 1935) and for that reason, even if the second and third agreements had been valid and subsisting agreements, that they had duly come to an end for the reason that Dr. Richardson could not then legally continue the practice of medicine himself. As to the promissory notes, Dr. Tiffin in his pleading took the position that in so far as one or both of them may originally have covered moneys owing under the first of the three agreements, they had been fully paid, and in so far as they may have covered moneys under the second and third agreements, no consideration was given for the said notes by Dr. Richardson and for that reason no moneys were owing thereunder. Dr. Tiffin further pleaded the *Medical Act* and the *Statute of Frauds* and further, by amendment at the trial, that the second and third agreements were null and void as being in restraint of trade, and that by reason of the restrictions therein contained all three agreements were "unfair, oppressive and tyrannous" and ought not to be enforced. Dr. Tiffin counter-claimed for the return of $3,177.71 which he claimed to have been overpaid by him under the first

1940

RICHARDSON v. TIFFIN.

Davis J.

agreement, and for a declaration of the Court that the second and third agreements were never valid and subsisting agreements and never at any time became effective, and for the return of the two promissory notes for cancellation.

This may be a convenient place to refer to the restrictive covenants. In the first agreement the covenant was in these words:

> The party of the second part (Dr. Tiffin) also agrees not to practice in or within twenty miles of the town of Wallaceburg without the consent of the party of the first part (Dr. Richardson) under penalty of $10,000 as liquidated damages before May 1/1939.

In the second agreement the covenant was in these words:

> In consideration of years of association in the practice of medicine in a similar manner and in further consideration of this agreement and the moneys herein provided the party of the second part (Dr. Tiffin) agrees not to practise medicine directly or indirectly by himself or through any person on his behalf within 25 miles of the Town of Wallaceburg for a period of six years from the date set for the expiration of this agreement, namely, May 1st, 1936.

In the third agreement the covenant was in exactly the same language as in the second agreement other than that the period of six years was to run from the date set for the expiration of the third agreement, namely, May 1st, 1939. All the agreements were apparently drawn up by the doctors themselves without the intervention of any solicitor. This probably accounts for the rather loose language in the first agreement, "while practising for the party of the first part" and "agrees to practise for the party of the first part to the best of his ability"; and in the second and third agreements the words "agrees to continue the practice of medicine in the town of Wallaceburg for and on behalf of the party of the first part and in his own name." There is no doubt that the plain intention of the parties, and it was fully carried out, was that Dr. Tiffin would practise by himself and in his own name, and it was only in the sense of sharing the earnings of the practice with Dr. Richardson that these words were used. It may be observed that there was a restrictive covenant in the agreement of November 5th, 1929, between

Dr. Cowan and Dr. Tiffin when the former sold his practice to the latter. The covenant there was:

> The vendor covenants that he will not practise either as a physician or a surgeon or act directly or indirectly as partner or assistant to or with any other physician or surgeon either at the said town of Wallaceburg or elsewhere within twenty miles thereof, under penalty of $5,000.

McTague J.A., who tried the case, gave judgment in favour of Dr. Richardson but in view of the evidence as to periodic statements and payments on account he thought it better to give the parties a complete accounting from the beginning, May 1st, 1930. As to the *Medical Act,* he found that Dr. Richardson did not practise medicine after his name was stricken from the Registry in October, 1935, and that whatever rights he had against Dr. Tiffin arose out of contract, not prohibited in any way, that he could see, by the statute. The trial judge found that the agreements were not without consideration. As to the second and third agreements being invalid on account of the restrictive covenants, the trial judge passed no opinion upon the question of the validity of the covenants because in his view they were in any event severable and did not affect the validity of the other provisions of the agreements. Nothing was said in the reasons or in the formal judgment about the counter-claim.

Upon appeal by Dr. Tiffin to the Court of Appeal for Ontario, that Court allowed the appeal without costs and dismissed both the action and the counter-claim without costs. The majority of that Court took the position that the first agreement was invalid upon the ground that a trust on the part of Dr. Tiffin, which the learned trial judge had found, could not be established, and all the members of that Court decided that the second and third agreements were entirely without consideration. "The position of affairs is, therefore," said Middleton J.A., with whom Gillanders J.A. agreed, "that all moneys that have been paid under these agreements is payment in a mistaken view of the law, and that neither party can recover anything from the other." Henderson J.A., who dissented in part, took the view the first agreement was valid and he would have given Dr. Richardson a reference, at his own risk as to costs, to ascertain what moneys, if any, were still owing in respect of the three years covered by the first agreement.

1940

RICHARDSON v. TIFFIN.

Davis J.

From that judgment Dr. Richardson appealed to this Court.

Dr. Tiffin did not appeal against the dismissal of his counter-claim.

Counsel for the respondent, Dr. Tiffin, sought to support the judgment appealed from by a somewhat exhaustive review of many well known decisions on covenants in restraint of trade and on want of consideration. But in my view they had no real application to the facts of this case. Whether or not the restrictive covenants are enforceable is beside the question because if they are unenforceable they are clearly severable. In any case there is nothing in the evidence to support the contention that either the second or the third agreement was made by Dr. Tiffin because of any thought or fear on his part of the enforcement of the restrictive covenant. The only reference at all in the evidence on this point was when Dr. Tiffin was asked in cross-examination as to the third agreement whether he had not been interested in making some bargain with Dr. Richardson to prevent being restrained at the end of the second three-year period from practising in Wallaceburg. His answer was: "He (that is, Dr. Richardson) made that bargain." Dr. Tiffin added that he had been dissatisfied with the proposed extension to May, 1941, and he changed it to May, 1939, and then signed. While I cannot agree with the learned trial judge that a trust was created by the first agreement, I think the simple statement of the facts throughout shows that there was consideration for all three agreements. We are not concerned with the adequacy of the consideration. So far as the *Medical Act* is concerned, Dr. Richardson's name was not stricken from the Registry until October, 1935, and in any case it was the earnings from Dr. Tiffin's practice, carried on by himself in his own name alone, which were covered by the agreements.

The defence to the action had, in my view, no merit in fact and no foundation in law. I would therefore allow the appeal and restore the judgment at the trial with costs to the appellant both of the appeal to the Court of Appeal and of the appeal to this Court.

1940

RICHARDSON v. TIFFIN.

Kerwin J.

KERWIN J.—The facts in the present case are set forth in the reasons for judgment of the trial judge, Mr. Justice McTague, and the most important of them are referred to by Mr. Justice Henderson in the Court of Appeal. I do not delay, therefore, to repeat them in detail.

The first agreement between the parties, who were medical practitioners, is admitted by each to be valid and binding. By it the appellant (plaintiff) was to pay the respondent (defendant) three hundred dollars per month for thirty-six months, together with the necessary expenses connected with the practice of medicine, and also ten per cent. of the receipts from that practice, after payment of all expenses including the monthly salary: the respondent was to practise for that period for the appellant. The appellant paid to the respondent fifteen hundred dollars, which was used by the latter to purchase the practice and goodwill of a Dr. Cowan, together with certain of the latter's equipment. The appellant also purchased the premises in which Dr. Cowan had practised, and the respondent continued to practise there, using the said equipment down to the time he repudiated any obligations towards the appellant. The appellant claims there is a balance due him under that agreement, while the respondent claims to have overpaid.

The second agreement, dated April 17th, 1933, provides that the respondent would continue the practice for and on behalf of the appellant and that the latter would pay the respondent fifty per cent. of the net profits of the practice for three years. It is alleged that this agreement is not enforceable by virtue of that part of section 4 of the *Statute of Frauds* (R.S.O., 1937, c. 146) which provides that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof. The precise contention is that if any consideration existed, it did not appear in the written document. The promise of the appellant to pay the respondent is sufficient to dispose of this contention without reference to the other items of consideration suggested by the appellant.

By entering into the first agreement, the respondent undertook, in effect, that he would, at its expiration, turn over to the appellant the practice which he had been enabled to commence with the appellant's money, unless

1940

RICHARDSON v. TIFFIN.

Kerwin J.

some new agreement was entered into. The new agreement being valid to the extent indicated, the respondent is bound to account to the appellant in accordance with its terms.

In addition to the same defences being raised against the third agreement entered into by the parties on September 6th, 1935, the respondent sets up that, due to the fact that at the times that agreement became operative and the action was commenced, the appellant's registration under the Ontario *Medical Act* had been cancelled, the appellant cannot compel an accounting from the respondent because of sections 47 and 50 of that Act. I agree with the view of the trial judge that the appellant did not contravene these sections.

There was no material alteration in the second and third agreements by reason of the affixing of seals by the appellant on his own duplicates. In any event, no alteration was made in the duplicates in the possession of the respondent, and upon them the appellant is entitled to rely. It is unnecessary to express any opinion as to the validity of the restrictive covenants and that question should be left for determination when it arises. I would allow the appeal and restore the judgment at the trial, with costs throughout.

I cannot part with the case without referring again to the respondent's plea of section 4 of the *Statute of Frauds*. The mere fact that it was thought advisable to set up this defence indicates to me, at least, that it is high time that steps be taken to consider the advisability of repealing the section. The Law Revision Committee in England in its sixth interim report (May, 1937) has already made a recommendation to that effect.

Appeal allowed with costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondent: *Fraser & Burgess.*

R. C. CARTWRIGHT (PLAINTIFF).....APPELLANT;

AND

H. L. CARTWRIGHT, VERA A. CARTWRIGHT AND A. D. CARTWRIGHT (DEFENDANTS) .....RESPONDENTS.

1940

* March 18, 19.
* June 29.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Action for reconveyance of land—Claim by defendant in respect of improvements made thereon—Right to relief—Parties—Joinder of defendant's wife as party defendant.

Under an arrangement between the executors of a deceased's will and C., the executors delivered a deed of conveyance (absolute in form but not intended to operate as an absolute conveyance) of certain land of deceased's estate to C., who, pursuant to the arrangement, mortgaged the land and turned over the proceeds to the executors for use in the administration of the estate. C. was given an option to purchase, but if he did not exercise it within the time fixed he was to reconvey the land to the executors. C. did not exercise the option as such; but, *bona fide* believing, though erroneously (as found at trial and by this Court), that the result of certain later negotiations was (or, *per* Davis J., was so close to as to make practically certain) a sale to him of the land, made considerable improvements thereon. He resisted the present action for a reconveyance, and alternatively claimed in respect of the improvements.

Held: (1) C. must reconvey the land and account as to rents, profits, etc.

(2) C. should be paid from the estate such amount as the land had been enhanced in value by said improvements.

(3) The action as against C.'s wife, who, on the claim for reconveyance, had been made a defendant, should be dismissed.

Per Crocket and Kerwin JJ.: The facts that C. had had the legal title in himself (though subsequently transferred to the mortgagee), and *bona fide* believed that he had become the purchaser, under which belief he made the improvements, brings him within s. 36 of *The Conveyancing and Law of Property Act*, R.S.O., 1937, c. 152.

Per Davis J.: Good faith (found to exist in this case) is at the basis and of the essence of a claim for compensation in respect of improvements such as those made by C. Plaintiff's action was plainly a claim for an equitable right in the land (the legal estate had been conveyed to C. for the purpose of putting on the mortgage and had then passed to and remained in the mortgagee, and it was the beneficial ownership that plaintiff sought to be established), and the relief given to C. in respect of the improvements was one which a court of equity had the power to give under all the facts and circumstances of the case. C.'s wife could have no right to dower in the land, which was held by C. in trust for deceased's estate (the only basis upon which a reconveyance to the estate was sought), and therefore (on the plaintiff's own claim) was not a necessary party.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1940

CARTWRIGHT v. CARTWRIGHT

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which allowed the appeals of the defendants H. L. Cartwright and Vera A. Cartwright from the judgment of Makins J. at trial.

The plaintiff and the defendant A. D. Cartwright are the executors of the will of Frances Jane Cartwright, deceased. The plaintiff sued for an order that the defendants H. L. Cartwright and Vera A. Cartwright (wife of the defendant H. L. Cartwright) do reconvey certain land to said executors in accordance with a certain agreement of February 16, 1932 (between the executors and H. L. Cartwright), and for an accounting from the defendant H. L. Cartwright of all moneys, rents or profits received by him from or in connection with said land. The defendant H. L. Cartwright pleaded that an option of purchase contained in said agreement had been exercised by him and that a subsequent agreement, in June, 1935, had been made providing for payment of the balance due by him on the purchase price, and alternatively that in or about May, 1935, an agreement had been made for sale to him of the land; that, relying on the agreement made in 1935, he, with the knowledge of plaintiff and his co-executor, had spent large sums of money in improving the property. He asked that the action be dismissed, and alternatively claimed a lien upon the land for the improved value thereof. He counterclaimed for a declaration that the agreement of 1935 is in full force and effect and for specific performance thereof. The defendant Vera A. Cartwright pleaded that at the time when she was married to the defendant H. L. Cartwright the said land was subject to a mortgage and that she had never been in possession of the land, and asked that the action as against her be dismissed.

The material facts of the case (as found by this Court) are sufficiently stated in the reasons for judgment in this Court now reported.

The trial judge, Makins J., found that there was no binding agreement made in 1935 as alleged by the defendant H. L. Cartwright and that he did not exercise the option for purchase given him in said agreement of 1932, and gave judgment for plaintiff, ordering the defendants H. L. Cartwright and Vera A. Cartwright to reconvey the land to the executors, subject to a certain mortgage for

$2,000 (the facts in connection with which are stated in the reasons for judgment in this Court now reported), and directed a reference to take an account and report on all moneys, rents or profits received by the defendant H. L. Cartwright from said land, and ordered that he pay to the executors such amount as should be found due to the estate upon the taking of the account. But he found also that the defendant H. L. Cartwright had acted in good faith in making the improvements, believing that he had or would have an agreement for sale of the land to him; and the trial judge directed a reference to ascertain by what amount, if any, the land had been enhanced in value by the said improvements, and made an order for payment to said defendant of such amount.

The defendants H. L. Cartwright and Vera A. Cartwright appealed to the Court of Appeal for Ontario, and the plaintiff cross-appealed against the order in respect of the improvements. The Court of Appeal found and declared that on or about June 1, 1935, an agreement was made whereby the defendant H. L. Cartwright became the purchaser of the land from the executors; and allowed said defendants' appeals and dismissed the action; and dismissed plaintiff's cross-appeal.

The plaintiff appealed to the Supreme Court of Canada. The defendant H. L. Cartwright cross-appealed for a declaration that a certain alleged agreement made on or about July 18, 1935, was a valid and subsisting agreement.

R. L. Kellock K.C. for the appellant.

H. L. Cartwright for himself and Vera A. Cartwright, respondents.

THE CHIEF JUSTICE—I concur in the conclusions agreed upon by my brothers Davis and Kerwin as follows:—

The appeal is allowed and the judgment at the trial restored with a variation by striking out the words "and Vera A. Cartwright" in the paragraph numbered 1 thereof and by adding a new paragraph numbered 12 thereto:

> "This Court doth further order and adjudge that the action as against Vera A. Cartwright be dismissed with costs."

The cross-appeal is dismissed without costs. The appellant R. C. Cartwright will have as against the respondent H. L. Cartwright his costs

1940

CARTWRIGHT v. CARTWRIGHT.

Duff C.J.

of the appeal to this Court and of the appeal to the Court of Appeal but is to pay the respondent H. L. Cartwright the costs of the cross-appeal to the Court of Appeal.

There will be no costs to or against A. D. Cartwright in this Court or in the Court of Appeal. Vera A. Cartwright is entitled to her costs in the Court of Appeal and in this Court. The motion of the respondent H. L. Cartwright for leave to adduce further evidence is dismissed without costs.

RINFRET J.—The appeal should be allowed and the judgment at the trial restored with costs throughout.

The judgment of Crocket and Kerwin JJ. was delivered by

KERWIN J.—It was quite frankly stated in argument before us on behalf of H. L. Cartwright that he had considered he was dealing not with two trustees but with two executors, one of whom would be able to bind the estate, and that on that basis he thought he had made a definite agreement with A. D. Cartwright on the occasion of his telephone conversation with the latter on or about June 1st, 1935. That would dispose of any suggestion that he had determined to exercise the option but, even without that statement at bar, I find it impossible to agree with the Court of Appeal that H. L. Cartwright became the purchaser of the land at the option price.

The trial judge found that H. L. Cartwright had acted *bona fide*. With that I agree, and in my opinion H. L. Cartwright thought he had a concluded bargain with the estate through A. D. Cartwright, and upon that supposition proceeded to make the improvements. Having had the legal title in himself (although subsequently transferred to the first mortgagee), and *bona fide* believing that he had become the purchaser, brings him, in my opinion, within section 36 of *The Conveyancing and Law of Property Act*, R.S.O., 1937, chapter 152. The improvements were made under the belief that the land was his,—subject only, of course, to the payment of the purchase price. A person who mistakenly believes that he has concluded an agreement to purchase the land and who acts *bona fide* is "under the belief that the land is his own." In *Montreuil* v. *Ontario Asphalt Co.* (1), the Company was

(1) (1922) 63 Can. S.C.R. 401.

in possession under a lease and had not exercised an option to purchase, and the case is quite distinguishable from the present.

Vera A. Cartwright was not a necessary party and the action against her should be dismissed with costs. With this variation, the judgment at the trial should be restored.

The appellant R. C. Cartwright should have as against the respondent H. L. Cartwright his costs of the appeals to this Court and the Court of Appeal but should pay H. L. Cartwright the costs of the cross-appeal to the Court of Appeal. The cross-appeal to this Court should be dismissed without costs. There should be no costs to or against A. D. Cartwright in this Court or in the Court of Appeal. Vera A. Cartwright is entitled to her costs in the Court of Appeal and in this Court. The motion for leave to adduce further evidence should be dismissed without costs.

DAVIS J.—It is unfortunate that this family litigation should have gone without an amicable settlement. The judgment of the Court of Appeal might well have been accepted by the parties as a fair and reasonable disposition of the matter. But the parties chose to continue their litigation. The appellant (plaintiff) appealed from the judgment to this Court and the respondent H. L. Cartwright (one of the defendants and a plaintiff by counterclaim) gave notice of cross-appeal. The parties insist upon their strict rights and this Court must therefore now endeavour to determine what those rights are.

The litigation arises out of a dispute as to the beneficial ownership of a residential property near the city of Kingston in the province of Ontario which comprises some sixty acres of land and is known as "Cartwright's Point" or "The Maples." The property was owned at the time of her death in 1920 by the widow of the late Sir Richard Cartwright. By her will she named two of her sons, R. C. Cartwright, the appellant (plaintiff), and A. D. Cartwright, one of the respondents (defendants), to be the executors and trustees, and to them probate was granted. Lady Cartwright by her will devised all her real and personal estate unto her executors and trustees upon trust to sell (subject to certain provisions with which we are not now concerned) with power to postpone sale for as long as they might think fit.

1940

CARTWRIGHT v. CARTWRIGHT.

Davis J.

Under date of November 30, 1931, the trustees delivered a deed of conveyance of the said property, absolute in form, to the respondent H. L. Cartwright for a consideration expressed on the face of the deed to be $10,000. The said H. L. Cartwright is a grandson of the testatrix and is a solicitor practising in Kingston. His uncle R. C. Cartwright, the appellant, lived in Toronto and his uncle A. D. Cartwright, respondent, lived in Ottawa. It is admitted by all parties that the document was not intended to operate as an absolute conveyance. The executors required money at that time for the continued administration of the estate (twelve years having passed since the death of the testatrix) and, there being no power in the will to borrow, the executors and the grandson H. L. Cartwright adopted the scheme of putting the property into the name of H. L. Cartwright personally so that he might raise money upon it for the purposes of the estate. This improper conduct on the part of the executors was the first step towards the unfortunate position of affairs which now exists. By a collateral agreement in writing dated February 16, 1932, between the executors and H. L. Cartwright it was agreed that H. L. Cartwright would put a mortgage on the property for $2,000 and turn the proceeds over to the executors for use in the administration of the estate. This he did. Subsequent to and in pursuance of this agreement, H. L. Cartwright managed the property and was in receipt of the rents and profits. The agreement further provided that H. L. Cartwright should have an option to purchase the property from the estate at any time during the term of the mortgage at the price of $10,000 "by paying" the difference between the then amount of the outstanding mortgage and the purchase price. But if the option was not exercised within the term of the said mortgage, H. L. Cartwright agreed

> to thereupon reconvey the said property to the said [trustees] on their request in writing so to do and the said property shall thereupon be revested in the said [trustees].

The term of the $2,000 mortgage having expired on February 1, 1937, and the respondent H. L. Cartwright having paid nothing to the estate and having refused to comply with a written demand from the trustees to reconvey the property in accordance with the agreement of February 16, 1932, this action was commenced by one of

the executors and trustees, R. C. Cartwright, against the said H. L. Cartwright and his wife Vera Cartwright to compel the reconveyance of the lands and premises in question to the estate, free and clear from any encumbrance other than the $2,000 first mortgage above referred to. The other executor and trustee, A. D. Cartwright, though he had joined in a written demand for a reconveyance, did not join in the action and was consequently made a party defendant. Vera Cartwright (who is also a solicitor practising with her husband in Kingston) took the position that the action did not in any way lie against her because at the time she married H. L. Cartwright, February 2, 1935, the lands sought to be recovered were then subject to the $2,000 mortgage and remain so, and that she herself had never been in possession of the lands or of any part of them. Her position was that she had no interest in the property other than an inchoate right of dower, the property at all material times being subject to a mortgage. The other executor and trustee, A. D. Cartwright, as a defendant admitted in his pleading that there was an agreement of purchase and sale and that he on his part had always been ready and willing to carry out the same; although he submitted his rights to the Court he asked that the action be dismissed and that in any event no order as to costs should be made against him.

The action went to trial before Makins J. On the evidence it was plain that H. L. Cartwright never paid or tendered any money at any time; in fact he did not contend that he ever exercised the option as such. He testified that he never agreed to purchase the property on the terms of the option, i.e., $8,000 in cash. He did contend, however ,that some time in 1935 an agreement was made with the estate whereby he was to become the owner of the property in question. The date when the alleged agreement was made and its terms were left in the vaguest sort of expression. It is difficult to put one's finger on any particular date or on any particular term of the agreement set up by H. L. Cartwright.

Makins J. reached the conclusion that no enforceable agreement was ever made by the trustees, on the one hand, and H. L. Cartwright, on the other, for the purchase and sale of the property and the learned judge

1940

CARTWRIGHT v. CARTWRIGHT.

Davis J.

ordered H. L. Cartwright and his wife Vera Cartwright to reconvey the property to the trustees and directed a reference to take an account of the dealings of H. L. Cartwright with the property.

Either believing that he had completed arrangements for the purchase of the property or, as more likely appears from the evidence, believing he was so close to the completion of the negotiations then pending as to justify him in proceeding with his plans to improve the property, H. L. Cartwright in June, 1935, had undertaken substantial renovations and improvements to the property which resulted in converting what was a summer house into an all-year-round residence at a cost which appears to have been about $6,000. At that time, on June 12, 1935, he put a second mortgage on the property for $6,000 to raise the money necessary to make the structural changes and improvements. By July 10, 1935, the building operations were substantially completed. Makins J. found that H. L. Cartwright had acted in good faith in expending the money on the property and allowed him on his alternative claim, by way of counterclaim, such sum, if any, as might be found on a reference to the Local Master to be the amount of the enhanced value of the property.

The parties then appealed and cross-appealed from that judgment to the Court of Appeal for Ontario. H. L. Cartwright appealed upon the ground that the order against him for a reconveyance of the property should not have been made and, alternatively, that the learned trial judge should have given him a lien on the property for the amount of its enhanced value. Vera Cartwright gave notice that upon the appeal she would contend, upon the ground that she had no interest in the property, that the judgment should be varied by dismissing the action as against her. The plaintiff, while supporting the trial judgment in so far as it ordered the reconveyance of the property, cross-appealed upon the ground that compensation should not have been granted to H. L. Cartwright in respect of the improvements made by him.

The Court of Appeal said that the proper conclusion of the whole matter was that "on or about June 1st, 1935," an agreement had been made between H. L. Cartwright and the trustees whereby H. L. Cartwright became the purchaser of the property at the price of $10,000, he

to assume the existing mortgage for $2,000 and to be credited with the amount owing thereunder on account of the purchase price. The Court therefore allowed the appeal and dismissed the action, but the Court made no order as to the costs of either the action or of the counter-claim or of the appeal or of the cross-appeal. I venture to think that it was thought that the judgment might be accepted by all parties as a convenient and satisfactory disposition of the matter. But from that judgment the parties appealed and cross-appealed to this Court.

Dealing with the issues strictly, as we are not only invited by the parties but bound to do, I cannot find any evidence of an enforceable agreement for the purchase and sale of the property. In fact I think it very plain on the evidence that there never was any such agreement, and that the trial judge was fully justified in ordering a reconveyance to the estate. It is impossible for me to accept the conclusion that an agreement was made between H. L. Cartwright and the trustees "on or about the first day of June, 1935," when as a matter of fact all the parties had met at Kingston in the office of Mr. Farrell, a solicitor, as late as the 18th day of July, 1935, in an effort to see if some sort of an agreement could not be arrived at and subsequently, on the 22nd of July, Mr. Farrell had drafted an agreement for submission to the parties, an agreement which no one, however, except A. D. Cartwright ever signed. Moreover, the proposed agreement so drafted provided that the estate should sell the property to H. L. Cartwright in consideration of a five-year third mortgage for $5,000—a transaction which the trustees of the property could have no power under the will to enter into. These facts are entirely inconsistent with an enforceable agreement having been made "on or about June 1st, 1935" or at any time. I cannot see any escape from the position that H. L. Cartwright is bound to reconvey.

The appellant contends further that, notwithstanding that H. L. Cartwright spent probably $6,000 on the property during June and July, 1935, he is not entitled to any compensation in respect of this expenditure. The trial judge, however, found as a fact that H. L. Cartwright had acted in good faith. Good faith is at the basis and of the essence of a claim for compensation in respect of

1940
CARTWRIGHT v. CARTWRIGHT.
Davis J.

such permanent and substantial improvements to property. With this finding of good faith we cannot interfere. The trial judge gave merely the amount, if any, of the enhanced value of the property; he did not declare a lien upon the property for the amount and this was one of the grounds of the respondent H. L. Cartwright's appeal to the Court of Appeal. The learned trial judge, no doubt, recognized the difficulty that might lie in his way if he declared a lien for the improvements under sec. 36 of *The Conveyancing and Law of Property Act,* R.S.O., 1937, ch. 152:

> 36. Where a person makes lasting improvements on land, under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court may direct.

Whatever may be the full scope of the words "under the belief that the land is his own" (the provision is a remedial one and should receive "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act." Sec. 10 of *The Interpretation Act*), the learned trial judge did not expressly put the compensation upon that ground or under that statute. It seems to me, although he does not say so, that he gave the relief which he thought ought to be given, under all the facts and circumstances, by a court of equity in a suit, such as this action, where a plaintiff claims to be entitled to any equitable estate or right. Sec. 15 (*c*) of *The Judicature Act,* R.S.O., 1937, ch. 100. This action was plainly a claim for an equitable right in the land and premises. The trustees had conveyed the legal estate to H. L. Cartwright in November, 1931, for the purpose of putting on the $2,000 mortgage. The legal estate passed from H. L. Cartwright to and remains in the first mortgagee. It was the beneficial ownership in the estate that the appellant (plaintiff) sought to be established in the action.

The trustees conveyed the property to the grandson H. L. Cartwright. They put him in possession. He was to have the collection of the rents and profits. He was

not asked to pay any rent and he was given the option to purchase. The trustees left the property entirely in his hands for several years. R. C. Cartwright, one of the trustees, lived in Toronto at this time and his brother, the other trustee, A. D. Cartwright, lived in Ottawa at this time. The former left everything in the hands of the latter. Neither of them appears to have taken any interest in the property. A. D. Cartwright undoubtedly was ready and willing at all times to see the property sold by the estate to H. L. Cartwright on almost any terms; he it was who signed the draft agreement of July 22, 1935, to sell the property to H. L. Cartwright for the consideration of a five-year third mortgage of $5,000. A. D. Cartwright undoubtedly created or encouraged the belief in H. L. Cartwright that the latter would be able to enjoy the benefit of the substantial expenditures on the property that he made. H. L. Cartwright fell into the error of regarding his two uncles in relation to the property, not as trustees but as merely executors of the will, and as a result of that error thought as a matter of law that the word or act of A. D. Cartwright was binding upon R. C. Cartwright. A court of equity was not, under all the facts and circumstances of the case, without power to deal with the whole matter just as the trial judge did.

While I think a cautious solicitor would, in an action of this sort, add as a party defendant the wife of the person in possession and asserting ownership of the property, it would be done at the risk of costs. The point is not that the husband did not have the legal estate in the property at the time of his marriage or at any subsequent time. H. L. Cartwright had been holding the property in trust for the estate; that was the only basis upon which a reconveyance to the estate was sought. His wife could have no right to dower in property held by her husband in trust for another, and was not therefore, on the plaintiff's own claim, a necessary party and the action should have been dismissed as against her.

I would therefore allow the appeal, set aside the judgment appealed from and restore the judgment at the trial except that the said judgment should be varied by striking out the words "and Vera A. Cartwright" in the

1940

CARTWRIGHT v. CARTWRIGHT

Davis J.

paragraph numbered 1 thereof and by adding new paragraph 12 thereto:—

And this Court doth further order and adjudge that the action as against Vera A. Cartwright be dismissed with costs.

The cross-appeal should be dismissed without costs.

The appellant R. C. Cartwright should have, as against the respondent H. L. Cartwright, his costs of the appeal to this Court and of the appeal to the Court of Appeal, but should pay to the respondent H. L. Cartwright the costs of the cross-appeal to the Court of Appeal. There should be no costs to or against A. D. Cartwright in this Court or in the Court of Appeal. Vera A. Cartwright is entitled to her costs in the Court of Appeal and in this Court. The motion of the respondent H. L. Cartwright for leave to adduce further evidence should be dismissed without costs.

Appeal allowed with costs; judgment at trial restored with a variation.

Solicitors for the appellant: *Mason, Foulds, Davidson & Kellock.*

Solicitors for the respondents H. L. Cartwright and Vera A. Cartwright: *Cartwright & Cartwright.*

Solicitors for the respondent A. D. Cartwright: *Smith, Rae, Greer & Cartwright.*

1940

* April 29.
* June 29.

GENERAL SECURITIES LIMITED (DEFENDANT) ..... APPELLANT;

AND

DON INGRAM LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Loan of money—Damages for breach—Contract between automobile dealer and finance company—Breach by latter—Right to substantial or nominal damages—Measure of damages.

The respondent company, engaged in the selling of automobiles, brought an action for damages for breach of a contract whereby the appellant company agreed to finance the respondent's purchases of cars. The

* PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Taschereau JJ.

1940

GENERAL SECURITIES LTD. v. DON INGRAM LIMITED.

trial judge held that the contract alleged had been proven, that the appellant had broken it and the respondent was entitled to substantial damages, and that, having found that the appellant company had full knowledge of the circumstances under which the contract was made and that the loss by the respondent of its franchise granted it by the car manufacturers and the consequent destruction of its business and its loss on the sale of the assets were natural and probable results which must have been within the contemplation of the appellant, the trial judge held that the damages should be assessed accordingly. This judgment was affirmed by the appellate court.

Held that the appeal should be dismissed and that the respondent was entitled to the damages awarded by the trial judge.

Hadley v. *Baxendale* (9 Ex. 341); *Mennie* v. *Leitch* (8 O.R. 397); *The South African Territories Limited* v. *Wallington* ([1898] A.C. 309); *Prehn* v. *Royal Bank of Liverpool* (L.R. 5 Ex. 92); *Manchester and Oldham Bank Ltd.* v. *Cook* (49 L.T.R. 674); *Wilson* v. *United Counties Bank* ([1920] A.C. 102) discussed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Fisher J. (2) and maintaining the respondent's action for damages for breach of contract.

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

Alfred Bull K.C. for the appellant.

M. A. Manson for the respondent.

THE CHIEF JUSTICE—The facts in this case are stated in the careful judgment of the learned trial judge, Mr. Justice Fisher (2).

In October, 1937, and for something like four years before that, the respondents were, under an agreement of November, 1933, the retail distributors, and for some time the wholesale distributors, for the Studebaker Corporation of Canada, who manufacture and sell automobiles. In February, 1934, the appellants and the respondents entered into an agreement by which the appellants undertook to furnish such credit and advance such moneys as might be required from time to time to finance exclusively the

(1) [1940] 2 W.W.R. 350.
(2) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.

1940

GENERAL SECURITIES LTD. v. DON INGRAM LIMITED.

Duff C.J.

respondent's purchases of automobiles and to supply working capital for the respondents' business. Pursuant to this agreement the appellants, during the years 1934, 1935, 1936 and 1937, furnished the respondents with credit and made advances. In the autumn of 1937 the respondents were contemplating the purchase of twenty-six automobiles from the Studebaker Corporation and the appellants agreed unconditionally with the respondents, as the learned trial judge finds, to finance the purchase of these automobiles, and in October of that year the respondents, relying upon this agreement with the appellants, contracted with the Studebaker Corporation to purchase these automobiles and made an agreement with the Vancouver-St. Lawrence Line for the transport of the same to Vancouver by water. In December the automobiles reached Vancouver and the bills of lading, with draft attached, were presented to the respondents for acceptance and payment. The appellants, on being requested to furnish funds for this purpose, pursuant to the agreements of 1934 and October, 1937, refused to do so. The respondents having endeavoured unsuccessfully to arrange elsewhere for funds to meet the draft, the Studebaker Corporation terminated its agreement with the respondents on the 10th of January, 1938, and sold most of the automobiles to persons appointed by the corporation as agents for British Columbia in place of the respondents. The learned trial judge finds that as a result the respondents were obliged to discontinue their business and that its assets had to be sold at a loss. The learned trial judge further finds as follows:

> In the present case I find that at the time the contract was made as aforesaid in or about the month of October, 1937, the defendant had full knowledge of the circumstances under which the contract was made. The evidence conclusively proves that. The defendant kept in close touch with the plaintiff's business and had actual knowledge of the probable consequences of the breach. In my opinion loss of profits on the automobiles and loss of the plaintiff's franchise with the consequent loss of its business and loss on realization of its assets were under the circumstances natural and probable results which must have been and were within the contemplation of the defendant. The defendant is therefore liable to pay damages to the plaintiff accordingly.

The learned judge proceeds:

> I now come therefore to assess the damages and before doing so I pause here to say that I have noted paragraph 25 of the said franchise agreements providing for termination without cause on ten days' notice and I have tried to keep in mind the many contingencies that might

have affected the matter. I am satisfied however that substantial damages have been caused to the plaintiff by the defendant's breach of contract as aforesaid and that they can and should be assessed under the headings as hereinafter set out after making allowances, as I have tried to do for contingencies to an extent reasonable in all the circumstances. After careful consideration of the evidence and the argument of counsel I think a fair assessment of the damages is as follows:

I estimate the damages arising from the loss of profits on twenty-six automobiles at $2,000, the damages arising from the loss of the franchise and the consequent loss of the business at $5,000 and the damages arising from the loss on realization of the assets at $1,000. Judgment accordingly in favour of the plaintiff against the defendant for the total damages of $8,000 and costs.

The Court of Appeal (1) concurs in the findings and conclusions of the learned trial judge.

I have no doubt that the law is correctly applied to the facts of this case in this judgment and in that of the Court of Appeal. I think the rule with regard to damages for breach of a contract to advance money is accurately stated in the treatise on damages in Halsbury, 2nd edition, Vol. 10, p. 121, article 153:—

But upon breach of a contract to lend money, the additional expense incurred in obtaining the loan elsewhere is a natural result of the breach and may be recovered, or such other substantial damage as was within the contemplation of the parties.

This case presents none of the difficulties that sometimes arise, touching the application of the second branch of the rule in *Hadley* v. *Baxendale* (2).

The appellants were fully aware of the material circumstances. In October when they agreed to finance the proposed purchase, pursuant to the existing agreement of 1934, they must have realized with the knowledge they had, if they gave a thought to the matter, that, if they refused to make the necessary advance on the arrival of the goods in Vancouver and the presentation of the draft, the respondents would be unable to take it up and that the Studebaker Corporation would (probably, if not certainly) sever their relations with the respondents, and that in consequence of such a severance it was highly probable that the respondents would be forced out of business and would suffer the pecuniary loss naturally resulting therefrom. The appeal is hardly an arguable one and should be dismissed with costs.

(1) [1940] 2 W.W.R. 350. (2) (1853) 9 Ex. 341; 23 L.J. Ex. 179

1940

GENERAL SECURITIES LTD. v. DON INGRAM LIMITED.

Davis J.

DAVIS J.—The respondent company carried on business in the city of Vancouver as wholesale and retail automobile dealers and distributors; in particular as a distributor for the Studebaker Corporation of Canada, selling and distributing in British Columbia automobiles manufactured by that company under what is commercially called "a franchise."

The appellant company carries on a financial business in the city of Vancouver, and in particular the business of financing motor car dealers.

The appellant provided the respondent with all moneys required for the financing of the respondent's business from February, 1934, until the events occurred which are complained of in this action. It is admitted by the respondent that the appellant's approval was necessary before it purchased cars which it expected the appellant to finance. The contract set up in the statement of claim was made verbally in October, 1937, between Don Ingram, the president of the respondent company, and J. W. MacDougall, the manager of the appellant company. MacDougall died a few days after the writ was issued and consequently his evidence was not available. The appellant denied that there was any contract to finance the 27 automobiles referred to in the statement of claim, but owing to the death of MacDougall was unable to offer any evidence to contradict that of Ingram to the effect that such a contract had been made. There was evidence, therefore, upon which the learned trial judge could find as he did that the appellant agreed with the respondent unconditionally to finance the purchase of 27 automobiles. The learned trial judge (1) awarded damages for the breach of this contract at the sum of $8,000. The appellant appealed to the Court of Appeal for British Columbia but its appeal was dismissed (2). The appellant then appealed to this Court but only in respect of the amount of damages.

The evidence is that Ingram between the 13th and 18th days of October, 1937, interviewed MacDougall and asked him if the appellant would finance the purchase of the cars. The reason the respondent wished to purchase so many cars at once was the imminence of an increase in

(1) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.
(2) [1940] 2 W.W.R. 350.

railway freight rates which was expected on the 1st November, 1937, and the respondent then had an opportunity of bringing the cars by water through the Panama Canal at a rate much lower than the rail rate. Ingram says that MacDougall told him to go ahead and bring the cars in.

The cars were shipped in two lots by vessels leaving Montreal on October 30, and November 15, respectively. Ingram says that about the 20th November MacDougall called him on the 'phone and asked him to cancel the shipment of the cars; and that he, Ingram, explained that they could not be shipped back to the factory as the boats were on their way. About a week later MacDougall asked him to call at his office, which he did. He found MacDougall worried; MacDougall thought there was going to be a depression as things were very bad in the East; money was tightening up and the finance companies were very much loaded up with wholesale paper; the dealers had overstocked, and he did not know whether he could finance the cars. He painted a very blue picture, from the information he had acquired in Eastern Canada and the United States. Ingram says that at the conclusion of this interview he consulted his banker, and on his advice he went back to MacDougall and told him that "we would lose our franchise and be put out of business."

Ingram says that MacDougall calmed him down somewhat and said that he thought that everything would be all right, but he wanted as much time as he could have to raise the funds, and to leave it with him.

Ingram saw MacDougall again when the first shipment arrived on or about the 7th or 8th December. MacDougall wanted to know how long he could leave the cars on the dock, and Ingram told him up until the 17th December, after which demurrage would be charged. On the 15th December Ingram took the invoice of the cars and the freight bills to MacDougall's office. After a few days MacDougall definitely refused to finance the shipments.

Ingram then endeavoured to obtain the money elsewhere, particularly from other companies in the same line of business. He finally obtained a promise from one of the finance companies (hereinafter for convenience called the new finance company) to take over all the respondent's financing provided an additional $5,000 capital was put into the respondent's business. Ingram endeavoured to

1940

GENERAL SECURITIES LTD. v. DON INGRAM LIMITED.

Davis J.

raise $5,000, and succeeded in making tentative arrangements to this end, but the basis of the loan was to be a chattel mortgage on the respondent's equipment, and when that was made known to the new finance company a discussion arose as to the terms of repayment of the proposed $5,000 loan. Apparently the new finance company was not satisfied, so Ingram went back to the proposed lender and arranged for twelve months' time within which to pay back the money. The new finance company had to put the proposition before its head office; head office did not think it was a suitable arrangement and declined to take over the financing.

MacDougall's attitude appears to have been that Ingram should not worry about the matter as the Studebaker Company could not, in his opinion, find another local distributor, and would be forced to take care of the matter itself.

The respondent then received a letter dated January 10, 1938, from the Studebaker Corporation cancelling the franchise. After the cancellation of the respondent's franchise a new distributor was appointed, and the respondent was able to sell to him all the new unused cars at cost price, and the parts in the stock room for the exact money paid to the factory, leaving only the equipment and furnishings, which also were sold to the new distributor for $3,100.

The learned trial judge allowed damages on the following basis:

(*a*) Loss of profits on 26 automobiles.....	$2,000
(*b*) Damages arising from the loss of the franchise and consequent loss of business....	5,000
(*b*) Damages arising from loss on realization of the assets	1,000

This amount of damages was confirmed by the Court of Appeal. Before this Court counsel for the appellant admitted liability for breach of a contract to loan money but contended that the respondent was not entitled to more than nominal damages or, alternatively, that the damages should have been limited to loss of profits on a re-sale of the motor cars.

On a contract to make a loan of money the measure of damages is the loss sustained by the breach. The damages

may be merely nominal or at least not greater than the additional sum obliged to be paid for raising the money from some one else. The general rule was well stated by Armour J. in *Mennie* v. *Leitch* (1). But here the respondent couldn't get the money elsewhere and the general rule does not cover the case. The respondent was entitled under the special circumstances to general and substantial damages for the breach of the contract; and the ordinary consequence rule is the only satisfactory test of remoteness. The courts below have agreed upon the amount of the damages and we should not interfere. The appeal should be dismissed with costs.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—This is an appeal by the defendant, General Securities Limited, from a judgment of the Court of Appeal for British Columbia (2) which affirmed the judgment of Fisher J. (3) in favour of the plaintiff, Don Ingram Limited. I take from the reasons for judgment of the trial judge the following statement:—

> The plaintiff's claim against the defendant is for damages for breach of a contract alleged to have been made in or about the month of October, 1937, between the plaintiff and the defendant for financing the purchase of twenty-six automobiles and the carrying charges thereon from Windsor, Ont., to Vancouver, B.C.
>
> It is or must be common ground that in or about the month of October, 1937, and for some four years prior thereto, the plaintiff was the retail distributor, and for part of that time had been also the wholesale distributor, for the Studebaker Corporation of Canada Limited, selling and distributing in the Province of British Columbia or in certain designated portions thereof automobiles manufactured by the said Company, under what may be called franchise agreements with such Company effective upon the 29th day of November, 1933, and amended from time to time thereafter. By an agreement made in or about the month of February, 1934, the defendant agreed with the plaintiff to furnish the necessary credit and to advance such moneys as should be required from time to time to finance exclusively the plaintiff's purchases of automobiles and to supply working capital for the plaintiff's business, and pursuant to such agreement the defendant did during the years 1934, 1935, 1936 and during part of the year 1937 furnish the plaintiff with credit and advanced such moneys as were necessary for the purposes aforesaid.

The trial judge found that the contract alleged by the plaintiff had been entered into and the appellant does

(1) (1885) 8 O.R. 397. (2) [1940] 2 W.W.R. 350.
(3) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.

1940

GENERAL SECURITIES LTD. v. DON INGRAM LIMITED.

Kerwin J.

not now dispute that finding. The question is as to what, if any, damages are recoverable for the undoubted breach of the contract, and as to this Mr. Justice Fisher states:—

> I come now therefore to assess the damages and before doing so I pause here to say that I have noted paragraph 25 of the said franchise agreements providing for termination without cause on ten days' notice and I have tried to keep in mind the many contingencies that might have affected the matter. I am satisfied however that substantial damages have been caused to the plaintiff by the defendant's breach of contract as aforesaid and that they can and should be assessed under the headings as hereinafter set out after making allowances, as I have tried to do, for contingencies to an extent reasonable in all the circumstances. After careful consideration of the evidence and the arguments of counsel I think a fair assessment of the damages is as follows:
>
> I estimate the damages arising from the loss of profits on the twenty-six automobiles at $2,000, the damages arising from the loss of the franchise and the consequent loss of the business at $5,000 and the damages arising from the loss of realization of the assets at $1,000.

Liability is disputed by the appellant for damages under any of the heads mentioned.

It was first argued that this was a mere contract to loan money and that, therefore, the damages should be nominal in accordance with decisions such as *The South African Territories Limited* v. *Wallington* (1). However, this is not that kind of a case. Not only did the appellant know intimately the respondent's financial position but, as security for any advances that it might take, held a floating charge upon the assets of the respondent. The contract was not to advance money subject to its repayment being demanded at any time but was a special one to finance the purchase of the automobiles and to leave the money at interest until the automobiles should be sold in the usual course of business. Under these circumstances, if the damages were within the contemplation of the parties as the probable result of the breach of the contract, the principles enunciated in *Hadley* v. *Baxendale* (2) would apply. *Prehn* v. *Royal Bank of Liverpool* (3); *Manchester and Oldham Bank Limited* v. *Cook* (4).

It was next argued that a deficiency in the amount of capital employed in respondent's business was the cause of the respondent being unable to secure the necessary funds elsewhere and that the damages flowed from that lack. Assuming it to be proved that in a business sense the

(1) [1898] A.C. 309.
(2) (1854) 9 Ex. 341.
(3) (1870) L.R. 5 Ex. 92.
(4) (1883) 49 L.T.R. 674.

respondent required further capital in its undertaking, one of the main objects of the bargain between the parties was the supplying of that capital and, in any event, the short time at the disposal of the respondent to make other arrangements shows that that circumstance was the compelling factor in respondent's inability to secure funds from other sources.

The third and fourth submissions were that even if the damages did result from the breach, they were not the natural and probable consequences thereof, nor were they contemplated by the parties at the time of the making of the contract. On the evidence, both of these contentions fail. As early as 1935 the appellant knew that the respondent would lose its franchise from the Studebaker Company if cash were not paid for ordered automobiles upon their arrival in Vancouver. It follows as a matter of course that if respondent did not have the automobiles, it would lose its profit on the retail sale and, lacking a franchise, a probable result would be that respondent would have to dispose of other Studebaker cars on hand, its stock of parts for Studebaker cars, and its used cars.

Finally, to quote the words of Lord Atkinson in *Wilson* v. *United Counties Bank* (1), the damages in this case must have been

> in the contemplation of the parties when they entered into the contract as the result which would probably flow from the breach of it and that the damages therefore are not too remote.

The damages have been assessed on a proper basis and no question being raised as to the various sums, the appeal should be dismissed with costs.

HUDSON J.—The facts are fully set out in the judgment of the learned trial judge (2).

He found that when the original contract was made between the parties the defendant had full knowledge of the plaintiff's circumstances, and thereafter always kept in close touch with the plaintiff's business. He also found that the defendant knew that the probable consequences of a breach would be a loss of profits on the automobiles, a loss of the plaintiff's franchise and consequent loss of its

(1) [1920] A.C. 102, at 132.
(2) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.

1940

GENERAL SECURITIES LTD. v. DON INGRAM LIMITED.

Hudson J.

business, and that the loss on realization of its assets were under the circumstances natural and probable results. The learned judges in appeal agreed with him (1).

The circumstances here are far different from the breach of a simple promise to lend the money and justify a substantial verdict. While the amount awarded appears somewhat large, it has been concurred in by all the judges of the Court of Appeal and I do not think it should be disturbed here. The relevant authorities are fully discussed in the judgments in the Court below.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

Solicitor for the respondent: *M. A. Manson.*

1940

* May 27.
* Oct. 1.

ERNEST SOULLIERE, EXECUTOR OF THE ESTATE OF EDMOND PRATT, (PLAINTIFF) ..... APPELLANT;

AND

AVONDALE MANOR LAND COMPANY LIMITED (DEFENDANT).... RESPONDENT.

HENRY PRATT AND HEDGWIDGE PRATT (PLAINTIFFS) ..... APPELLANTS;

AND

AVONDALE MANOR LAND COMPANY LIMITED (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of land—Action by vendor to recover from purchaser balance of purchase price—Inability of vendor to convey title because title lost through purchaser's default in covenant to pay taxes.

Where the vendor under an agreement for sale of land is unable to convey title to the land he cannot, by an action for enforcement of

* PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Taschereau JJ.

(1) [1940] 2 W.W.R. 350.

covenant, recover from the purchaser the balance of the purchase price, even though the vendor's inability to convey title is because his title was lost in consequence of default (known to the vendor) by the purchaser in his covenant to pay the taxes on the land (and, *per* the Chief Justice and Kerwin J., even though the purchaser had taken possession and accepted the vendor's title, or even if there were a primary obligation on the purchaser to the municipality to pay the taxes). But, *semble,* the vendor may have a right of action against the purchaser for damages for breach of the covenant to pay the taxes.

Royal Trust Co. v. *Kennedy,* [1930] S.C.R. 602, applied.

APPEALS by the plaintiffs from the judgments of the Court of Appeal for Ontario dismissing their appeals from the judgments of Makins J. (1) dismissing the actions. The actions were similar and were tried together.

Each action was brought to recover the balance of purchase price, and interest, alleged to be due and owing by the defendant under a covenant to pay contained in an agreement for sale of lands to defendant. The defendant had covenanted to pay taxes and had made default therein, to the knowledge (as found by the trial judge) of the plaintiffs; and the Township of Sandwich West (within which township the lands were situated), under its powers and rights under *The Ontario Municipal Board Act, 1932* (22 Geo. V, c. 27), s. 109, had registered against the lands, or the greater portion thereof, a certificate vesting the title thereto in the said Township; and the lands were lost to the parties.

The trial judge, Makins J., on the authority of *Royal Trust Company* v. *Kennedy* (2), gave effect to the defendant's contention that the plaintiff, having lost title and ability to convey, cannot enforce the agreement, and he gave judgment dismissing the action without costs. He suggested that the proper procedure for the plaintiff would be to sue for damages for breach of covenant.

On appeals by plaintiffs to the Court of Appeal for Ontario, that Court (without written reasons) dismissed the appeals without costs, "reserving to the plaintiff the right to bring an action for damages or to seek any relief except that which is specifically sought in this action."

(1) *sub nom Souldoere* v. *Avondale Co. Ltd.,* [1939] Ont. W.N. 86; [1939] 1 D.L.R. 785.
(2) [1930] S.C.R. 602.

1940

SOULLIERE v. AVONDALE MANOR LAND CO. LTD.

The plaintiffs appealed to the Supreme Court of Canada. By the judgment of this Court now reported the appeals were dismissed with costs.

A. F. Gignac for the appellants.

A. Racine K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—These are appeals from judgments of the Court of Appeal for Ontario affirming, with a variation, the judgments of the Honourable Mr. Justice Makins. The latter are based upon *Royal Trust Company* v. *Kennedy* (1). While in that case suit had been brought in Quebec, the law of the Province of Ontario applied, and, unless the decision can be distinguished, it is fatal to the appellants.

It is perhaps advisable to mention first certain other decisions, some of which were referred to on the argument. In *Lebel* v. *Dobbie* (2), Mr. Justice Hyndman determined that where a purchaser under an agreement for sale of land covenants to pay the taxes thereon but fails to do so and the land is forfeited because of their non-payment, the vendor, notwithstanding his lack of title, is entitled to recover the amount of the purchase price from the purchaser, as the latter cannot avail himself of his own default as a defence. It was argued that the vendor, if entitled to succeed at all, should have judgment for damages only, to the extent of the value of the land, but that argument was not given effect to. An appeal, heard by Harvey, C.J., Stuart, Simmons and McCarthy, JJ., was dismissed with costs, without written reasons being given.

In *Broder* v. *Rink and McRadu* (3), the Court of Appeal of Saskatchewan dismissed an appeal from the trial judge, who had dismissed an action for specific performance by a vendor of land. The vendor had agreed to sell one, Toader Pahomi, lots 5 and 6 in block 29, Regina, for $1,500, payable in instalments. Pahomi agreed to sell these lots to the defendants and later released to the plaintiff, who was still the registered owner, all his right, title and interest therein. Subsequently, McRadu, one of

(1) [1930] S.C.R. 602. (2) (1919) 15 Alta. L.R. 126.
(3) (1920) 56 D.L.R. 478.

the defendants, paid a certain sum on account to the plaintiff. The defendants failed to pay the taxes which in their agreement of sale with Pahomi they had agreed to pay, and in November, 1916, the lots were offered for sale for taxes. The plaintiff redeemed lot 5; the trial court found, and the Court of Appeal confirmed the finding, that the plaintiff purchased lot 6 at the tax sale, in the name of his wife. The Court of Appeal dealt only with one point, viz., whether the plaintiff, having bought lot 6 at the tax sale, and having subsequently put it out of his power to convey that lot to the defendants, was entitled to collect from them the purchase price.

Mr. Justice Lamont, speaking on behalf of the Court (consisting of Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A.), said it was not necessary to consider whether the *Lebel* case (1) was correctly decided. "I do not suggest (he says at page 480) that it was not,

> for I have not considered whether the failure of a purchaser to pay the taxes carries with it the results therein set out, or whether it exposes him merely to an action for damages for breach of covenant and the other remedies expressly provided for in the agreement of sale.

Mr. Justice Lamont pointed out that in the *Lebel* case (1) the failure of the purchaser to pay the taxes resulted in the title passing out of the hands of the vendor and into the hands of the town, while in the instant case the failure of the defendants to pay the taxes had no such result. After the tax sale, Broder was still the owner of both lots and could have made title to the defendants had he so desired. In fact the statement of claim alleged both his ability and willingness to do so. Mr. Justice Lamont found no analogy between the case of a vendor buying in his property at a tax sale and that of a second mortgagee buying mortgaged property at a sale held under a first mortgage. He suggested that a much closer analogy would be the case of a first mortgagee buying in the mortgaged premises. He referred to *Mutual Life Assurance Co. of Canada* v. *Douglas* (2), as authority for his statement that if a mortgagee acquires title under a sale for taxes, he cannot hold the title under his tax title and at the same time recover the mortgage moneys under the mortgagor's covenant to pay. He also referred to the judgment of Mr. Justice Anglin in *Sayre and Gilfoy* v. *Security*

(1) (1919) 15 Alta. L.R. 126. (2) (1918) 57 Can. S.C.R. 243.

1940

SOULLIERE v. AVONDALE MANOR LAND CO. LTD.

Kerwin J.

Trust Company Ltd. (1). In the last mentioned case the judgment appealed from was affirmed in this Court on an equal division of opinion.

In *Hutton* v. *Dent* (2), suit was brought in Ontario on a judgment recovered in Saskatchewan and, in the alternative, on the original cause of action, which was a covenant to pay for lands agreed to be purchased. In the Saskatchewan action, judgment had been recovered upon this covenant and an order made for the sale of the lands and payment by the defendant of any deficiency after crediting the money realized at the sale. The plaintiff obtained the leave of the court to bid, and bought the property. Subsequently, the first mortgagee sold the property under the power of sale in its mortgage. In the Ontario Court of Appeal, Hodgins J.A., who delivered the main judgment, stated that if it were a case between mortgagee and mortgagor, the facts would bring it within the exception to the equitable doctrine set forth in *Palmer* v. *Hendrie* (3) and *Walker* v. *Jones* (4). This exception (he states) allows recovery to be had in cases where the land has, by the default of the party liable to pay the debt, passed out of the hand of the mortgagee. After referring to Coote on Mortgages, etc., Mr. Justice Hodgins continues:—

> I think the principle upon which this exception depends is one which obtains between vendor and purchaser, for it is one of reason and common sense. This is an ordinary action on a covenant and the rules as to contract apply and govern the rights of the parties.

On appeal to this Court (*Dent* v. *Hutton* (5)), Sir Louis Davies and Mr. Justice Anglin agreed with the present Chief Justice of this Court, who dismissed the appeal with a variation by compelling the plaintiff to allow the defendant the full amount of the purchase money payable under the sale by which the plaintiff acquired title to the property. There were two questions upon which no opinion was expressed. These appear at pages 722 and 723:—

> The first of these is the question whether an unpaid vendor who has, in proceedings to enforce his lien for the purchase money, obtained leave to bid and, pursuant to that leave, purchased the property, can after the property has passed out of his possession and power proceed to enforce the judgment for the unpaid residue. Whether the vendor in such circumstances is in the same position as a mortgagee is a question of general importance, and before deciding it adversely to the view advanced

(1) (1920) 61 Can. S.C.R. 109.
(2) (1922) 53 Ont. L.R. 105.
(3) (1859) 27 Beav. 349; (1860) 28 Beav. 341.
(4) (1866) L.R. 1 P.C. 50.
(5) [1923] S.C.R. 716.

on behalf of the appellant, the weighty considerations which were urged and might be urged in support of that view would require the most careful examination. The other question is whether, the respondent having lost his title to the property in consequence of proceedings taken by the holder of a paramount security, he is in any view of the law, in consequence of the provisions of the agreement between him and the appellant, free from the operation of the principle which the appellant invokes. Upon neither of these questions, it must be understood, is any opinion now expressed.

It does not appear from the report of *Royal Trust Company* v. *Kennedy* (1) that any of these cases were cited in argument, and an examination of the factums discloses that they were not there mentioned. However, Mr. Justice Newcombe, speaking for the Court, after referring to the fact that the lands in question had been sold for taxes and not redeemed, says at page 608:—

> A title in this condition is something very different from that which the purchaser contracted to receive upon payment of the purchase money, and the question is whether he is, nevertheless, bound by reason of his failure to pay the taxes as covenanted. Other points were taken and debated at the hearing; but in the view which I take, it is unnecessary to consider these.

At page 611 he continues:—

> The plaintiff, nevertheless, now denies the purchaser's right to object to the maintenance of the action after the property has been sold for taxes, and so has passed out of the plaintiff's power to convey; and it is said that, inasmuch as the purchaser failed in performance of his covenant to pay the taxes, the defendants are now invoking their own default or that of the deceased as a means of escape; but I do not agree. It would be, in my opinion, very unreasonable to suppose that the parties ever contemplated that, in addition, or in lieu of the indemnity for which the law provides by way of damages, the purchaser or his estate should lose the benefit of his contract while still remaining subject to its burden, which is the result now sought to be accomplished.

It is true that in the *Kennedy* case (1) the purchaser had not taken possession or accepted the vendor's title which was encumbered by a mortgage and a writ of execution, and that Mr. Justice Newcombe states (page 611):—

> It must be realized that the vendor, as the owner, is primarily liable for the taxes, and that the covenant, whereby the purchaser becomes bound to pay, while it serves to engage the purchaser's indemnity for the vendor, does not create any direct obligation as between the purchaser and the municipal authorities.

But the decision was not based upon any of these considerations and the *ratio decidendi* appears in the extracts from the judgment already set out. It can make no

(1) [1930] S.C.R. 602.

1940

SOULLIERE v. AVONDALE MANOR LAND CO. LTD.

Kerwin J.

difference, therefore, if in the case at bar the respondent took possession and accepted the appellant's title, or even if there be a primary obligation on the purchaser to the municipality to pay the taxes. The evidence is not clear on all these points but from what does appear and from the length of time that elapsed they may be assumed in favour of the appellant. None of them can alter the fact that the decision in the *Kennedy* case (1) was placed squarely upon the ground that in addition to a claim for damages for breach of the purchaser's covenant to pay the taxes, a vendor of land is not able to succeed in an action for specific performance where he is not able to give title to the purchaser. The appellant is entitled, under the variation of the judgment of Mr. Justice Makins, made by the Court of Appeal, to bring an action for damages, and the appeal must be dismissed with costs.

DAVIS J.—The action is not one in equity for specific performance; it is an action to recover money on a covenant to pay. The bare facts are these: A. agrees to sell to B. and B. agrees to buy from A. certain lands, the sale to be completed at a future date; B., the purchaser, expressly covenants to pay the taxes meantime; B. fails to do so and the lands become vested in and the property of the municipality for non-payment of taxes (by virtue of the provisions of the Ontario statute 22 Geo. V (1932), chap. 27, sec. 109); A. sues B. for payment of the balance of the purchase money; B. pleads by way of defence the equitable doctrine that he is not required to pay unless the lands are conveyed to him and that A. is unable to convey; A. replies, "I am unable to convey only because of your own default in not paying the taxes you agreed to pay whereby the lands became by statutory authority vested in and the property of the municipality; consequently the rules of contract apply and govern the rights of the parties. No equity enters into the matter."

While the equitable doctrine is plain that a vendor of land before he can recover judgment for the purchase money must have either conveyed or tendered a conveyance of the lands, there is an exception where the inability of the vendor to do so is the result of the neglect or default of the purchaser. But I can find no escape

(1) [1930] S.C.R. 602.

from concurring in the dismissal of this appeal in view of the decision of this Court in *The Royal Trust Company* v. *Kennedy* (1). The action was dismissed by Makins J. because he felt bound by that decision and an appeal from his judgment to the Court of Appeal was dismissed without written reasons but the formal judgment was varied by reserving to the appellant (plaintiff) "the right to bring an action for damages or to seek any relief except that which is specifically sought in this action."

In *Hutton* v. *Dent* (2), the inability of the vendor to convey was due to the fault of the purchaser in allowing the land to be sold under a mortgage which he had assumed as part of the purchase price. Were I free to do so, I should follow the reasoning and conclusion of the late Mr. Justice Hodgins in the Court of Appeal for Ontario in that case, but I am not free to do so because though an appeal to this Court from that judgment was dismissed (3), the judgment of this Court was put on other grounds.

HUDSON J.—The decision of this Court in the case of *Royal Trust Company* v. *Kennedy* (4) was unanimous. The principle enunciated in the judgment of Mr. Justice Newcombe, speaking for the whole Court, seems to me to be directly in point in this case. For this reason I would dismiss the appeal with costs.

TASCHEREAU J.—These appeals are from the judgments of the Court of Appeal for Ontario which affirmed judgments given by Mr. Justice Makins of the Supreme Court of Ontario. I believe that we are bound by the decision given in *Royal Trust Company* v. *Kennedy* (4). In that case it was decided that the law ascertains the damage for breach of the covenant according to the method indicated by *Lethbridge* v. *Mytton* (5) and *Loosemore* v. *Radford* (6): "when a purchaser covenants to pay the taxes, the vendor may, at any time, when unpaid taxes are overdue, maintain an action against the purchaser for the amount." It was also decided that an action for the balance of the price of sale cannot be maintained when the vendor cannot give title to the property.

(1) [1930] S.C.R. 602.
(2) (1922) 53 Ont. L.R. 105.
(3) *sub nom. Dent* v. *Hutton*, [1923] S.C.R. 716.
(4) [1930] S.C.R. 602.
(5) (1831) 2 B. & Ad. 772.
(6) (1842) 9 M. & W. 657.

1940

SOULLIERE v. AVONDALE MANOR LAND CO. LTD.

Taschereau J

In the present instance, the vendors, having lost title to the property, are unable to perform their covenants to convey and are, therefore, precluded from recovery of any moneys due under the agreements.

I would dismiss the appeals with costs, reserving to the plaintiffs all the rights they may have to bring an action for damages.

Appeal dismissed with costs.

Solicitors for the appellants: *A. F. Gignac* and *A. B. Drake.*

Solicitor for the respondent: *Armand Racine.*

1940

* June 6.
* Oct. 1.

MARY EMMELINE HARPER (PLAINTIFF) ..... APPELLANT;

AND

THE MUNICIPAL CORPORATION OF THE TOWN OF PRESCOTT (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Negligence—Injury from fall on icy sidewalk—Liability of municipality—Question as to "gross negligence" within s. 480 (3) of Municipal Act, R.S.O., 1937, c. 266.

This Court dismissed (Crocket and Taschereau JJ. dissenting) the plaintiff's appeal from the judgment of the Court of Appeal for Ontario, [1939] 4 D.L.R. 453, holding (reversing judgment at trial), in an action for damages against defendant municipality for injuries to plaintiff from a fall on an icy sidewalk on a street within the municipality, that, on the facts and circumstances in evidence, the municipality was not guilty of "gross negligence" within the meaning of s. 480 (3) of the *Municipal Act,* R.S.O., 1937, c. 266, and therefore was not liable.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Chevrier J. at trial) (Riddell J.A. dissenting) held that the defendant municipality was not guilty of "gross negligence" within the meaning of s. 480 (3) of the *Municipal Act,* R.S.O., 1937, c. 266, and dismissed the plaintiff's action for damages for injuries to her from a fall on an icy sidewalk on a street within the munici-

* PRESENT:—Duff C.J. and Crocket, Davis, Hudson and Taschereau JJ.

(1) [1939] Ont. W.N. 492; [1939] 4 D.L.R. 453.

pality, which occurred on February 4, 1937, at about 10.30 o'clock in the evening. The appeal to this Court was, by the judgment now reported, dismissed with costs, Crocket and Taschereau JJ. dissenting.

R. L. Kellock K.C. and *H. Beaumont* for the appellant.

T. N. Phelan K.C. and *J. D. Watt* for the respondent.

THE CHIEF JUSTICE—This appeal should be dismissed with costs.

CROCKET J. (dissenting)—The appellant, a widow of 38 years, who had been employed as city passenger and ticket agent of the Canadian National Railways at Prescott for several years, slipped on an icy sidewalk in Prescott on February 4th, 1937, and sustained such painful and serious comminuted or shattered fractures of both the tibia and fibula bones of her right leg that she was unable to return to her office to resume her duties until the first week in September, and then only with the aid of crutches, which she continued to use for a further period of three months. During the first three weeks of this period of nine months she endured all the pain and discomfort attending the binding of these shattered bones as well as her badly bruised and swollen thigh in a special metal splint. On its removal a plaster cast was applied to the whole limb up to the hip and kept her in further discomfort until March 22nd, when before her removal to her apartment another cast had to be applied and kept on until May 15th. Altogether she was confined to bed for 17 weeks. Although—thanks to what seems to have been a very high order of surgical care and skill—she made a remarkable recovery from such an injury, her limb at the time of the trial two years after the accident was not restored to its former natural condition. It then showed a permanent disfigurement due to the unavoidable formation of a callous lump at the fracture point and was one-half inch shorter than the left leg, producing a noticeable limp.

The accident happened at about 10.30 p.m. on the west side of West street, which runs southerly down hill from Park street across Dibble and Henry streets, when Mrs. Harper was returning from a public concert, which had been given in the schoolhouse, situated on the northeast

1940

HARPER v. TOWN OF PRESCOTT.

Crocket J.

corner of Dibble street. She brought this action against the respondent to recover damages for her injury and pecuniary loss, which she alleged was caused by the negligence of the municipal corporation, relying on the provisions of the *Municipal Act,* R.S.O., 1937, ch. 266. Subsections 1, 2 and 3 of sec. 480 of this Act read as follows:

(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provisions of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk.

The action was tried before Mr. Justice Chevrier without a jury in February, 1939. He found on the facts established by the evidence adduced before him that the respondent's servants were guilty of gross negligence within the meaning of subs. 3 of s. 480 of the Act and directed the entry of judgment in favour of the appellant for $2,710.80 together with her costs.

The Court of Appeal, McTague and Gillanders, JJ.A. (Riddell, J.A., dissenting), reversed the trial judgment and directed the dismissal of the action with costs.

With all deference, I think the majority judgment on appeal is erroneous for the reason that it proceeds upon a misinterpretation of the term "gross negligence," as used in s. 480 of the *Municipal Act,* and an unwarranted disregard of the specific findings of the learned trial judge upon essential questions of fact depending upon the credibility of evidence adduced before him.

In the reasons for the appeal judgment delivered by McTague J.A., His Lordship says that, while he is in agreement with the proposition laid down by Chief Justice Anglin in this Court in *Holland* v. *City of Toronto* (1), that there could be no *a priori* standard for determining when negligence should be deemed "very great negligence," as Sedgewick J. expressed it in *City of Kingston* v. *Drennan* (2), he thought that in general what a plaintiff had

(1) The judgment of the Supreme Court of Canada (Dec. 1, 1926) is reported in full in 59 Ont. L.R. 628, at 631-637.

(2) (1897) 27 Can. S.C.R. 46, at 60.

1940

HARPER v. TOWN OF PRESCOTT.

Crocket J.

to prove under that standard was that there was a breach of the duty to keep the sidewalk reasonably safe for pedestrians using same reasonably, "and that the breach of that duty approaches the wilful, the reckless, the wanton; the breach must be flagrant."

That the Legislature ever intended that a municipal corporation should not be liable for any personal injury caused by snow or ice upon a sidewalk without proof of such a standard of gross negligence as that laid down in this judgment I cannot for my part believe. While it is clear that the Legislature meant something more than the failure to exercise ordinary reasonable care and attention in maintaining and keeping its sidewalks safe for pedestrians, it is to my mind hardly possible to suppose that, in legislating this civil liability upon a municipal corporation, as it expressly does by subs. 1 of the above section, it had any thought in enacting subs. 3 of exempting all municipalities from such liability so long as they or their servants were not guilty of a degree of negligence which is only measurable by the standard of the Criminal Law.

There have been several judgments in this Court and also in the Ontario courts dealing with the meaning of "gross negligence" as used in this enactment. Not one of these judgments has ever ventured to suggest that the enactment requires the proof of either "wilful," "reckless," "wanton," or "flagrant" negligence as necessary to fix a municipal corporation with liability for personal injury caused by snow or ice upon a sidewalk.

In *Holland* v. *City of Toronto* (1), Anglin, C.J.C., pointed out that the term "gross negligence" in this statute was not susceptible of definition, and that the circumstances "giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence and the extent of the risk which it creates" depends upon so many different elements as to make it impossible to lay down any dependable criterion of liability for all cases. Referring to the evidence in that case His Lordship said:

> The highly dangerous condition of the sidewalk from Wednesday to Friday was fully proven. The risk of accident, having regard to the relatively heavy pedestrian traffic, was great. An intelligent person observing the conditions with any reasonable degree of care on the Thursday should have realized the risk of leaving the sidewalk uncleaned

(1) 59 Ont. L.R. 628 (Supreme Court of Canada).

1940

HARPER v. TOWN OF PRESCOTT.

Crocket J.

and unsanded. The duty of the city sectionman was simple and easy—merely to give notice to the occupant to clear off the snow and ice or to sprinkle sand or ashes over it.

There was, in our opinion, on the part of Blackburn, the city sectionman, such "very great negligence" that to hold it to be less than "gross" would be to encourage a reckless indifference on the part of municipal authorities to the safety of persons lawfully using the streets, and would, in effect, be to declare that municipal corporations in Ontario are immune from liability for personal injury caused by accidents due to snow and ice on sidewalks. We agree with Mr. Justice Riddell—"on any definition of gross negligence" we are unable to see that Blackburn's conduct "does not come within the words."

In an earlier case in this Court, *German* v. *The City of Ottawa* (1), in which the majority of the court held that failure to sand or harrow a sidewalk before 9 a.m. of February 2nd, when the conditions calling for it only arose on that morning, was not gross negligence and that the city was not liable for personal injury caused at that hour by ice on the sidewalk, especially if it was not in a place of special danger, nor on a street of heavy traffic and did not call for immediate attention, Anglin J. based his judgment, in which Davies J. concurred, upon the fact that there was no direct evidence that the city's servants had any actual or specific notice of the existence of the danger at the locus of the accident, and that there was nothing in the record to suggest that this place was one of special hazard, which called for preferential care or treatment. (See p. 90). The vital question involved in that case, he pointed out at p. 89, was whether the failure of the city employees to prevent an admittedly dangerous condition amounted to gross negligence within the meaning of R.S.O., ch. 192, s. 460 (3). "Its solution," His Lordship said, "must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it." Duff, J., who with Davies and Anglin, JJ., constituted the majority, simply stated that the appeal should be dismissed with costs. Fitzpatrick, C.J., and Idington, J., dissenting, held that, notwithstanding the city's servants had no actual or specific notice of the existence of the danger at the locus of the accident, the city officials should have realized from the sudden drop of the temperature on the afternoon preceding the accident that the sidewalks would be dangerous

(1) (1917) 56 Can. S.C.R. 80.

on the following morning, and that in such circumstances it was gross negligence to reduce the working staff and to fail to do work on the sidewalk where the accident occurred.

In *Pierce* v. *City of Toronto* (1), in which the County Court Judge of the County of York had held the city liable under the same enactment for personal injury to the plaintiff's wife caused by her falling on an icy street crossing, and awarded judgment in favour of her husband and herself, the Court of Appeal, *per* Latchford, Britton and Middleton, JJ. (Meredith, C.J. C.P., dissenting), dismissed an appeal from the County Court judgment. Latchford, J., in his reasons said that,

> As found by the trial judge, the crossing at which Mrs. Pierce was injured was a particularly dangerous one, and was known to be such by the defendants, who had not taken effective measures to render it reasonably safe for persons lawfully using the street. . . . In this case the city authorities were well aware that the crossing was in a dangerous condition, but the means which they adopted to provide a remedy were insufficient and ineffective.

Middleton, J., in his reasons said that,

> There was a condition full of peril known to the defendants, and an attempt to cope with the situation which was quite inadequate and which ought to have been appreciated as inadequate by those in charge. This constituted gross negligence.

The learned trial judge in his reasons for judgment in the present case refers to the above cases, as well as to that of *Legris* v. *Town of Cobalt* (2), in which it appeared that the slippery place where the accident occurred had been sanded in the morning but that most of the sand had been blown away by a high wind before Mrs. Legris slipped and was injured in the afternoon. In that case, following the *Pierce* case (3), the Appeal Court dismissed the municipality's appeal.

In *Fletcher* v. *City of Calgary* (4), the Appeal Division of the Alberta Supreme Court (Harvey, C.J., and Stewart and Beck, JJ.) held that,

> When a sidewalk is on a steep slope and is used, to the knowledge of city officials whose duty it is to put sand and ashes on the slippery places, by children with sleighs and toboggans, making it more than naturally slippery, there is a duty on the city to pay more attention to it than to others not so dangerous and failure to take extra precautions to prevent injury to pedestrians is negligence for which the city is liable.

(1) (1919) 16 Ont. W.N. 48.
(2) (1921) 21 Ont. W.N. 187. (3) (1919) 16 Ont. W.N. 48.
(4) (1921) 60 D.L.R. 357.

1940

HARPER v. TOWN OF PRESCOTT.

Crocket J.

It is clear, I think, that the decisions and dicta, to which I have refererred, far from lending any support to, actually negative the premise upon which the majority judgment in the Appeal Court is based, viz.: that there must be proof of negligence measurable by the standard of that prescribed by the Criminal Law before there can be any recovery against the municipality under the provisions of the *Municipal Act*. This, in my respectful opinion, marks the judgment *a quo* as one which ought not to be affirmed by this Court.

Apart, however, from this fundamental objection, an examination of the record clearly shows that the majority judgment in the Appeal Court has disregarded and reversed specific findings of the trial judge upon questions of fact involving the credibility of witnesses, which it was his right and duty, and not that of the Appeal Court, to determine, as essential factors in the consideration of the degree of negligence imputable to the respondent corporation.

For instance, on the vital question as to whether the town street foreman had actual or specific notice of the existence of the dangerous situation which had been created at the locus of the accident by the school children sliding down the sidewalk, as their custom was on coming from school at 4 o'clock, and his opportunity of remedying it, the learned trial judge specifically found that the defendants were in fact made aware in time of the dangerous condition of West street, and further, that the fact that the school children had brushed off the sand which the sanding crew had sprinkled upon the icy sidewalk before the dismissal of the school in the afternoon was known to one of the town's employees (Annable, the street foreman).

Annable, who gave evidence as a respondent witness, swore in cross-examination that a citizen, a Mr. Fretwell, who lived on that street, had told him about half past four in the afternoon that the kids had slid the sand off "the hill" and that "the hill" was dangerous and slippery. Yet the majority judges in the Appeal Court say that "there is evidence that the foreman of the street gang was notified by a citizen about 4.30 in the afternoon that there were slippery places that needed sanding due to children sliding," and that "the evidence is that no particular street was mentioned, but that the foreman

took the statement to include West street"; and further, that "the foreman's attention was not called to a particular part of West street, but to slippery conditions on a number of streets." It is true that later on in his evidence Annable attempted to get away from his earlier statement by saying he "didn't think" West street had been mentioned to him, though admitting that in any event he knew the warning was diretced to "that hill." It was surely for the trial judge, and not for the Appeal Court, to determine which of Annable's two apparently contradictory statements should be accepted as the true version in relation to this all important question of an actual and specific warning having been given to the street foreman in time to enable him to remedy a specially dangerous situation and make the hilly sidewalk safe for pedestrians. The trial judge further found that Annable about 8 o'clock on the morning of the day of the accident told Roberts, who was in charge of the town's sanding crew, to sand West street sidewalk because there was to be a school concert that night at the school at the top of the hill. That clearly shows that Annable himself anticipated that there would be more than the usual number of pedestrians subjected to the peril of using this particular icy sidewalk that night. He himself admitted that West street was the steepest hill in the town, and the trial judge found that the accident happened at a point on the edge of the sidewalk about 118 feet below the top of the hill, where the down grade running south was between 6 and 7 per cent., and the grade of the four-foot wide concrete sidewalk from its inside to its outside edge was 6 per cent. There were several slides between the top of the hill and that point, and the one, on or beside which Mrs. Harper fell, according to the evidence of Annable, ran from near the west side of the sidewalk diagonally down and over the east side of the sidewalk and "right on to the road." Notwithstanding that he had been notified about half past four in the afternoon that the sand, which had previously been scattered over the sidewalk on this hill, had been brushed off by the children sliding after school, and of the existence of dangerous slides, and knew that an unusual number of pedestrians would be passing up and down this particular sidewalk that night, he concerned himself no more about the matter that night, but continued on his

1940

HARPER v. TOWN OF PRESCOTT.

Crocket J.

way to his home for supper while the teams and men of the town sanding machine were still out and easily available. He went back to the town hall after supper, he said, in accordance with what he intimated was his usual custom during the winter season, so as to be available for any emergency calls, not so much as bothering to go down by West street, which it appears was little out of his way. When he got back to the town hall, he said, "the boys was there" with the team and the sand. "And did you send one of them right up to West street?" he was asked. "No," he replied, "they said they had sanded West street." Further questioning brought from him the intelligence that it was at the fire barn where he saw "the gang" when he went back to duty after supper; that "they had put their equipment all away for the night, and that after they went away he hung around there, went here and there and up on Dean street, in the pool rooms, and on the corners," and started for home between half past eight and nine o'clock, going this time by way of West street, when, seeing the slide where, to quote his own words, "the kiddies had slid the sand off * * * I just took my foot like that and I just kicked some sand over it and went on"—sand, he explained, which he kicked off the sidewalk. When asked how he happened to go up West street he said that "he went up that way around to see the mayor," who, it seems, runs an hotel on Main street, denying that it was on account of any dangerous spots on West street. The accident claimed for happened two hours later. If this evidence, which I have quoted from the mouth of the respondent's street foreman, is itself not sufficient to warrant a finding of gross negligence on his part, then for my part I can conceive of no case in which any municipality could be held liable for a personal injury caused by snow or ice upon a sidewalk under the provisions of s. 480 of the Ontario *Municipal Act*.

In addition to this, however, the trial judge had before him the statement of Roberts, the man in charge of the sanding crew, another of the respondent's own witnesses, that if this sidewalk was sanded before 4 o'clock it wouldn't do much good because of the unfailing habit of the school children to use it for sliding after the dismissal of school.

The purpose, of course, of all municipalities in sanding icy sidewalks is to make them safe for the use of pedes-

trians. It is a matter of common knowledge that all populous cities and towns, which undertake to provide and maintain concrete or tarvia sidewalks, now recognize that pedestrians cannot be adequately protected against accidents on such sidewalks, when covered with dangerously slippery ice, by the use of cold sand, which will not take a firm hold upon the slippery ice surface, and that either hot sand, or sand which has been so mixed with salt or other material of like properties as to make it stick by eating into the glare ice, must be used if any real or effective protection against such danger is to be afforded. And it must be obvious, it seems to me, to anybody that the spreading of sand which cannot stick or produce any effect upon the icy surface of sidewalks—particularly running down steep hills—is more likely to create a trap than to provide a protection for pedestrians, who are thus invited to rely upon their safety and traverse them.

In the present case the learned trial judge has specifically found that the sand, which was scattered over the West street sidewalk earlier in the day, was cold sand, which was not properly mixed with the sodium chloride the town had provided for the purpose so as to cause it to adhere to or destroy the surface of these admittedly dangerous ice slides, and in my judgment the undisputed fact that it disappeared so quickly as the result of the sliding of the school children is itself ample evidence to warrant that finding. The appeal judgment, completely ignoring this finding, as well as the finding concerning actual notice of the existence of special danger in this particular locality in ample time to remedy it before the occurrence of this unfortunate accident, plainly suggests, as I read the reasons given for that judgment, that the mere fact that the street foreman had at 8 o'clock in the morning of the day in question ordered West street to be sanded, presumably in the usual manner, precludes the fixing of any liability upon the municipality for "gross negligence" within the meaning of the *Municipal Act*, and that the manner in which that order was carried out, and the efficacy of the sanding to meet the dangerous conditions it was intended to remedy, was not a consideration which should be taken into account in the circumstances of this case, as the two learned Appeal Judges in their examination of the printed record believed them to be.

1940

HARPER v. TOWN OF PRESCOTT.

Crocket J.

I fully agree with the opinion expressed by Mr. Justice Riddell in his dissenting judgment that there was gross negligence on the part of the municipality and its servants within the meaning of the *Municipal Act*. I would therefore allow the appeal and restore the judgment of the learned trial judge with costs throughout.

DAVIS J.—The Ontario *Municipal Act*, being R.S.O., 1937, ch. 266, expressly provides by sec. 480 (3) that a municipal corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk—except in case of gross negligence. The appellant fell upon an icy sidewalk in the town of Prescott, Ont., and she sued the municipal corporation for damages for her personal injuries. I do not think the evidence discloses gross negligence on the part of the municipal corporation.

I would dismiss the appeal with costs.

HUDSON J.—In this case there is no dispute about the material facts necessary to dispose of the matter. The sole question is whether or not on these facts it could properly be found that there was what the Ontario statute calls "gross negligence" on the part of the municipality. A trial judge held there was and the majority of the Court of Appeal held there was not.

Unlike the facts in a number of cases cited, here the municipality had done nothing to create a dangerous condition, or increase the danger caused by natural forces, and it had taken some precautions to avoid danger to pedestrians by sanding the sidewalk on the very day of the accident. It was not until about 4.30 p.m. that its street foreman was told that there were some slippery places due to children sliding. At that time the sanding gang were at work in some other part of the town and were due to stop work at 5 p.m.

Taking into account the climatic conditions at this season of the year, the brevity of time which elapsed between notice of the slippery condition and the accident, amounting at most to a few hours in the late afternoon and evening of a winter's day, it would seem to me that to hold the municipality liable would be imposing a burden upon it greater than could ever have been intended by the Legislature, when they provided that there should be liability only in the case of gross negligence.

I would dismiss the appeal with costs.

1940

HARPER v. TOWN OF PRESCOTT.

TASCHEREAU J. (dissenting)—The appellant, Mary Emmeline Harper, sued the Municipal Corporation of the town of Prescott for damages sustained when she fell on an icy sidewalk on the 4th of February, 1937.

The defendant except in case of "gross negligence" is not liable for a personal injury caused by snow or ice upon a sidewalk (s. 480, *Municipal Act*). The trial judge decided that there was "gross negligence," maintained the action for $2,710.78, but the Court of Appeal came to a different conclusion and dismissed the claim.

"Gross negligence" is not defined in the Act, but in *Holland* v. *City of Toronto* (1), Anglin, C.J.C., says:—

> The term "gross negligence" in this statute is not susceptible of definition. No *a priori* standard can be set up for determining when negligence should be deemed "very great negligence"—a paraphrase suggested in *City of Kingston* v. *Drennan* (2), which for lack of anything better has been generally accepted. The circumstances giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence, and the extent of the risk which it creates—the character and the duration of the neglect to fulfill that duty, including the comparative ease or difficulty of discharging it—these elements must vary in infinite degree; and they seem to be important, if not vital, factors in determining whether the fault (if any) attributable to the municipal corporation is so much more than merely ordinary neglect that it should be held to be very great, or gross, negligence.

In *German* v. *City of Ottawa* (3), Anglin J. also says:—

> Whether the failure of the city employees to prevent that condition arising or to remove it before 9 a.m. on Wednesday, the 2nd of February, amounted to "gross negligence" (defined by this court as "very great negligence"; *Kingston* v. *Drennan* (4)); which is the statutory condition of the defendants' liability (R.S.O., ch. 192, sec. 460 (3)), is, therefore, the vital question involved in this appeal. Its solution must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it.

I believe that these principles should be applied to the present case. The evidence, in my opinion, shows that the respondent is guilty of "gross negligence" and not only of ordinary neglect. I find the elements of this negligence specially in the evidence given by the foreman of the municipality, Annable. It is true that the sidewalk where the accident happened on the night of February the 4th had been sanded during the morning but, before the accident, the foreman had been told at 4.30 o'clock

(1) 59 Ont. L.R. 628, at 634, (Supreme Court of Canada).
(2) (1897) 27 Can. S.C.R. 46.
(3) (1917) 56 Can. S.C.R. 80, at 89. (4) (1897) 27 Can. S.C.R. 46, at 60.

1940

HARPER v. TOWN OF PRESCOTT.

Taschereau J

p.m. that the street was in a dangerous condition. He knew that many people that night would pass through that street to go to the High School, where there was an entertainment. Later, he saw the slippery condition of the sidewalk, which he admits in his evidence, but did nothing to make it safe for pedestrians. He had sufficient time to fulfill his duty which, under the circumstances, was to take the necessary steps to remove this dangerous condition.

There was on the part of Annable, the city foreman, as Anglin, C.J.C., pointed out in the *Holland* case (1) at page 637:—

> * * * such "very great negligence" that to hold it to be less than "gross" would be to encourage a reckless indifference on the part of municipal authorities to the safety of persons lawfully using the streets, and would, in effect, be to declare that municipal corporations in Ontario are immune from liability for personal injury caused by accidents due to snow and ice on sidewalks.

I, therefore, come to the conclusion that the respondent is guilty of gross negligence and that it cannot escape liability.

I would allow the appeal and restore the judgment of the trial judge with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Casselman & Beaumont.*

Solicitors for the respondent: *Herridge, Gowling, MacTavish & Watt.*

1940

* May 28, 29
* Oct. 1.

NIAGARA WIRE WEAVING COMPANY LIMITED (PLAINTIFF)..... APPELLANT;

AND

THE JOHNSON WIRE WORKS LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Action for infringement—Lack of invention.

The action was for a declaration that three patents (two of them for an alleged new and useful improvement in seams for woven wire belts, and the other for an alleged new and useful improvement in belts

* PRESENT:—Duff C.J., Crocket, Davis, Hudson and Taschereau JJ.

(1) 59 Ont. L.R. 628 (Supreme Court of Canada).

for Fourdrinier machines) had been infringed by defendant and for consequential relief. The judgment of Maclean J., President of the Exchequer Court of Canada, [1939] Ex. C.R. 259, dismissing the action, mainly on the ground that, in view of the state of the art, there was lack of invention to support the patents, was affirmed.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the action. The action was brought for a declaration that as between the parties three letters patent owned by the plaintiff were valid and had been infringed by the defendant, an injunction, damages, etc. Two of the patents were for an alleged new and useful improvement in seams for woven wire belts and the other was for an alleged new and useful improvement in belts for Fourdrinier machines. The dismissal of the action by Maclean J. was mainly on the ground that, in view of the state of the art, there was lack of invention to support the patents.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

W. F. Chipman K.C. for the respondent.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—I can see no ground upon which we should interfere with the judgment of the learned President of the Exchequer Court. There was undoubtedly much commercial success but it was the result of a practical improvement in the article that added nothing to it of an inventive nature. A better article was produced by better workmanship.

The appeal should be dismissed with costs.

CROCKET J.—I fully concur in the reasons so clearly stated by the learned President for his decision in dismissing this action for the alleged infringement of the three patents relied on by the appellant, and would therefore dismiss this appeal with costs.

HUDSON J.—I agree that this appeal should be dismissed, with costs, for the reasons expressed by the learned President of the Exchequer Court.

(1) [1939] Ex. C.R. 259; [1939] 3 D.L.R. 285.

1940

NIAGARA WIRE WEAVING CO. LTD. v. JOHNSON WIRE WORKS LTD.

TASCHEREAU J.—I fully agree with the views expressed by the learned President of the Exchequer Court, and I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*

1940

* May 9, 10.
* Oct. 1.

A. H. CAMERON AND OTHERS.....APPELLANTS;

AND

H. WINCHESTER AND A. J. HASLAM, ADMINISTRATORS WITH THE WILL ANNEXED OF THE ESTATE OF LUCY JANE ROBERSON, DECEASED, AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND

Administration of Estates—Administration proceedings in Court of Chancery, Prince Edward Island—Order directing final distribution of estate—Question as to overpayment of income, by trustees in course of administration of the estate, to one of the beneficiaries—Adjustment in final distribution in the administration proceedings.

In the course of administration of the estate of R., deceased, payments of income to his daughter L., for a certain period up to the time of L.'s death in 1934, included income to which, under rights as determined in accordance with the interpretation of R.'s will by this Court in 1937 (*Cameron* v. *Haszard,* [1937] S.C.R. 354), the appellants were entitled. In administration proceedings in the Court of Chancery of Prince Edward Island, the Master of the Rolls made an order on March 22, 1939, affirmed by the Court of Appeal in Equity, directing the final distribution of R.'s estate, the order taking no notice of the fact of said overpayments of income to L. On appeal to this Court:

Held: In directing the final distribution of R.'s estate the Court of Chancery in the administration proceedings was not only entitled but was bound to take into account, in adjusting and settling the amounts for the final distribution between appellants on the one hand and L.'s estate on the other, the overpayments of income that had been made to L.; and according to such adjustment to make allowance to appellants in the distribution, to the extent that there were assets of R.'s estate, available for that purpose, being administered by the Court. (In the issues and circumstances of the case, it was not necessary to decide the question whether overpayments could be

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

recovered and brought back to R.'s estate in the administration proceedings, nor the question of the right to claim interest on overpayments).

APPEAL from the judgment of the Court of Appeal in Equity of Prince Edward Island affirming the judgment or order of the Master of the Rolls as to final distribution of the estate of Edward Roberson, deceased.

The said Edward Roberson died in 1883, leaving his widow and three daughters, Georgianna, Hannah and Lucy. His daughter Georgianna died in 1885, ten days after the birth of her only child, who died within two months later, leaving the child's father, Alexander Cameron, as the child's next of kin. Alexander Cameron died in 1921. He had remarried, his second wife had predeceased him, and he left surviving him three sons by his second marriage. These sons, claiming through their father, and also two of them as executors of their father's will, are the present appellants. Of the other members of the family of said Edward Roberson, deceased, his daughter Hannah died in 1907, his widow died in 1909, and his daughter Lucy died in 1934. By a judgment of the Supreme Court of Canada, given on March 19, 1937 (1), certain questions were decided involving the interpretation and effect of certain clauses in the will of said Edward Roberson. It is claimed on behalf of the present appellants that in the course of the administration of the estate of said Edward Roberson there were included in payments of income made to his daughter Lucy, from the time of her mother's death in 1909 to the time of Lucy's death in 1934, income to which, under the rights of the parties as determined in accordance with the subsequent interpretation of Edward Roberson's will by the Supreme Court of Canada as aforesaid, the said Alexander Cameron and, after his death in 1921, his sons (claiming through him) were entitled. The estate is now being administered in the Court of Chancery of Prince Edward Island, and the order now appealed from, made by the Master of the Rolls on March 22, 1939, and affirmed by the Court of Appeal, directed the final distribution of the estate of Edward Roberson and closed it out, the order taking no notice of the fact that Lucy Roberson had received overpayments of income as aforesaid.

(1) *In re Roberson; Cameron* v. *Haszard,* [1937] S.C.R. 354.

1940

CAMERON v. WINCHESTER.

The material facts and circumstances of the case and questions in issue are sufficiently stated in the reasons for judgment in this Court now reported.

Donald McKinnon K.C. and *J. D. Watt* for the appellants.

L. A. Lovett K.C. and *W. E. Bentley K.C.* for the respondents the administrators with the will annexed of the estate of Lucy Jane Roberson, deceased.

The judgment of Crocket, Davis, Kerwin and Hudson JJ. (Taschereau J. also adopting the reasons) was delivered by

DAVIS J.—The litigation out of which this appeal arises is the aftermath of the judgment of this Court in *Cameron* v. *Haszard* (1). In the earlier appeal the proper interpretation of the will of the late Edward Roberson, who died in 1883, was in dispute. The difficulty had arisen out of the fact that one of the testator's surviving daughters died in 1885 leaving her surviving an infant ten days old, who died a few weeks later leaving his father, Alexander Cameron, as his only next of kin. This Court held, following the then recent judgment in the Privy Council in *Browne* v. *Moody* (2), that the daughter's child had acquired a vested interest in his grandfather's estate.

In the earlier appeal some questions were raised as to the payments of income that had been made over a period of many years on the basis that the grandchild had not acquired a vested interest. "If the parties cannot now agree," we said,

> upon an adjustment and settlement of their differences in respect of the impeached payments of income, that part of the bill of complaint should be remitted to the Court of Chancery. The facts in connection with the payments of income from these funds are not at all complete in the record before us but there is sufficient to indicate that there may well have been such an acquiescence on the part of the late Mr. Cameron, the father of the grandchild, who was himself one of the executors of the testator's will, as to preclude those now claiming through him from recovering against the surviving executor income which has been actually paid out by him, though, perhaps, to persons for the time being not strictly entitled to this income upon the construction which we have now put upon the provisions of the will respecting the funds in question. A great many years have elapsed since many of the payments were made, the surviving trustee obviously acted throughout in absolutely good faith,

(1) [1937] S.C.R. 354. (2) [1936] A.C. 635.

and many matters of fact and questions of law may arise for consideration if the question of the actual payments of income is pressed. The evidence before us is quite insufficient to enable us to deal with the dispute.

The formal judgment of the Court in this connection was as follows:

> And this Court did further order and adjudge that in the event of the parties hereto failing otherwise to adjust and settle the claim of the appellants in respect of the alleged improper disposition of income received from and after the death of the respective life tenants thereof, from the bequests and share of residue which became vested in the said Edward Roberson Cameron, and which are set forth in paragraph two hereof, the said claim be referred back to the Court of Chancery of Prince Edward Island for further disposition.

Edward Roberson Cameron was the name of the grandchild. The parties could not adjust and settle their differences and the matter was proceeded with in the administration proceedings in the Court of Chancery of Prince Edward Island in connection with the grandfather's estate.

What might have been and should have been a very simple proceeding is now to be found in a most confused and confusing record out of which with some difficulty a few simple facts, which appear to have been lost sight of in the mass of evidence and submissions of counsel throughout, stand out boldly.

It is satisfactory to observe that the capital of the estate remains, after the deduction of all proper disbursements, at almost exactly the same figure at which it began in 1883. There is no suggestion of any neglect, much less wrongdoing, in the handling of the estate over a period of more than fifty years. But the fact remains that certain income from the estate was paid out over a period of approximately twenty-five years on a basis quite inconsistent with the rights of the parties as determined for the first time by the judgment of this Court in 1937.

So far as the capital of the estate is concerned, its division presents no difficulty. The whole controversy relates to the payments of income. There are now really only two contestants in relation to that income and they are both before the Court. On the one hand are the Camerons (the appellants), who take through the will of the father of the grandchild. On the other hand are those (respondents) who take under the will of Lucy Roberson, an unmarried daughter of the original testator Edward Roberson, who did not die until 1934. Her mother, the

1940

CAMERON v. WINCHESTER.

Davis J.

widow of the original testator, had died in 1909. The present appeal is concerned solely with the income that came into the estate and was paid out between the date of the death of the testator's widow on November 28th, 1909, and the date of the death of the daughter Lucy on January 13th, 1934. During those years the rate of interest on mortgages was high and the resultant income to the estate substantial. It is not in dispute that the total income during this period was over $30,000 and that most of this income was paid over to the daughter Lucy without regard to the Camerons. It apparently did not occur to anyone during that period that half of that income should go to those entitled through the grandchild. The father of the grandchild was the latter's sole next of kin and was himself an executor of the original estate. He did not die until July 16th, 1921, and although entitled (though it was not so determined until the judgment of this Court in 1937) to half of this income as the sole next of kin of his child, was a party during his lifetime to handing most of the income over to the testator's daughter Lucy.

The estate of Edward Roberson is now being administered in the Court of Chancery in Prince Edward Island and the order appealed from, made by the Master of the Rolls and affirmed by the Court of Appeal for Prince Edward Island, directs the final distribution of the estate and closes it out. But the order takes no notice of the fact that the daughter Lucy received most of the income from the time of her mother's death in 1909 down to the time of her own death in 1934, although those claiming from time to time through the grandchild, Cameron, were entitled to one-half of it. That strikes one at once as something that is wrong where a court of equity is administering an estate and determining the final distribution of it. The issue, we are afraid, became beclouded by many different contentions and arguments. It was said that the Court had no jurisdiction in the administration proceedings to do other than deal with the assets that were still in the estate and to that extent under the control of the Court. It was said that if the Camerons wanted to get back the overpayments from Lucy's estate, some other separate and independent proceedings would have to be

taken outside the administration proceedings. In any event, all sorts of defences were raised on behalf of Lucy's estate, such as the acquiescence of Mr. Cameron during his lifetime (he being both an executor and a beneficiary of the original estate), the statute of limitations and the law relating to payments made under a mistake of law as distinct from payments made under a mistake of fact. Without passing upon the question whether or not the overpayments could be recovered and brought back to the original estate in the administration proceedings (no such issue was formulated on behalf of the Camerons in these proceedings), it is plain that in directing the final distribution of the estate the Court of Chancery in the administration proceedings was not only entitled but was bound to take into account in adjusting and settling the amounts for the final distribution between the two groups of beneficiaries (the Camerons on the one hand and the Lucy Roberson's estate on the other) the overpayments that had been made to Lucy Roberson during her lifetime. *Bullock* v. *Downes* (1); *Dibbs* v. *Goren* (2); *In re Robinson, McLaren* v. *Public Trustee* (3). When it comes to the final distribution of the estate it does not matter whether overpayments were made out of income or out of capital. In the estate that is now being administered by the Court of Chancery certain securities and moneys remain to be distributed and if one beneficiary has already received $13,000 to $16,000 more than she was entitled to (the exact amount it is unnecessary for us to determine), an evening up can and should readily be made. There is not enough in the estate to completely adjust the differences, but, to the extent that there are available assets being administered by the Court, those adjustments ought to be made. The amount not being sufficient to cover the principal of the overpayments, the question of the right to claim interest on the overpayments does not arise as a practical matter. The overpayments, without taking interest into account, amounted to between $13,000 and $16,000, and the amount to which Lucy's estate was held entitled by the order appealed from on the basis of a distribution of the capital of the estate without regard to the

(1) (1860) 9 H.L.C. 1. (2) (1849) 11 Beav. 483.
(3) [1911] 1 Ch. 502.

1940
CAMERON v. WINCHESTER.
Davis J.

overpayments of income but including her share of income received since December, 1938, is far short of the amount of the overpayments received by Lucy during her lifetime.

The appeal is allowed and the orders of the Master of the Rolls and of the Court of Appeal in Equity, Prince Edward Island, are varied so as to direct that the remaining assets of the Edward Roberson estate shall be transferred or paid over to the three named Camerons in equal shares, after payment thereout of the costs, expenses and compensation referred to in the order of the Master of the Rolls. The appellants shall have their costs in the Court of Appeal and in this Court against the respondents, the Administrators with the will annexed of Lucy Jane Roberson, deceased.

TASCHEREAU J.—For the reasons given by my brother Davis, I would allow this appeal.

Appeal allowed with costs.

Solicitor for the appellants: *A. A. McLean.*

Solicitor for the respondents the administrators with the will annexed of the estate of Lucy Jane Roberson, deceased: *W. E. Bentley.*

1940
* March 12 13, 14.
* Oct. 30.

J. DONAT MARLEAU (PLAINTIFF).....APPELLANT;

AND

THE PEOPLE'S GAS SUPPLY COMPANY LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of Goods—Purchaser claiming damages for alleged breach of conditions implied by s. 15 of Sale of Goods Act, R.S.O., 1937, c. 180—"Goods supplied under a contract of sale"—Sale of acetylene gas supplied in tank—Explosion of tank in purchaser's garage—Cause of explosion—Evidence—Findings of trial judge—Pleadings—Allowance of amendment at trial—Effect and scope of pleadings as amended.

Defendant, a manufacturer and distributor of acetylene and other gases, had delivered to plaintiff two tanks (or "cylinders") containing acetylene gas which plaintiff required (to defendant's knowledge) to use in plaintiff's garage. Plaintiff had purchased from defendant the acetylene gas, but when it was used was to return to defendant the tanks (which defendant had purchased from the manufacturer

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

thereof) and (for retention after 30 days) pay a rental therefor. (A time limit was fixed for return but had not expired when the accident in question occurred). Some time after said delivery, one of said tanks, which tank had not been used since delivery, exploded (whether from defect therein or from some immediately prior volume explosion or other external cause in the garage, where plaintiff had been working at a welding operation, was a matter in dispute), and plaintiff was injured and his property damaged. He sued for damages. In his statement of claim he alleged that the explosion was caused by negligence of defendant "in storing under compression acetylene gas in a defective and unsafe tank, the bottom part of which, not being properly and securely welded and affixed to the remaining portion, suddenly and violently separated from it with the resulting explosion." There was no proof of any such improper or insecure welding. By amendment allowed at the trial, plaintiff added in his statement of claim a plea that he purchased the gas and hired the tank, having made known to defendant the purpose for which they were required and relying upon defendant's skill or judgment, the gas and tank being goods which it was in the course of defendant's business to supply; that the gas was purchased and the tank hired by description; that "the said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired and were not of merchantable quality" and that plaintiff's damages were the direct and proximate result thereof. The trial judge found that the explosion "was due to some defect in the internal structure or set-up of the cylinder, using the words in their widest application" and "that the cylinder exploded by reason of extremely high internal pressure only, due to some internal structural defect," and gave judgment to plaintiff for damages. This judgment was reversed by the Court of Appeal for Ontario, ([1939] Ont. W.N. 367; [1939] 4 D.L.R. 199) which held, on their view as to the issue raised by the pleadings and the lack of proof to support plaintiff on that issue, it was not open to the trial judge to enter upon a consideration of all the possible causes of the explosion or "to find that the explosion was due to some unknown defect in the cylinder not alleged by the plaintiff, and the nature of which the evidence does not disclose." Plaintiff appealed.

Held (Rinfret and Kerwin JJ. dissenting): Plaintiff's appeal should be allowed and the judgment at trial restored.

Per curiam: Said amendment to plaintiff's pleadings at the trial was, having regard to the proceedings, discussions, and offering of terms to defendant, properly allowed, and plaintiff's pleadings, so amended, covered a claim founded in contract generally for breach of conditions implied under s. 15 of the *Sale of Goods Act*, R.S.O., 1937, c. 180.

Per Crocket, Davis and Hudson JJ.: Upon all the evidence there was warrant for the trial judge's finding as to the cause of the explosion and (though on the printed record a doubt as to such cause might exist in the minds of an appellate court) his finding should not be disturbed; and on that finding, and as the facts essential to give rise to the conditions implied by said s. 15 of the *Sale of Goods Act* were established, plaintiff was entitled to judgment for damages.

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Though the tank was not actually sold but only the acetylene gas contained therein, yet both were "goods supplied under a contract of sale" within the meaning of said s. 15 of the *Sale of Goods Act*. *Geddling* v. *Marsh*, [1920] 1 K.B. 668, cited.

Per Rinfret and Kerwin JJ. (dissenting): Upon the evidence, the cause of the explosion of the tank in question was a prior volume explosion; and whether that was so or not, there was not sufficient in the evidence to warrant the inference that the tank (assuming, but not deciding, that said s. 15 of the *Sale of Goods Act* applied to it) and its contents were not reasonably fit for the purpose for which they were intended or that they were not of merchantable quality.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of the trial judge, Chevrier J.) dismissed the action, which was brought to recover damages for personal injuries and damage to property caused by an explosion in the plaintiff's garage which the plaintiff alleged occurred by reason of defect in an acetylene gas tank delivered by the defendant to the plaintiff. The material facts of the case sufficiently appear in the reasons for judgment in this Court now reported. The appeal to this Court was allowed and the judgment at trial restored with costs throughout, Rinfret and Kerwin JJ. dissenting.

A. W. Beament K.C. for the appellant.

T. N. Phelan K.C. and *G. E. Edmonds K.C.* for the respondent.

The judgment of Rinfret and Kerwin JJ., dissenting, was delivered by

KERWIN J.—This is an appeal by J. Donat Marleau from a judgment of the Court of Appeal for Ontario dismissing an action brought by him against The People's Gas Supply Company Limited and thereby reversing the judgment of Mr. Justice Chevrier after a trial without a jury. The action should be dismissed, but as my reasons for that conclusion are different from those assigned by the Court of Appeal, it will be necessary to refer to the pleadings and the course of the trial and to state the facts in some detail.

The plaintiff was the owner of a building in the village of St. Isidore in the Province of Ontario, in which he conducted a garage business for the repair of motor cars, and

(1) [1939] Ont. W.N. 367; [1939] 4 D.L.R. 199.

he himself was a mechanic accustomed to doing acetylene welding. The defendant is a company engaged in the business of manufacturing and distributing acetylene and other gases. About the thirty-first day of March, 1937, the defendant delivered to the plaintiff, at his garage, two tanks of acetylene gas. There is no dispute as to the arrangement under which this delivery was made,—the plaintiff purchasing the quantity of acetylene in the tanks and agreeing to pay a rental for the containers. The smaller of the two tanks (Exhibit 8) was placed on the garage floor against the north wall and was never used in any way. From time to time, as occasion required, the larger tank (Exhibit 13) was used by the plaintiff in connection with his welding operations. On the night of May 28th, 1937, while Exhibit 13 was so in use, Exhibit 8 exploded, injuring the plaintiff and damaging the building and contents.

In his statement of claim, the plaintiff alleged that the explosion was caused through the negligence of the defendant by

> storing under compression acetylene gas in a defective and unsafe tank, the bottom part of which, not being properly and securely welded and affixed to the remaining portion, suddenly and violently separated from it with the resulting explosion.

The tank alleged to be "defective and unsafe" was Exhibit 8. The defendant denied negligence and it was on that basis that the action proceeded and the trial commenced. The trial continued for some days until the plaintiff's case was practically completed when counsel for the plaintiff applied to amend the statement of claim by adding the following:—

> The Plaintiff purchased the acetylene gas contained in the said tank from the Defendant and hired the said tank and the contents thereof (other than the said acetylene gas) from the Defendant having made known to the Defendant the purpose for which the said gas and tank were required and relying upon the skill or judgment of the Defendant, the said gas and tank being goods which it was in the course of the Defendant's business to supply. The said gas was purchased and the said tank was hired by description. The said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired and were not of merchantable quality. The damages suffered by the Plaintiff as herein set out were the direct and proximate result of the said goods not being reasonably fit for the purpose for which they were sold and/or hired and not being of merchantable quality.

This application was opposed by the defendant but the trial judge allowed it. The question of terms was dis-

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Kerwin J.

cussed, including one as to whether the trial should be adjourned for the purpose of giving the defendant an opportunity to prepare to meet the case put forward by the statement of claim as amended. Counsel for the plaintiff also offered to recall any or all of his witnesses so that they might be further cross-examined. After consideration, counsel for the defendant determined to proceed with the trial without asking for any adjournment.

Undoubtedly a trial judge has the right to grant an amendment during the trial of an action, and an appellate court may interfere with the judgment pronounced after such a trial, if the opposite party has suffered any injustice. In the present case the Court of Appeal considered that this had occurred but, in view of the facts that an adjournment was suggested and the privilege offered to counsel for the defendant to cross-examine again any, or all, of the plaintiff's witnesses, and that counsel then decided to continue with the trial, I am unable to agree. It is true that witnesses were present from a distance, including experts, but all these matters of expense could have been arranged. When counsel deliberately takes a stand under these circumstances, the party for whom he appears must abide by the consequences.

It was next argued that even with the amendment the defendant was only obliged to meet a claim of breach of contract confined to an allegation of negligence through a defective weld but the remarks of counsel for both parties on the motion to amend, and the amendment itself, are not, in my view, capable of that construction. As amended, the claim against the defendant is founded in contract, generally, as well as in tort.

From the amendment and the argument at bar, it appears that reliance is placed upon section 15 of *The Sale of Goods Act,* R.S.O., 1927, chapter 163, the relevant provisions of which are as follows:—

15. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(*a*) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied con-

dition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(*b*) Where goods are bought by description from the seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

It is said that these provisions clearly apply to the sale of the acetylene gas and that so far as the container is concerned, the plaintiff and defendant, as bailee and bailor for hire, are, in relation to the implied conditions, in the same position as vendee and vendor, citing *Hyman* v. *Nye* (1); *Vogan* v. *Oulton* (2). It is also contended that the tank, although not actually sold, falls within the meaning of the expression "goods supplied under a contract of sale" as used in section 15 of the Act, citing a decision of a Divisional Court, *Geddling* v. *Marsh* (3), and a decision of the New York Court of Appeals, *Haller* v. *Rudmann* (4), where the *Geddling* case (3) is referred to. There appears to be a difference of judicial opinion as to whether the obligation of a bailor is the same as that of a vendor but, in the view I take of the matter, it is unnecessary to determine the point.

The method of constructing tanks such as the one in question was described, and in fact the history of Exhibit 8 was given. It was not manufactured by the defendant but by a company in the United States. Steel plate of a certain specification was used to form a disc which was cut to the required length and a forged steel boss to carry a valve and a protecting cap was welded at the top. Through the bottom, the cylinder was next filled, under pressure, with an approved porous filler consisting of asbestos plug discs,—this filler serving two purposes, (1) as a carrying or distributing agent for acetone, (2) to break up acetylene into small cells so that in the event of ignition taking place, propagation of the flame would be prevented. A convex bottom was next placed in position and welded. (It might here be interpolated that on the question of negligence the trial judge found no defect, as alleged, in

(1) (1881) L.R. 6 Q.B.D. 685.
(2) (1898) 79 L.T. 384, (1899) 81 L.T. 435.
(3) [1920] 1 K.B. 668.
(4) (1937) 249 N.Y. 83.

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Kerwin J.

this welding, and in this I agree). Acetone was put in through the valve opening in the head of the tank. It was then subjected to an internal pressure of five hundred pounds of air and one out of the lot of two hundred, or less, that included Exhibit 8, was subjected to an internal hydro-static test of seven hundred and fifty pounds per square inch. A special ring was attached by shrinking around the bottom of the cylinder to protect the weld from abuse in service. Finally, in the convex bottom of the tank were inserted three fusible plugs each containing a core of some material having a low melting point, the purpose of these being to release internal pressure in the cylinder that might be built up due to external heat.

Exhibit 8 was sold by the manufacturer to the defendant in April, 1931. The history of the tank thereafter shows that from time to time the defendant charged the tank with acetylene gas and sent it to its customers. The method of charging was described and no fault has been found with it.

On the night of the explosion, May 28th, 1937, Marleau was welding a piece of metal and for that purpose was using Exhibit 13 in conjunction with an oxygen tank, the two being strapped together on a carrier or holder. Marleau was standing, facing north and seven to ten feet easterly from Exhibit 8, which still stood on the garage floor near the north wall and which had never been used. He completed the welding operation, changed the torch from his right to his left hand, turned off the supply of oxygen, and was about to turn off the acetylene when he heard an explosion, "felt a kind of forced air" on his left side, and became unconscious.

There was a pit in the garage that had been constructed in order to permit mechanics to work underneath motor cars. Marleau was found, after the explosion, in this pit,—about twenty feet from where he had been standing. He was taken outside where it was discovered he had been burned on the hands and face, and the front part of his trousers and underwear had been torn away half way to his hips. An employee who had been working in the pit heard an explosion, felt a rush of air from the direction of the north wall and "something" burned him. The roof was blown off the garage and part of the walls knocked

down. One of two men who were standing near a motor car on the floor of the garage was killed. A dent was discovered in the cement floor just where Exhibit 8 had been standing; the weld-protecting ring that had been on the tank was found on the garage floor as was also the bottom of the tank but, instead of the latter being convex to the inside of the tank as it was prior to the explosion, it was concave. Two of the plugs from the bottom of the tank were picked up in the garage, not fused, and from the evidence it seems clear that they were forced out of their position when the bottom of the tank was deformed. The rest of the tank was found partly buried in the earth at a distance of about three hundred feet from the position it had occupied in the garage. The plugs in the bottom of Exhibit 13 had fused. This tank, Exhibit 13, and the oxygen tank that had been in use with it, were found on the floor but, except for the gauge on the oxygen tank and the hose, undamaged.

The theory of the plaintiff was that Exhibit 8 had exploded from some internal cause, while the theory of the defendant was that there had been a prior external volume explosion in the garage, which caused Exhibit 8 to explode. It is common ground that an acetylene tank such as Exhibit 8 would explode only from one of these two causes, or from external heat, and it is also common ground that in view of the fact that the plugs on Exhibit 8 had not fused, the last alternative was excluded.

I agree with the trial judge that *res ipsa loquitur* does not apply. The tank was not under the control of the defendant at the time of the explosion as were the premises in question in *United Motors Service Inc.* v. *Hutson* (1). In *Donoghue* v. *Stevenson* (2), there was no doubt about the snail being in the bottle. In *Grant* v. *Australian Knitting Mills Ld.* (3), it was shown that the woollen garment, when purchased from the retailer, was in a defective condition owing to the presence of excess sulphites.

The question remains as to what caused Exhibit 8 to explode. The trial judge decided that there was no prior volume explosion and that, therefore, there remained only the plaintiff's theory to account for the explosion, and that there must have been some defect in the construction of

(1) [1937] S.C.R. 294. (2) [1932] A.C. 562.
(3) [1936] A.C. 85.

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Kerwin J.

the tank or in the method of charging it with acetone or acetylene gas. The issue does not depend upon the credibility of witnesses but upon the inference to be drawn from undisputed facts. What the proper inference should be may give rise to a difference of opinion and, after anxious consideration of the evidence, I have concluded that there was a prior volume explosion.

We have not here a case of Exhibit 8 standing in the garage and with nothing else occurring in the building that could have no possible relevance to an explosion. The opinion of Mr. Hazen, an expert called by the defendant, that there was a flash-back in the hose stretching from the torch to Exhibit 13 is corroborated by other evidence. Even Stryker, a witness called for the plaintiff, admitted that there might have been a flash-back. Mr. Hazen was also definitely of opinion that following this flash-back, there was a volume explosion in the garage, although he could not say exactly what caused it. He pointed to the elliptical form of the sides of Exhibit 8 after the explosion, and I agree that it is impossible to believe that this deformation was caused when the shell hit the ground some distance away. In view of the condition of the top of Exhibit 8, I find it difficult to believe that that tank went through the roof of the garage before there had been a prior explosion causing the roof to be moved. There is also the evidence of the witness Dumas, who on the night in question was on the same street as the garage and about three hundred feet south of it, and who testified that he heard three detonations, the first two being not as loud as the last.

I have not overlooked that Mr. Pitts, the manager of the defendant company, testified that the presence in the tank of acetone was not a safety factor. In this he is quite wrong, as Mr. Hazen was clear that the absence of acetone, or a sufficient quantity of it, would have a tendency to make the tank more liable to explode. But, as a practical matter, Mr. Pitt's erroneous opinion has no application. The presence of acetone allows the tank to be charged with a greater quantity of acetylene than would otherwise be the case, and from the records it appears that the weight of Exhibit 8, without any acetone, was ninety-three pounds; the acetone put in by the manufac-

turer was twenty pounds; on each occasion that the tank was returned to the defendant, it was weighed in order to discover if it were deficient in acetone, and on three occasions acetone was added.

Assuming that section 15 of *The Sale of Goods Act* applies to the container as well as the acetylene gas, my view is that there was a prior volume explosion which caused Exhibit 8 to explode. Whether that be so or not, there is not sufficient in the evidence to warrant the inference that the tank and its contents were not reasonably fit for the purpose for which they were intended or that they were not of merchantable quality. I would dismiss the appeal with costs.

CROCKET J.—This action, as originally brought, claimed damages to the amount of $25,666.90, for the destruction of the plaintiff's garage and contents as well as other property and for personal injury suffered by the plaintiff in consequence of the explosion of an acetylene gas tank, through the alleged negligence of the defendant in storing acetylene gas in a defective and unsafe tank, the bottom part thereof "not being properly and securely welded and affixed to the remaining portion."

The respondent in its statement of defence admitted that it was the manufacturer and distributor of acetylene and other gases, but alleged that it did not manufacture tanks in which to distribute the gas but purchased them from a reliable manufacturer, and that if the tank in question was defective or unsafe it had no knowledge thereof. It also pleaded unavoidable accident and alternatively that the accident was due entirely to the negligence of the appellant.

The plaintiff joined issue on the statement of defence and gave notice that he desired the issues of fact to be tried by a jury, but when the case was called for trial at the L'Orignal sittings of the court in March, 1938, the presiding judge (Chevrier, J.) granted a motion of the defendant's counsel to strike out the jury notice on the ground that the pleadings involved the consideration of technical questions and expert testimony relating to the cause of the explosion, and the action was consequently one that could better be tried without a jury. The action, therefore, was tried as a non-jury case.

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Crocket J.

After the trial had continued for several days and the plaintiff's expert witnesses had been examined, cross-examined and re-examined as to the possible causes of the explosion, Mr. Beament, who had then joined Mr. Marion as the plaintiff's counsel, made an application to amend the statement of claim by adding a claim for breach of the implied conditions of the contract of sale and hire, under which the acetylene gas had been delivered to the plaintiff in the said tank, in that the said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired, and were not of merchantable quality. Although Mr. Phelan, the defendant's counsel, strenuously objected to the allowance of the amendment upon the ground that it would shift the whole basis of the plaintiff's case from one of tort to one of contract and seriously prejudice the defendant if the trial were proceeded with upon that basis, inasmuch as he had in the preparation of the defence naturally considered the case only from the point of view of negligence, he stressed on the other hand the great expense already incurred by the defendant in connection with the attendance of its expert witnesses, which could not be fully compensated for by any terms that could well be granted on the suggested order for adjournment. At the same time he admitted that the facts involved were the same, whether the question of the defendant's liability were considered from the viewpoint of negligence or that of breach of contract. After a long discussion between His Lordship and counsel, in which it appeared that the plaintiff did not intend to adduce any further evidence and offered to recall any witnesses already examined in order that the defendant's counsel might cross-examine them further if he desired and to submit to any terms that might be imposed, His Lordship intimated that he would allow the amendment, and granted a recess for two hours to afford Mr. Phelan an opportunity of considering whether he should prefer to have the trial adjourned to the next court or to proceed. When the court reconvened Mr. Phelan announced his decision to proceed with the trial and expressly stated that he did not desire to further examine any of the plaintiff's witnesses. The trial was accordingly proceeded with upon the pleadings as amended and con-

tinued for another two or three days, which were mostly occupied with the evidence of Mr. Coakley, factory manager of the Pressed Steel Tank Co., of Milwaukee, from whom the defendant had purchased the alleged faulty tank and many other similar tanks, and that of two other expert witnesses. Practically the whole of the testimony of these three witnesses was directed to the defendant's claim that the explosion of the alleged defective tank, described in the case as Exhibit No. 8, was caused by a so-called external volume explosion, which had occurred in the garage immediately before in connection with a welding job, on which the plaintiff was engaged at his bench from 7 to 10 feet distant from that tank, though he was making no use of it for that purpose, and it had not been used since its delivery to the garage some weeks before.

At the conclusion of the evidence the learned trial judge heard the arguments of opposing counsel and reserved judgment thereupon. This he delivered some weeks later. While stating in his reasons therefor that he could not find that the weld was defective, as alleged in the original statement of claim, he did expressly find that the tank exploded through no fault of the plaintiff and that its explosion was " due to some defect in the internal structure or set-up of the cylinder, using the words in their widest application", and further "that the cylinder exploded by reason of extremely high internal pressure only, due to some internal structural defect," and that it was not of merchantable quality. He allowed the plaintiff $13,565.95 for the damages sustained thereby.

The defendant thereupon appealed to the Court of Appeal, which allowed the appeal and dismissed the action with costs on the ground that it was not open to the trial judge to enter upon a consideration of all the possible causes of the explosion or "to find that the explosion was due to some unknown defect in the cylinder not alleged by the plaintiff, and the nature of which the evidence does not disclose."

It is quite apparent, I think, from the reasons given for the judgment on appeal that the court altogether ignored the amendment of the plaintiff's statement of claim, which the trial judge granted on the trial in the circumstances

1940
MARLEAU
v.
PEOPLE'S
GAS SUPPLY
CO. LTD.
Crocket J.

above stated, and treated the case as one which could only be determined upon the basis of the original claim for negligence in connection with the improper and insecure welding of the base to the remaining portion of the tank.

With all respect, I am of opinion that the Court of Appeal was not justified in so holding, in view of the course of the whole trial and particularly of the defendant's election in the circumstances above stated to proceed with its defence on the amended statement of claim rather than take the suggested adjournment on terms, and that the defendant was in no way prejudiced by the amendment. It was, to my mind, not only open to but the duty of the learned trial judge to determine the question of the liability of the defendant for breach of the implied conditions of the contract of sale and hire under the added claim, as well as that for the negligence first charged. Although founded on tort, the claim was one which manifestly arose out of the relationship of purchaser or lessee and vendor or lessor as between the plaintiff and the defendant, and necessarily involved proof of the existence of some fault in the tank in question, to which its explosion and the resulting damage was attributable. The defendant's own plea of unavoidable accident or, in the alternative, that the evplosion of the tank was entirely due to the negligence of the plaintiff, called for the full investigation of all possible causes of the tank's explosion, and it was indeed to that issue, as the record discloses, that practically the whole of the evidence, apart from that bearing on the assessment of damages, was directed from the beginning to the end of the trial. The Court of Appeal having erroneously, as we think, concluded that, notwithstanding the allowance of the amendment, the case could not be considered as involving any claim for breach of the implied conditions of the contract of sale and hire beyond that charged in the original statement of claim, the question remains as to whether upon that branch of the case the learned trial judge was warranted in holding the defendant responsible for the explosion as having been caused by some internal structural defect in the tank, and for the damages the plaintiff sustained as a direct consequence thereof. Although the amendment itself does not say so, it is clear that the claim thereunder is based upon the law

as declared in s. 15 of the Ontario *Sale of Goods Act*. This enactment is in its terms the same as that contained in s. 14 of the Imperial *Sale of Goods Act, 1893*, 56 & 57 Vict., ch. 71, and, like the latter, is a codification of principles long recognized by the common law of England. It cannot be questioned, I think, that the amendment sets up a good and valid cause of action. Whether there was a sale only of the acetylene and a mere bailment of the tank, there can be no doubt that the acetylene could only be supplied in a tank of a particular description nor that both the acetylene and the tank were supplied by the defendant under a contract of sale within the meaning of the law, as declared by s. 15 of the Ontario *Sale of Goods Act*. See *Geddling* v. *Marsh* (1).

Apart from the cause of the explosion, there was no serious dispute as to any of the factors essential to fix the defendant with responsibility as seller under the added claim. It was admitted that the defendant company was a manufacturer and distributor of acetylene and other gases, which could only be supplied to its customers in tanks specially designed and constructed in order to insure their safe transportation and storage when charged. The gas and tank, therefore, were clearly goods of a description, which it was in the course of the defendant's business to supply, and were in fact supplied to the plaintiff under its agreement of sale. That the defendant knew the particular purpose for which this and other similar tanks, charged with acetylene and oxygen, were required and, in the circumstances, that the plaintiff relied on the skill or judgment of the defendant, not only in relation to the manufacture of the gas, but the safety and security of the tanks in which the gases were delivered, can hardly be questioned upon the evidence as it appears in the record. The contract of sale, under which the defendant supplied these tanks and their contents to the plaintiff, must be taken, I think, to have carried with it an implied warranty that they were, not only of merchantable quality, but fit for the particular purpose for which they were supplied.

Both parties clearly recognized that the essential issue centred in the cause of the tank's explosion, and that the explosion could only have been brought about by one or

(1) [1920] 1 K.B. 668.

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Crocket J.

other of three possible means. These were described as: 1st, the application of considerable external heat; 2nd, external violence or concussion such as a prior or contemporaneous volume explosion, and 3rd, internal defect in the tank itself. It was common ground that if the first two of these possible causes were negatived, the explosion was necessarily attributable to the third. Mr. Coakley, the factory manager of the Pressed Steel Tank Co., from whom the defendant purchased this and other acetylene gas tanks, was asked if it was fair to say that this cylinder, Exhibit No. 8, did not explode by reason of any locally applied heat. His answer was:

A. The examination of it does not reveal evidence of any locally applied heat.

Q. And, if it did explode by reason of any locally applied heat, it would not comply with the Canadian Railway Commission specification No. 8, would it? Isn't that correct? A. That is correct.

Q. So that you would not suggest that it could be locally applied heat that caused this cylinder to explode? A. I don't see how it could be.

Q. So that we have eliminated one possible cause? A. No, it could be in a fire and heat would explode it. Locally applied heat is heat applied at only one point.

Q. There is no evidence of anything like that, is there? That external fire caused this explosion? A. I can't honestly say there is.

Q. In point of actual fact, I notice from the base of the tank that it looks as though those fusible plugs had been forced out? A. That would happen due to the bottom being reversed, the holes becoming larger.

Q. Whereas, if the cylinder had been subjected to heat, the plugs would have fused? A. Yes.

Q. Rather than being forced out, as they appear to have been? A. Yes.

Q. So that, in your opinion, would negative the theory that this cylinder exploded by reason of extraneous heat? A. I can't see any reason for that.

Q. Now we are down to two possibilities, external shock or inherent vice in the cylinder itself? A. That is right.

Q. And if the evidence were to satisfy His Lordship that this explosion of the cylinder, Exhibit No. 8, were not caused by external shock, then we would be left with one thing only, inherent vice? A. Yes, sir.

The following questions and answers on the same subject appear in the cross-examination of Mr. Pitts, the President and General Manager of the defendant company:

Q. If a cylinder explodes without any abnormal external cause, would that be evidence that the cylinder was defective in some respect? A. I think so, yes.

Q. That is, either the cylinder or its contents? A. Yes.

Q. Should a proper cylinder of that kind, properly charged, explode? A. No.

Q. And if, without any other cause, it does explode, that is evidence that either the cylinder or its contents are defective? A. Without any other cause, yes.

* * *

Q. And a cylinder that will explode without external cause, you would hardly say it is fit for the purpose for which it is intended? A. If it exploded without any cause, I would say it was an unfit cylinder.

And from the cross-examination of Mr. Hazen, Vice-President of the Milton Hershey Co., Montreal—the defendant's principal independent expert witness:

Q. Now, talking of a cylinder in good condition and properly charged, you came to the conclusion that it can only be set off by one of two methods. I wrote them down as you gave them. The first one was violent concussion and the second one was the application of heat, and then you paraphrased "Violent concussion" by saying "violent shock." Is that right? A. Yes.

Q. So that, if this cylinder exploded, and assuming that, as you have sworn, that it was a cylinder in good condition, it must either have been the subject of the application of considerable heat or it must have been the subject of a violent concussion. Is that correct, Mr. Hazen? A. I would say so, yes.

Q. So that, if the evidence were to establish that, prior to the explosion of this cylinder, it had not been subjected to the application of considerable heat, nor had it been subjected to any violent concussion then we would be left with the only conclusion that it exploded by reason of some defect in the cylinder or in the contents themselves? A. That would be true, yes.

With external heat definitely eliminated as a possibility, as was conceded all around, there remained but one thing, other than inherent defect, to account for the explosion of the cylinder, Exhibit No. 8, viz.: that it had been subjected to concussion from a prior or contemporaneous volume explosion in the garage, whereby the internal pressure in this cylinder had been so increased as to cause it to blow up. Although Professor Jamieson of McGill University, another expert witness examined for the defence, testified that in his opinion an internal pressure must have developed of at least 1,350 pounds to the square inch before the cylinder blew up, and that a volume explosion such as Mr. Hazen had suggested could have increased the internal pressure in a cylinder to that extent, the defendant's whole case in support of the hypothesis of a prior volume explosion in the garage rested in the main on the suggestion of Mr. Hazen that a so-called flash-back had occurred in the oxygen tube of the welding apparatus the plaintiff was using at the time, from which flash-back a volume explosion might have developed in the garage by

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Crocket J.

reason of its releasing gases, which subsequently became ignited. The oxygen tube, in which he suggested the flash-back occurred, led, of course, from the oxygen tank the plaintiff was using, and this naturally in conjunction with an acetylene tube leading from another tank containing acetylene, described as Exhibit No. 13, to the welding torch, in which the mixture of the two gases was controlled by valves. The oxygen and acetylene tanks were braced together on a rack situated a few feet east of the welding bench where the plaintiff was doing his welding job. Yet Mr. Hazen admitted that if gasolene fumes were the basis of the suggested volume explosion "they naturally did not come from the acetylene tank," and that, as far as gasolene fumes were concerned, the flash-back had nothing to do with it. It is somewhat difficult to follow his varying statements in this connection, and I therefore quote from his evidence precisely as it appears in the record of his cross-examination:

Q. Assuming for a minute that it was gasoline fumes that caused this volume explosion, that heat of the torch itself would have been sufficient to ignite those fumes, would it not? A. Yes.

Q. And, therefore, the flash-back would have nothing to do with the ignition of gasoline fumes, if it were gasoline fumes that caused that explosion? A. I think not.

Q. That is correct? A. I think so.

Q. So that, if the explosion was caused by gasoline fumes, the flash-back has no relevancy? A. Not at all.

* * *

By His Lordship: Q. Mr. Beament asked if your conclusion was that the only relevancy of the flash-back is if it was the cause of releasing from the acetylene tank in use sufficient acetylene to form an explosive mixture in the garage. A. It might have ignited them. I don't think it is likely, but it might have.

By Mr. Beament: Q. Would not the torch itself have ignited the gasoline fumes without any flash-back? A. The torch? It would probably be out when the flash-back occurred.

Q. Mr. Hazen, please. If there were gasoline fumes in that room, they didn't come there suddenly, like that (snapping fingers)? A. No.

Q. Then the torch was going, admittedly, or certainly up to the time when the flash-back occurred. Isn't that true? A. Yes.

Q. A flash-back could not occur unless the torch was going? Isn't that true? A. Certainly.

Q. Could a flash-back occur if the torch wasn't burning? A. Certainly not.

By His Lordship: You are going to leave me under the impression that there were gasoline fumes in the garage. I can assume for the sake of argument that there were. But I do not know whether there were or not.

By Mr. Beament: I am trying to eliminate gasoline fumes as a possibility, my Lord. I am trying to get the witness to say if there had been gasoline fumes in that garage, they would have been ignited long before by the torch.

By Witness: That is so.

By Mr. Beament: Q. So that the flash-back has no relevancy to the ignition of the gasoline fumes? They would have been ignited anyway? A. Yes, they would.

Q. And, when we finally get down to it, the only thing to give relevancy to the flash-back is that it might have caused the escape of acetylene from the cylinder, Exhibit No. 13. Is that the only relevancy of the flash-back, that it might have caused the escape of acetylene from Exhibit No. 13? A. Yes, the flash-back might have caused the release of gases from the cylinder in use, Exhibit No. 13.

Q. That is the only relevancy of the flash-back? A. As far as that cylinder is concerned.

Q. As far as anything is concerned? A. Yes, I think so.

Q. Then the only relevancy of the flash-back was that it might have caused the release of acetylene fumes from Exhibit No. 13 which, on ignition, might have exploded? A. I think so.

Q. You have examined the cylinder, Exhibit No. 13? A. Yes.

Q. And you tell me that, as far as your examination would disclose, there was nothing defective about it? A. That is true, except that the plugs were melted out.

Q. But that has no relevancy to our discussion at the present time? A. Not now.

Then he admitted that the valve equipment that was on Exhibit No. 13 had not in any way been affected by the explosion and that there was no apparent place from which anything could escape, so that if there was an escape of acetylene consequent on the flash-back, if there was a flash-back, it must have taken place after the acetylene had passed through the valve. I may say here that both the acetylene and oxygen tanks, which the plaintiff was using in his welding job when the explosion occurred, admittedly were found intact on the floor of the garage after the explosion and also numerous pieces of burning asbestos saturated with liquid acetone containing acetylene in solution, which could only have come from the cylinder Exhibit No. 8 when it exploded. There was also evidence of portions of rubber oxygen and gasolene tubes of the welding apparatus having been burned in varying degrees while a length of about 7 feet of the rubber hose was entirely missing, which Mr. Hazen admitted might have been burned by an external flame.

Whether the balance of probability lay on the side of the defendant's claim that Exhibit No. 8 blew up in consequence of a prior volume explosion caused by a flash-

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Crocket J.

back in the welding apparatus or on the side of the plaintiff's claim that it exploded in consequence of its own internal defect was the problem which it was the special duty of the learned trial judge to determine. This involved a careful consideration, not only of the testimony of Mr. Hazen and the other expert witnesses for the defence, but of the whole evidence on both sides, which the record shews His Lordship followed with the closest possible attention throughout. Having concluded, as he did, "that the cylinder exploded by reason of extremely high internal pressure only, due to some internal structural defect," I am not, after anxious consideration of all the relevant testimony, prepared to say that that finding was wrong, or that there was not sufficient evidence to warrant it.

I would therefore allow the appeal and restore the trial judgment with costs throughout.

DAVIS J.—The action out of which this appeal arises was brought by the appellant, the owner and operator of a garage and motor car repair shop, against the respondent company, which is a manufacturer and distributor of acetylene and other gases, for damages for personal injuries and property loss sustained by him as the result of an explosion on his premises. The explosion was a very severe one, as is shown by the amount of the damages, and assessed by the trial judge at $13,565.95.

That a particular steel tank filled with acetylene gas which the respondent had sold and delivered under contract to the appellant had actually exploded on the appellant's premises at the time and in the place complained of, is not in dispute. The base of the tank or container (commonly called "the cylinder") was found after the explosion on the floor of the garage, while the body of the tank, which had been blown through the roof of the garage, was found with its nose embedded in a field some 200 feet away from the garage. The explosion, whatever was its cause, practically demolished the garage building, killed a customer who was standing in the garage near an open door and caused serious and permanent injuries to the appellant himself.

The appellant in the ordinary course of his business carried on welding operations by the use of a mixture of oxygen and acetylene gases. The respondent manufac-

tured and distributed both these gases and the appellant regularly purchased his supplies of these gases from the respondent. The respondent did not itself manufacture the tanks or containers into which it put the acetylene gas but it supplied and delivered the gas in tanks or containers which its customers were required to return when the contents had been used. The container was not to be retained for more than 90 days and a nominal charge per week was made for its retention after 30 days. When the explosion in question occurred the 90 days had not expired, though nothing really turns on that point.

There is no direct evidence as to how the explosion actually occurred and a mass of evidence was given, including much expert testimony, in an endeavour to indicate what really happened, but, as might well be expected under such circumstances, the real cause can only be inferred from the known facts.

Mr. Phelan, counsel for the respondent, in a very careful review of the evidence which extended to two large printed volumes, left me in a great deal of doubt as to what was the real cause of the explosion that did all the damage—in fact I think I should lean to the view that the explosion of the particular tank in question may have been caused by something that occurred at the moment in the welding apparatus which the appellant had been operating some 10 or 15 feet away from the corner of the building in which the particular tank had been resting for some two months, awaiting use when the contents of another tank then in use had been exhausted. This welding operation was being done on a table and the apparatus consisted of a torch and two rubber tubes leading from two separate tanks on the floor, one tank of oxygen and the other of acetylene. The appellant had finished his welding and had turned off the supply of oxygen to his welding torch and was preparing to turn off the acetylene when the explosion occurred. It is difficult for me to believe that the unopened tank in question resting on its weight in the corner exploded of itself. But on the other hand, if the initial explosion occurred in the welding operation it is strange that the two tanks being used in the welding operation remained intact where they were on the floor near the welding table. From each of these tanks rubber hoses had led to the welding torch and the flow of gas

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Davis J.

was controlled by valves on the hoses. It is a question of fact, and the learned trial judge saw and heard a great many witnesses and, it is plain, very carefully followed the evidence. It requires more than a doubt or suspicion on my part, merely reading the printed evidence, to disturb the finding of fact of the trial judge. One thing is plain on the evidence and that is that the acetylene tank in the corner exploded and that it could not have exploded except from one of three causes: (1) external heat, or (2) external force, or (3) some inherent defect. No one suggested that there was any external fire or heat, and the trial judge has found definitely that the explosion was not caused by any external force, though the respondent's evidence was directed towards the theory that it was the force of an earlier explosion, called a "flash-back," in the hose of the oxygen tank which the appellant had been using in his welding operation that had caused the unused and unopened acetylene tank in the corner to explode. There seems to me to be much to support that theory and I was impressed with it; but the trial judge, after seeing the witnesses and hearing all the evidence, expressly excluded this as the cause. The trial judge was very definite on that point:

> I am also convinced that the explosion of the cylinder was not due to what has been described as outside concussion, due to external violence, as for instance from a volume explosion.

Further, the trial judge found as a fact that the cylinder did not explode through any fault of the plaintiff.

That left only some inherent defect in the tank or its contents as the cause of the explosion. The properties of acetylene gas and the complex process of handling and transporting the gas are, with detailed references to the evidence, set out in the respondent's factum as follows:

> The cylinders are made of steel plate, of a specified strength; drawn to produce a shell. Into the top of the shell is welded a boss which carries the valve and valve cap. Before the bottom is welded on, the cylinder is completely filled with an approved porous filler—asbestos, which is put in under pressure of 80 to 100 pounds. This filler serves to break up the mass of acetylene gas which later is compressed into the tank, so that in the event that ignition takes place, propagation of the flame is confined to the small spaces in the porous filling. In the base of the tank are inserted three fusible plugs; the metal of which fuses at 212 degrees Fahrenheit, and thereby the compressed gases are released without explosive force. The bottom is then welded on to the cylinder. The tanks are then subjected to pressure tests of 500 pounds. * * *

Into the porous filling of the tank so constructed is inserted a liquid known as acetone which dissolves the acetylene gas later forced into it under pressure. The acetone dissolves about twenty-five times its own volume of gas, thus increasing the economy of the container and furnishing at the same time a very definite safety factor because the acetone tends to prevent disintegration of the acetylene.

The learned trial judge in carefully considered written reasons gave judgment in favour of the appellant for the amount of the damages upon the finding that "the explosion was due to some defect in the internal structure or set-up of the cylinder, using the words in their widest application." The respondent appealed to the Court of Appeal for Ontario and its appeal was allowed and the action was dismissed with costs. From that judgment an appeal was taken to this Court.

The real difficulty in the appeal turns on the pleadings. The difference between the view of the case taken in the Court of Appeal and my own view of the case is a difference in what is to be taken as the proper interpretation of the pleadings. The appellant in the first place put his claim in tort, and solely in tort, in the statement of claim. I quote paragraphs 2, 3 and 4 of the statement of claim:

2. On or about the 31st day of March, 1937, the defendant delivered or caused to be delivered to the garage of the plaintiff two tanks of acetylene gas required by the plaintiff.

3. The plaintiff carefully put aside, for future use, one of those tanks in the exact condition in which it was received from the defendant and proceeded to use the other tank for welding operations and was still using it for that purpose in the evening of May 28th, 1937, when the unused tank, through no interference or fault whatsoever on the part of the plaintiff or anyone in or near the garage, suddenly exploded.

4. The plaintiff alleges that the explosion was caused or brought about by and through the sole negligence of the defendant, its servants and employees, in storing under compression acetylene gas in a defective and unsafe tank, the bottom part of which, not being properly and securely welded and affixed to the remaining portion, suddenly and violently separated from it with the resulting explosion.

At the trial, after the plaintiff had put in all his evidence over a period of some six days, his counsel moved the trial judge to grant an amendment to the statement of claim. The amendment asked for was in the following words:

5. (*a*) The plaintiff purchased the acetylene gas contained in the said tank from the defendant and hired the said tank and the contents thereof (other than the said acetylene gas) from the defendant having made known to the defendant the purpose for which the said gas and

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Davis J.

tank were required and relying upon the skill or judgment of the defendant, the said gas and tank being goods which it was in the course of the defendant's business to supply. The said gas was purchased and the said tank was hired by description. The said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired and were not of merchantable quality. The damages suffered by the plaintiff as herein set out were the direct and proximate result of the said goods not being reasonably fit for the purpose for which they were sold and/or hired and not being of merchantable quality.

The application for the amendment was opposed by counsel for the respondent and there was considerable argument by counsel for both parties as to the amendment sought to be made. The appellant's counsel made it plain that he did not desire to offer any further testimony in the case even if the amendment were granted but simply desired to set up on the facts that had been already proved a case against the respondent in contract upon the ground that the acetylene gas and tank which had been supplied under a contract of sale were not reasonably fit for the purpose for which they had been supplied and were not of merchantable quality, and that the damages suffered by the appellant as disclosed in the evidence were the direct result. During the discussion on the application for the amendment Mr. Phelan said very properly that

> the object of [the proposed amendment] is to shift the whole basis of the plaintiff's case from one of tort to one of contract. It is true that the facts are the same, as my friend says, but the application of those facts to the law is quite a different problem.

The trial judge expressed the view that, the trial having then gone on for so many days and the amount claimed being a large amount, he was inclined to allow the amendment. "I think a very great hardship would be occasioned if I limited the scope of the action." After a couple of hours' adjournment in which the respondent's counsel was given time to consider whether he would go on with the defence or take advantage of the trial judge's offer that the case could stand over till the next sittings of the Court (the case was being tried at L'Orignal without a jury), Mr. Phelan stated that the defence would go on rather than have the case stand over. The amendment was treated as duly made to the pleadings, and the trial proceeded.

There was no proof at the conclusion of the plaintiff's case when the amendment was asked for, nor any proof

on the whole of the evidence, of the act of negligence alleged in the original pleading that "the bottom part" of the tank had not been "properly and securely welded and affixed to the remaining portion." And it is not contended by counsel for the appellant that there was any such proof. Obviously that was apparent to counsel for the appellant at the close of the plaintiff's evidence and was the practical reason for the amendment to put the case on the contractual relationship that existed between the parties on the sale of the acetylene gas. But when the case got to the Court of Appeal that Court took the view that the amendment must be treated as limited to the particular cause of complaint set out in the original statement of claim, that is, that the bottom part of the tank had not been properly and securely welded and affixed to the remaining portion, and that that was the only issue which the Court could consider. There being no evidence to support a claim based on that narrow ground, and that feature of the case being really conceded by the present appellant, the Court of Appeal appear, as stated by counsel to us, to have taken the view that the whole evidence could not properly be reviewed and considered by the Court on the wider basis of a claim in contract for failure to supply the goods reasonably fit for the purpose for which they had been sold. When the case came before this Court, without deciding at the time whether the amendment should be treated as so limited or not, we heard argument upon the whole of the evidence as if the amendment were wide enough to found the action in contract on the ground of failure by the vendor to supply the goods under the contract to the purchaser in reasonably fit condition. I think we are all of the opinion that the amendment cannot properly be read as limited to a claim in contract based solely on the allegation that the bottom part of the tank had not been properly secured to the upper portion. It must be apparent that such an amendment would have served no practical purpose, because, if it could not be proved as a fact that the welding at the base of the container had been defective and that that caused the explosion, then it did not matter that proof of negligence in that respect might not be necessary in an action on a contract for the sale of goods though it would be necessary in an action in tort, or, to put it another way, if you proved

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Davis J.

as a fact that the welding at the base of the container had been defective it would, in the case of a highly explosive liquid, be *per se* evidence of negligence and you would not need to fall back on a claim in contract. The practical view of the amendment, as it suggested itself to the trial judge as well as to counsel for the respondent was, in the words of Mr. Phelan during the discussion of the proposed amendment as above referred to, "to shift the whole basis of the plaintiff's case."

It is to be regretted that we have not had the advantage of a consideration of the case by the members of the Court of Appeal on the basis of the amendment being wide enough to cover a case of goods supplied under a contract of sale. The provisions of sec. 15 of the Ontario *Sale of Goods Act* (R.S.O., 1937, ch. 180) follow the Imperial Act, 56 and 57 Vict., ch. 71, sec. 14, in that where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose. And, further, when goods are bought by description from the seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality.

There can be no doubt on the evidence that the appellant as a motor car repair man was a regular customer of the respondent in the purchase of oxygen and acetylene gases for the purpose of his business, and that the respondent was a manufacturer and distributor of these gases and knew the particular purpose for which the gases were required and that the buyer relied on the seller's skill and judgment. That being so, and the facts in evidence being found by the trial judge to establish that the explosion of the acetylene tank in question was not caused by any external heat or by any external force or concussion but was caused by some inherent defect, the appellant was entitled to succeed in his action on the basis that the goods "supplied under a contract of sale," to adopt the exact words of sec. 15 of the *Sale of Goods Act*, were not

reasonably fit for the purpose for which they were sold and that the breach of the statutory condition was the direct cause of the appellant's damages.

Something was said during the argument that, the tank or container not being sold but only its contents, the *Sale of Goods Act* could not apply to the container. But both the container and its contents were "goods supplied under a contract of sale." *Geddling* v. *Marsh* (1).

Some of the items in the assessment of damages, particularly with reference to the wife's illness, may be doubtful, but no serious objection was taken before us to the amount of damages assessed by the trial judge, and I do not think, in any event, that we should be justified in considering any revision of the items upon which the learned trial judge reached his ultimate amount.

For the reasons above given, the appeal should, in my opinion, be allowed and the judgment at the trial restored with costs throughout.

HUDSON J.—I am in general agreement with the views expressed by my brothers Crocket and Davis. My chief difficulty was to ascertain, if I could, the immediate cause of the explosion of the cylinder supplied by the defendant. On this question, the learned judges of the Court of Appeal did not find it necessary to come to a conclusion.

Consideration of the evidence in the record leaves me in considerable doubt and, under these circumstances, I deem it my duty to accept the decision of the learned trial judge. See remarks of Lord Esher in *Colonial Securities* v. *Massey* (2); *Bigsby* v. *Dickinson* (3).

I would, therefore, allow the appeal and restore the judgment at the trial with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *L. P. Cecile.*

Solicitor for the respondent: *G. E. Edmonds.*

(1) [1920] 1 K.B. 668.
(2) [1896] 1 Q.B. 38.
(3) (1876) 4 Ch. D. 24.

INDEX

ASSESSMENT AND TAXATION— *Continued*

acted that "lands and other immoveables held as owner and occupied by the corporation for the above purposes are assimilated to the property of educational establishments as to exemptions from municipal and school taxes." Subsequently, the appellant association became owner of a property situated in the city respondent, it consisting of a large building in which there were offices, a theatre, a skating rink, badminton courts, billiard rooms, bowling alleys and restaurants. The theatre, two of the offices, and the skating rink were leased and a general admission fee was charged by the association for the privilege of using the other entertainment places, there being no difference in the fee depending on whether one of the public was a member of the association or not. But there were two offices used by the association, one being occupied by a priest acting as chaplain and co-manager and the other serving as library and meeting hall for the members. The respondent city sued the appellant association for $4,060.64 for municipal and school taxes imposed for the fiscal years of 1936 and 1937. The appellant took the ground that its property was exempt from these taxes under the amended statute above mentioned; and it also urged that the chaplain's office and the library room, being used for the purposes of the association, and therefore not taxable, had been illegally assessed for taxation and that the whole valuation of the appellant's property was null and void; but, in its conclusions, the appellant merely asked for the dismissal of the respondent's action. Judgment was rendered by the Recorder's Court in favour of the respondent for the amount of its claim, less the sum of $94.35, the Recorder exempting the two offices from taxation; and that judgment was affirmed by the appellate court. There was no cross-appeal in that Court or in this Court as to the partial exemption granted by the trial judge. *Held* that the judgment appealed from should be affirmed and the respondent city's action maintained. *Per* Rinfret, Crocket, Hudson and Taschereau JJ.—The theatre, the arena, the rented offices and the restaurants constituted for the benefit of the appellant association sources of revenues; and consequently the latter could not benefit from the exemption of taxes provided by the statute. The appellant's rights are the same as those of the religious institutions or educational establishments; and the clause creating an exemption from taxes has its application only when the properties are occupied by them for the purposes for which they have been established, and not solely to raise a revenue.—The other ground of appeal raised by the association that the valuation was null in toto

ASSESSMENT AND TAXATION— *Continued*

for the reason that part of the building, not being taxable, had been assessed, must be dismissed, as there is no clear and positive evidence that these two offices were occupied by the association for the attainment of the purposes mentioned in the incorporating Act. *Toronto Ry. Co.* v. *Toronto* ([1904] A.C. 809), *Donohue* v. *Paroisse de St. Etienne de la Malbaie* ([1924] S.C.R. 511) and *Montreal L.H. & P. Co.* v. *Westmount* ([1926] S.C.R. 515) discussed. *Per* Davis J.—The incorporating statute clearly enacts that the exemption is only while the property is owned and occupied by the appellant association for the purposes of the corporation. Moreover, the building cannot be assessed piecemeal; two or three rooms out of a large office building, for instance, cannot be left free from taxation and yet all the other rooms be subject to it; the building is either taxable or it is not taxable.—Whatever may be said as to the occupation of several different parts of the building, it is not disputed that two portions are rented for private office use and the theatre portion is leased on a yearly basis. On a fair interpretation of the statutory provision, the corporation to be entitled to exemption must occupy the immoveable property for its own purposes and it cannot be said to occupy the immoveable property when any substantial portion of it is in the occupation of others. The statute is not satisfied by showing that the corporation occupies some portion of the building for its own purposes. ASSOCIATION CATHOLIQUE DE LA JEUNESSE CANADIENNE-FRANÇAISE *v.* LA CITÉ DE CHICOUTIMI **510**

2——*Telephone company—Personal property in town—"Actual cash value"—Basis on which assessors must estimate—Rule 2 of section 17 of The Assessment Act, N.S. Statute of 1938, chapter 2.*]—The appellant company provides telephone service throughout the province of Nova Scotia, including the respondent town. This appeal involves the municipal assessment of that town for 1939 in respect of the personal property of the appellant company within the municipality. The personal property consisted of certain central office equipment, switch board and testing apparatus, telephone poles, wires, cables, etc., some 300 telephone stations in residences and business places and equipment of various kinds. The total cost as installed from time to time amounted to $32,505.67. The *Assessment Act*, chapter 2 of the Nova Scotia Statutes of 1938 enacts by section 17, rule 2, that "all property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize if offered at auction after reasonable

CHURCHES—*Continued*

from procuring or permitting such officiating or conducting by the respondent Mayewsky; the return and delivery to the appellant corporation of what is called the antimins and an injunction restraining the respondent Mayewsky from wearing and using the said antimins. The antimins (a singular word) is a piece of linen about the size of a handkerchief which was given into the possession of the respondent Mayewsky at the time of his ordination as a priest of the appellant corporation for use in the ministration of the sacraments of the church. A counter-claim was brought by the respondent Mayewsky asking a declaration that he was a priest in good standing and that the purported disposition or expulsion of him as a priest was illegal, null and void, and for damages and other relief. The trial judge granted the injunction prayed for by the appellants and ordered the delivery of the antimins to the corporate appellant or to its Board of Consistory; and he also dismissed the counter-claim. The Court of Appeal, reversing that judgment in part, dismissed the appellants' action, but maintained the dismissal of the counter-claim. Both parties appealed to this Court by way of appeal and cross-appeal. *Held* that the appeal should be dismissed with costs; and that the cross-appeal should also be dismissed, but without costs, subject to the terms of an agreement between counsel as to variation of the order of the Court of Appeal, so as to provide that the dismissal of the counter-claim shall not be deemed an adjudication on any of the issues raised thereby other than those adjudicated upon in the main action. Davis and Hudson JJ. dissenting in part and holding that the respondent Mayewsky should be ordered to deliver up the antimins to the appellant corporation. *Per* Crocket J.—It was not intended by the federal statute of 1929 (by which the appellant corporation has been constituted) that the unincorporated church organization with all its congregations, priests and missions, together with their trustees as incorporated under provincial laws, should be merged in or absorbed by the corporate appellant, and the latter's so-called statutory charter has not deprived the trustees of the Cathedral of St. Mary the Protectress of its rights to hold the Cathedral property as trustees for the congregation, or the congregation of its right to manage its own temporal affairs. The antimins, having no substantial monetary value, the mere demand for their delivery to the Board of Consistory as the property of the corporate plaintiff would not, apart from all other considerations, be sufficient to justify the Manitoba Court in taking action by way of injunction. The manifest and sole purpose of this claim, as that

CHURCHES—*Continued*

of the whole action, was to enforce obedience to a purely ecclesiastical sentence or decree. *Per* Davis J.—Under all the circumstances of this case, this Court should not interfere with the expulsion order of the Church Court by enquiring into the proceedings against the respondent priest, examining the nature of the charges and the character of the evidence and then setting aside such order. But it has not been proved that the Cathedral congregation at Winnipeg ever signified its intention to become a part of the appellant corporation as stipulated in the statute, or that the Consistory ever issued a certificate admitting such congregation to the corporation. That being so, the congregation never became a part of the corporation, and the corporation therefore has no legal right to interfere with the congregation in continuing the services of its present pastor. Nor has the appellant corporation the right to restrain the respondent Mayewsky from officiating in the charge of that congregation or from officiating elsewhere, so long as he does not officiate "as a priest of the appellant corporation."—As to appellant corporation's claim to the antimins: the property in it has at all times been in the appellant corporation, and the latter is entitled to the return forthwith of the same. Therefore, this Court should issue an order directing the respondent Mayewsky to deliver up forthwith the antimins to the appellant corporation and granting injunction against the respondent Mayewsky restraining him from officiating or conducting any services in Canada "as a priest of the appellant corporation" unless and until he may become reinstated in good standing as a priest of the said corporation, and, otherwise, the appellants' action should be dismissed. *Per* Kerwin J.—The minutes of the meetings of the several councils of the unincorporated Ukrainian Greek Orthodox Church of Canada, held from 1918 to 1929, established that that Church never had any jurisdiction over the lands owned by the several congregations, the title to which, so far as concerns the Cathedral congregation, is vested by virtue of the provincial enactment in trustees; and, moreover, the terms of several sections of the Act of incorporation of 1920 indicate that the Federal Parliament did not ever purport to vest these lands in the Corporation; nowhere in the Act is there any grant of spiritual jurisdiction to the Corporation over the several congregations; the statute limits the power of the Corporation to temporal affairs over which alone it has any jurisdiction. Furthermore, while the respondent Mayewsky is a priest of the unincorporated Church, he never was a priest of the appellant Corporation as he never became a "part" of it or a "mem-

CONTRACT—*Continued*

court is not concerned with the adequacy thereof. The plain intention of the parties, and it was fully carried out, was that defendant would practise by himself and in his own name, and it was only in the sense of sharing with plaintiff the earnings of the practice that the rather loose language in the agreements as to defendant practising "for" or "for and on behalf of" plaintiff were used. As to the *Medical Act*, plaintiff's name was not struck from the register until October, 1935, and in any case it was the earnings from defendant's practice, carried on by himself and in his own name alone, which were covered by the agreements. *Per* Kerwin J.: As to the second agreement, whereby defendant was to continue the practice "for and on behalf of" plaintiff for three years, defendant's contention that, if any consideration existed it did not appear in the written document and thus the agreement was not enforceable by virtue of s. 4 of the *Statute of Frauds* (R.S.O., 1937, c. 146), is sufficiently met (apart from other items of consideration suggested) by plaintiff's promise therein to pay defendant 50% of the net profits. By entering into the first agreement, defendant undertook in effect that he would at its expiration turn over to plaintiff the practice which he had been enabled to commence with plaintiff's money, unless some new agreement was entered into. The new agreement being valid to the extent indicated, defendant is bound to account to plaintiff in accordance with its terms. Plaintiff did not contravene ss. 47 and 50 of the *Medical Act* and is not prevented because of those enactments from compelling an accounting. The validity of the restrictive covenants is not material in determining the present case. *Per* the Chief Justice and Crocket J. (dissenting): Plaintiff is not entitled to any rights as between himself and defendant on the footing that, in defendant's contract of purchase from C., plaintiff was the principal contracting through defendant as his agent, or that defendant's rights under that contract were held by him in trust for plaintiff; the contract between C. and defendant was a personal contract—C.'s patients were to be introduced to defendant (as to the true nature of the pith and substance of such a contract, *May* v. *Thomson*, 20 Ch. D. 705, at 718, referred to); further, it was well known to plaintiff and defendant that C. contracted in the full belief that defendant was contracting as principal and in particular in the full belief that defendant was not contracting as plaintiff's agent, and, in the circumstances, plaintiff could not have enforced the contract as a principal (*Ferrand* v. *Bischoffsheim*, 4 C.B., N.S. 710, at 717); further, the proposition of plaintiff's rights upon

CONTRACT—*Continued*

the footing aforesaid was really based on the assumption that plaintiff and defendant were inducing C. to enter into the contract by industrious concealment in circumstances which imparted to that concealment the character of misrepresentation; and it is not open to plaintiff to base his case upon his own wrong; he cannot set up a relationship in support of his claim which rests upon fraud upon third parties (*Jackson* v. *Duchaire*, 3 Term Rep. 551, and other authorities cited). It was definitely understood between plaintiff and defendant that the arrangement between them should be kept secret. The agreement between them did not contemplate the establishment of any such relationship as that of a partnership or that of principal and assistant. The patients treated by defendant in the course of his practice were his patients. If there was any *vinculum juris* which plaintiff could have invoked against defendants' resistance, it was that of debtor and creditor. The restrictive covenants were void in law; such a covenant in gross would be contrary to public policy and unenforceable; and such a covenant is not valid and enforceable as subsidiary to the contract between plaintiff and defendant—a contract merely binding defendant to practise for three years and pay to plaintiff a share of the earnings. There was no consideration to defendant for his second and third agreements with plaintiff; at the expiration of the period of the first agreement, plaintiff had nothing to give to defendant. It was not competent in this action to go outside the writing to find consideration for defendant's promise, the agreement being within s. 4 of the *Statute of Frauds*. The promissory notes, which were given in settlement of moneys supposed to be payable under the second and third agreements, do not advance the matter. Though their production establishes a *prima facie* right, a presumption of valid consideration, yet the facts are all before the court and the only possible consideration was money supposed to be owing under defendant's promises given without consideration. A promise to pay money, unenforceable because not supported by a valuable consideration, can, itself, be no consideration for a promise to pay these sums, whether in the form of a promissory note or in any other form. Putting the point in another way: the direct and immediate cause of the making and delivery of the notes and the whole basis of the agreement embodied therein was the mistaken belief, common to both parties, that the amounts thereof were due and owing; and the notes are unenforceable because, by reason of such mistaken belief, they were void. The mistake was one in respect of particular

COPYRIGHT—*Continued*

transacting the common business in respect of plans and with conducting the business of the Bureau. Considerable sums of money derived from the contributions of the members of the Association to the common fund were spent in obtaining the necessary information for constituting the rating schedules and other material and in the actual production of the material itself, which material was intended for the exclusive use of the members of the Association. As to the plans, those produced by the plan committee prior to the incorporation of the Bureau and those made afterwards by the Association up to the 1st January, 1924, were delivered to the Bureau with the intention that they should be the property of the Bureau, i.e., the legal ownership should be vested in the Bureau. There were also two classes of plans other than that made by the Bureau after the 1st of January, 1924: first, plans, the copyright to which was registered in the name of Charles Edward Goad, who died in 1910; and, second, plans, the copyright to which was registered in the name of Charles E. Goad Company; and the respondents claim title to these plans under assignment by the Toronto General Trusts Corporation, executors and trustees of the will of Charles Edward Goad, through the members of the firm Charles E. Goad Company and under a further assignment in 1931 from the Charles E. Goad Company to the Bureau. A large number of the Goad plans were partially or completely revised and reprinted by the salaried employees of the Survey Bureau, some prior to the assignment of the Goad copyrights in 1931 and some subsequent to that. The respondents alleged that the appellant, not a member of the Canadian Fire Underwriters' Association, authorized others to make copies or reproductions of the plans and rating schedules and converted such to its own use. The appellant denied respondents' title to copyright to the plans produced by C. E. Goad and claimed by respondents to have been acquired by assignment from the C. E. Goad Company in 1931. The appellant further pleaded that the acts of the respondents in withholding from the appellant and others copies of the works in question constituted a combine and conspiracy within the meaning of the *Combines Investigation Act*, R.S.C., 1927, c. 36, and the Criminal Code, R.S.C., 1927, c. 36, s. 498; that the respondents acquiesced in the alleged infringement and conversion and are guilty of laches, and that the period of limitation applicable to such actions is a bar to relief. *Held* that the appeal should be allowed in respect of the rating material brought into existence after the first of January,

COPYRIGHT—*Continued*

1924, and in other respects dismissed (1). The "rating material," designating what were known as rating schedules or manuals and rate books, minimum tariffs and specific ratings but excluding the plans, was the property of the members of the Association at the date when the *Copyright Act* of 1921 came into force on the 1st of January, 1924. These members were the owners, not only of the material itself, but of the common law, incorporeal, exclusive right of reproduction and became, by force of the statute (section 42 in the schedule), the owners of copyright in that material. Material of that character was subject-matter for copyright and, not being published, the exclusive right of multiplying copies of it, or of publishing it, was a right which the common law, prior to the statute of 1921, gave primarily to the authors of it. As to such material produced after the statute came into force, the respondents have not adduced sufficient evidence to establish a title to copyright in it. The members of the Association are all incorporated companies and they or any one of them cannot be an author within the meaning of the *Copyright Act*. Any one or all of them, that is to say, all the members of the Association at any given time, could be the owner or joint owners of copyright, but they could acquire copyright only in one of two ways,—either by assignment by some person having a title to the copyright or by one of the ways mentioned in the proviso to section 12 of the Act. As to the ground that the present case comes within subsection (*b*), the respondents must, in order to succeed, show that the material in respect of which the question arises was made "in the course of his employment" by a person or persons "under a contract of service or apprenticeship" with the respondents or some of them. But from the evidence it must be inferred that this material was produced by employees in the course of their employment under a contract of service with the members of the Association for the time being. And there is no evidence as to the practice in relation to the contracts under which the employees of the Association were engaged or in relation to the terms of their engagement. It is not a mere abstract possibility, but a practical possibility, that for convenience some form of arrangement was resorted to by which there was no direct contractual bond between the members of the Association and the employees, or that in any case the work was done by persons who were independent contractors. As to plans: The plans copyrighted by Charles Edward Goad in his lifetime and those copyrighted by the Charles Edward Goad Company passed to the Underwriters

constructed under one subsidy contract; and it *held* further that the annual credits of interest upon subsidy as provided for in the Act were not cumulative. *Held,* affirming the judgment of the Exchequer Court of Canada in this respect, that all rights in respect of subsidies accrued or accruing were subject to a radical condition that, unless the work was completed on the prescribed date, they would be forfeited if they had not already been liquidated in money, and therefore the respondent is not entitled to recover the amount of subsidies claimed by its petition of right. *Per* The Chief Justice:—The view upon which the Governor in Council acted apparently was that the statutory authority to pay came to an end on the prescribed date if the work had not then been completed; clause 5 of the subsidy contract which declares the effect of failure to complete the whole line by the first of August, 1916, was intended to give effect to that view of the statute. That condition was not overridden by the supplemental agreement; when the *Subsidy Act* is considered as a whole the conclusion must be that clause 5 had not the effect of defeating the intention of the statute. The enactment touching the date of completion cannot be regarded as directory merely and the Governor in Council did not exceed the discretion necessarily vested in him respecting the subsidiary terms of the contract in exacting conditions intended to secure the due and timely completion of the lines subsidized. *Held,* also, varying the judgment of the Exchequer Court of Canada, that, for the purpose of construing section 8 of the Act, each section of the line was a separate "railway or portion of railway subsidized under the Act"; and, therefore, the credit of three per cent per annum on the amount of the subsidy received could only be applied towards the payment of charges for services rendered upon the section of railway in respect of which the subsidy was granted and paid. *Held* further, affirming the judgment of the Exchequer Court of Canada, that the annual credits of interest upon subsidy as provided for in the Act were not cumulative. Judgment of the Exchequer Court of Canada, [(1938] Ex. C.R. 82) varied. THE KING *v.* QUEBEC CENTRAL RY. CO..... **246**

2——*Jurisdiction of Exchequer Court—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c) (as it stood in 1934)—"Public work"—Claim against Dominion Government for damage by fire through alleged negligence of persons employed on project organized and executed by Dominion Government, for construction, etc., on provincial highway, under The Relief Act, 1933 (Dom., 23-24 Geo. V, c. 18) and agreement (under authority of that Act) between Dominion and Province—Whether persons guilty of alleged negligence were "officers or servants of the Crown acting within the scope of their duties or employment" upon a "public work" within said s. 19 (c).*]—The Government of Canada, under authority of *The Relief Act, 1933* (Dom., 23-24 Geo. V, c. 18), entered into an agreement, dated August 21, 1933, with the Government of the Province of British Columbia, by which the Dominion agreed to assume responsibility for the care of all "physically fit homeless men" and for that purpose to organize and execute relief projects. In consequence of an agreement and request by the Province under said agreement of August 21, 1933, the Dominion instituted the project now in question, which consisted, by arrangement with the Province, of carrying out certain improvements, such as grading, widening and straightening, to a certain provincially-owned highway. The arrangements provided that the Provincial authorities would indicate the nature of the work to be done, such as the line of any re-routing, the extent of widening, etc., but the actual work would be carried out by the men on the strength of the project. All personnel connected with the project were so connected either as labourers or in an administrative or supervisory capacity under the authority of and conditions set out in certain Dominion Orders in Council, which provided, *inter alia,* for recruiting and organizing labour, and for transportation, accommodation, subsistence, care, equipment and allowance for the men employed, and included a provision empowering the Minister of National Defence, through the officers of his department, "to select and employ" "administrative and supervisory personnel." Appellant claimed against the Dominion Government for damage to appellant's property by fire, which damage, it was assumed for the purpose of certain questions of law raised, was sustained from a fire which originated from slash burning operations carried on by the project, the slash burning being done under provincial fire permit issued to the member of the project personnel then in charge of the work and the fire escaping through the negligence of such personnel in failing effectively to observe the directions as to patrol laid down by the permit. *Held:* The persons employed on the project were "officers or servants of the Crown acting within the scope of their duties or employment" upon a "public work," within the meaning of s. 19 (c) of the *Exchequer Court Act,* R.S.C., 1927, c. 34, as it stood at the relevant time (1934). (Judgment of Maclean J., [1939] Ex. C.R. 228, holding that the project

was not a "public work" within the meaning of said s. 19 (*c*), reversed.) The phrase "public work" ("chantier public" in the French version) as used in said s. 19 (*c*) discussed, with references to statutory definitions of the phrase, the history of the section, and *The King* v. *Dubois,* [1935] S.C.R. 378, and other cases. For a work to be a "public work" within said s. 19 (*c*), it is not necessary that the work or its site be property of the Crown in the right of Canada. It is sufficient to bring the work now in question within the designation if (in the words of the definition in the *Expropriation Act,* to which reference should be had in ascertaining the classes of things contemplated by "public work" in said s. 19 (*c*)) it was a work for the "construction, repairing, extending, enlarging or improving" of which public moneys had been "voted and appropriated by Parliament," and if at the same time such public moneys were not appropriated "as a subsidy only." Sec. 9 of *The Relief Act, 1933* (enacting that "any obligation or liability incurred or created under the authority of this Act * * * may be paid and discharged out of the Consolidated Revenue Fund") is a sufficient voting and appropriation within the sense of this condition, and the moneys voted to defray the cost of the work in question were not "appropriated as a subsidy only." It was a fair inference from the agreement, the Orders in Council and the agreed statement of facts that the particular area upon which the employees of the Defence Department were engaged was sufficiently defined by the arrangement between the representatives of the Dominion Government and the representatives of the Provincial Government to bring it within the conditions of the decision in *The King* v. *Dubois, supra.* SALMO INVESTMENTS LTD. *v.* THE KING. **263**

3——*Negligence—Petition of Right for damages—Suppliant struck by motorcycle driven by R.C.M.P. constable on driveway of Federal District Commission—Negligence of an "officer or servant of the Crown while acting within the scope of his duties or employment upon* a *public work" within s. 19 (c) of Exchequer Court Act, R.S.C., 1927, c. 34 (as it stood in 1936).*]—The accident in question occurred on August 23, 1936, on a driveway in the city of Ottawa, constructed and maintained by the Federal District Commission, a body created by c. 55 of the Statutes of Canada, 1927. The cost of construction of the driveway was defrayed out of moneys voted by Parliament for the purpose and the driveway is maintained out of such moneys. A part

CROWN—*Continued*

of the driveway passed through land used by the City of Ottawa for an agricultural exhibition and it was the practice of the Exhibition Association to obtain permission from the Commission to place barriers across the driveway at the east and west limits of the exhibition grounds for the purpose of preventing the public from gaining access to those grounds through from the Driveway; and such barriers were there on the day of the accident. On the first day of exhibition week, G., a R.C.M.P. constable (who had been engaged as traffic officer on the Driveway in the previous year during exhibition week, when the same part of it had been closed to the public) was driving his motorcycle on the Driveway in discharge of his duty of patrolling it for the purposes (*inter alia*) of enforcing traffic regulations and protecting the Commission's property. When, driving westerly, he reached the eastern limits of the exhibition grounds he received a signal to pass through the open gate of the barrier and proceeded on his way. In approaching the western limits of the grounds, on rounding a curve, he found his vision impaired by the sun, and when he became aware of the barrier there erected, though he immediately applied his brakes (which were in perfect order), he did not succeed in stopping until he had passed through and some few feet beyond the gate, which appellant, gatekeeper, was in the act of opening to allow G. to pass. Appellant was struck by the motorcycle and injured, and sued the Crown for damages. *Held:* (1) G. was negligent in not immediately bringing his motorcycle under control when he found his vision affected by the sun. Appellant was not guilty of contributory negligence. (2) G. at the time of the accident was an "officer or servant of the Crown" and "acting within the scope of his duties or employment upon" a "public work," within the meaning of s. 19 (*c*) (as it then stood) of the *Exchequer Court Act,* R.S.C., 1927, c. 34. Conceding that he was not engaged in traffic control when in the part of the Driveway within the ambit of the exhibition grounds (though even there he was charged with protecting Crown property—shrubs, trees, etc., on the Driveway border), yet even when passing through those grounds (to resume his duty as traffic officer beyond them) he was acting within the scope of his duty as traffic officer upon the Driveway (*The King* v. *Schobounst,* [1925] S.C.R. 458, the authority of which has been recognized in *The King* v. *Mason* [1933] S.C.R. 332, *The King* v. *Dubois,* [1935] S.C.R. 378, *The King* v. *Moscovitz,* [1935] S.C.R. 404 and *Salmo Investments Ltd.*

DAMAGES — *Tavern — Refusal to serve beer to coloured persons—Discrimination —Freedom of commerce—Monopoly or privileged enterprise—Licence Act, R.S.Q., 1925, c. 25—Alcoholic Liquor Act, R.S.Q., 1925, c. 37—Alcoholic Liquor Possession and Transportation Act, R.S.Q., 1925, c. 38.*]—The appellant, who is a negro, entered a tavern owned and operated by the respondent in the city of Montreal and asked to be served a glass of beer; but the servants of the respondent refused him for the sole reason that they had been instructed not to serve coloured persons. The appellant brought action for damages for the humiliation he suffered. The respondent alleged that in giving such instructions it was acting within its rights; that its business was a private enterprise for gain and that, in acting as it did, it was merely protecting its business interests. The trial judge maintained the action on the ground that the rule whereby the respondent refused to serve negroes in its tavern was illegal according to sections 19 and 33 of the Quebec *Licence Act*. But the appellate court reversed that judgment, holding that the above sections did not apply and that, as a general rule, in the absence of any specific law, a merchant or trader was free to carry on his business in the manner he conceived to be best for that business. *Held,* Davis J. dissenting, that the appeal to this Court should be dismissed. *Per* Duff C.J. and Rinfret, Crocket and Kerwin JJ.: The general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order; and the rule adopted by the respondent in the conduct of its establishment was not within that class. Also, as the law stands in Quebec, the sale of beer in that province was not either a monopoly or a privileged enterprise. Moreover, the appellant cannot be brought within the terms of section 33 of the Quebec *Licence Act,* as he was not a traveller asking for a meal in a restaurant, but only a person asking for a glass of beer in a tavern. As the case is not governed by any specific law or more particularly by section 33 of the Quebec *Licence Act,* it falls under the general principle of the freedom of commerce; and, therefore, the respondent, when refusing to serve the appellant, was strictly within its rights. *Per* Davis J. dissenting: Having regard to the special legislation in Quebec establishing complete governmental control of the sale of beer in the province and particularly the statutory provision which prohibits anyone of the public from buying beer in the glass from anyone but a person granted the special privilege of selling the same, a holder of such a permit from the government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell. The old doctrine that any merchant is free to deal with the public as he chooses has still now its application in the case of an ordinary merchant; but when the state enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then such doctrine has no application to a person to whom the state has given a special privilege to sell to the public. Judgment of the Court of King's Bench (Q.R. 65 K.B. 104) aff., Davis J. dissenting. CHRISTIE *v.* THE YORK CORPORATION **139**

2——*Quantum—Action for damages for deceased's loss of expectation of life, under the Trustee Act, R.S.O., 1937, c. 165, s. 37 (as it stood prior to amendment by 2 Geo. VI, c. 44, sec. 3)—Inadequacy of sum awarded by jury—New trial for re-assessment of damages.*]—Plaintiff's daughter, aged 23 years, was killed in an accident which he alleged was caused by negligence of defendant. Plaintiff sued for damages under *The Fatal Accidents Act,* R.S.O., 1937, c. 210, and also, as administrator of his daughter's estate, for damages for her pain and suffering and loss of expectation of life, under *The Trustee Act,* R.S.O., 1937, c. 165, s. 37 (as it stood prior to the amendment by 2 Geo. VI, c. 44, s. 3). At trial the jury found defendant guilty of negligence causing the accident in the degree of 55%, and assessed the damages under each Act respectively at $500, and plaintiff recovered judgment for 55% thereof in each case. Plaintiff's appeal to the Court of Appeal for Ontario was dismissed, and he appealed to this Court on the question of the quantum of damages. *Held:* The jury's assessment of damages

MOTOR VEHICLES—*Continued*

in view of the authorized permission to operate the trucks, the operation could be regarded in law as constituting an actionable nuisance. It was pointed out (*per* the Chief Justice and Davis and Hudson JJ.) that the authority to use the street was not obligatory but only permissive, and that even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons (*Manchester Corporation* v. *Farnworth,* [1930] A.C. 171, at 183. Also *Provender Millers (Winchester) Ltd. v. Southampton County Council,* 1939 W.N. 301, at 302, [1939] 3 All E.R. 882, affirmed, 1939 W.N. 367, [1939] 4 All E.R. 157, referred to). DUFFERIN PAVING AND CRUSHED STONE, LTD. *v.* ANGER **174**

2——*Negligence — Collision — One motor truck passing another while latter veering to left for purpose of making left turn— Responsibility for accident — Evidence — Findings—Highway Traffic Act, R.S.O., 1937, c. 288, ss. 39 (1) (c) (d), 12 (1) (b).*] —The action was for damages by reason of a collision, at night on an Ontario provincial highway, between plaintiff's motor truck and defendant's motor truck, both going westerly, while plaintiff's driver was attempting to pass defendant's truck which was veering to the left for the purpose of a left turn to be made on to a side-road which it was approaching. The trial judge found that the whole proximate cause of the accident was plaintiff's driver's negligence and gave judgment for defendant. The Court of Appeal for Ontario, [1939] O.R. 338, apportioned the blame for the accident, 75% against plaintiff's driver and 25% against defendant's driver, and gave judgment accordingly. On appeal to this Court, it was *held* that, in view of the findings at trial and the evidence (discussed), the judgment at trial should be restored. (Davis J. dissented, holding that on the evidence defendant's driver was clearly guilty of negligence contributing to the accident, that there was evidence wrongly admitted, and that certain evidence given unduly affected the trial judge's view of the whole case; rather than direct a new trial, he would take advantage of s. 4 of *The Negligence Act,* R.S.O., 1937, c. 115, and award one-half the damages assessed.) Secs. 39 (1) (*c*) (left turn at intersection of highways), 39 (1) (*d*) (duty of driver before turning left), and 12 (1) (*b*) (rear-view mirror) of *The Highway Traffic Act,* R.S.O., 1937, c. 288, considered with regard to matters in question. OTTAWA BRICK & TERRA COTTA CO. LTD. ET AL. *v.* MARSH **392**

MOTOR VEHICLES—*Continued*

3——*Automobile — Negligence — Car left unattended on a public highway—Unauthorized use of the car by employee— Injury to person—Liability of owner— Art. 1054 C.C. — Motor Vehicle Act, R.S.Q., 1925, c. 35, ss. 31 and 53.*]—The respondent, engaged in a trucking business, operated a warehouse in the city of Montreal which was also used as a garage for its trucks. In May, 1937, the appellant was struck by one of respondent's trucks, operated by one of its employees and he sued the respondent for the damages resulting from the accident. This employee was not employed as a truck driver, but was simply a helper; he had no operator's licence and took the truck without the respondent company's knowledge, permission or consent and in breach of the company's instructions and regulations. The respondent had left the truck unattended on the street, with the key in the switch. The appellant sought to hold the respondent responsible both under Article 1054 C.C. and under sections 31 and 43 of the Quebec *Motor Vehicle Act.* The action, tried before a jury, was dismissed by the trial judge, which judgment was affirmed by the appellate court. *Held,* affirming the judgment appealed from (Q.R. 66 K.B. 385), that the respondent was not liable. *Held,* also, that Article 1054 C.C. had no application in the circumstances of this case. According to the evidence, the employee took the truck contrary to formal prohibition of his employer and exclusively for his own purposes and, therefore, could not be held to have been in the performance of the work for which he was employed. Moreover, the respondent cannot be held to be liable on the ground that the injury was caused by a thing under his care, as the real cause of the accident was the employee's intervention; the latter, in acting as he did, was a stranger *vis-à-vis* the respondent. *Held,* also, that section 53 of the Quebec *Motor Vehicle Act,* which places the onus on the owner of a car to establish that the loss or damage did not arise through his negligence or improper conduct, has no application under the circumstances of the case; the proximate cause of the appellant's injury was the independent act of the employee and not any conduct of the respondent. Moreover, the presumption of liability created by that enactment was amply rebutted by the evidence. *Held,* further, that the respondent cannot be found guilty of negligence, for having left the truck unattended on the street in front of the garage with its key in the switch in contravention of the provisions of section 31 of the Quebec *Motor Vehicle Act. Prima facie,* in view of the sanction by penalty, the owner of a motor vehicle guilty of an offence under

NEGLIGENCE—*Continued*

restoration and changes made in the jetty, there had been negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon a public work; but he limited the relief to "the damages to the vessel directly attributable to the collision * * * , had such damages been ascertained immediately after the said collision." The respondent appealed and the suppliant cross-appealed. *Held,* affirming the judgment of the Exchequer Court of Canada and dismissing the appeal to this Court, that, upon the facts of the case, the submerged cribwork, which was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation, and in leaving that obstruction without providing any such warning, the officials and servants of the Crown in charge of these works were chargeable with negligence for which the Crown is responsible by force of section 19 (*c*) of the *Exchequer Court Act*; but *held,* varying the judgment of the Exchequer Court of Canada and allowing the cross-appeal, that the amount of damages should not be restricted to those mentioned in that judgment. *Per* Rinfret, Crocket and Kerwin JJ.: After the collision there has been negligence on the part of the ship's officers in not having discovered sooner than they did the extent of the damages; and the total loss of the vessel and its equipment would have been avoided had an attempt been made either to return her to the wharf or to beach her at some nearby point. But the suppliant, although not entitled to damages as a total loss, should recover more than the cost of the repair of the vessel as allowed by the trial judge, and should be granted any other damages directly attributable to the collision. *Per* The Chief Justice and Davis J.—The respondent is entitled to recover the total amount of damages claimed in the appeal. *Per* The Chief Justice: The onus resting upon the Crown, to shew that the loss of the vessel did not follow in the ordinary course as the "natural and reasonable" result of running upon the obstruction under water, has not been discharged; the Crown has not established such negligence of officers in charge of the ship as constituting *novus actus interveniens*. *Canadian Pacific Ry. Co.* v. *Kelvin Shipbuilding Co.* (138 L.T. 369) ref. *Per* Davis J.—The appellant would be subjected to a diminution of damages only if it be proved that those in charge of the vessel were guilty of negligence (as opposed to mere error of judgment) amounting to a *novus actus interveniens* which would have caused the extra damage; and there was no conclusive evidence that the vessel could have been saved from total destruction even if the leak in her had been discovered immediately after the collision. THE KING *v.* HOCHELAGA SHIPPING & TOWING CO. LTD. **153**

NEGLIGENCE—*Continued*

2——*Accident—Damages—Railway trainman—Killed while engaged in switching operations—No eye-witness of accident—Verdict of jury in favour of plaintiff—Set aside by appellate court—Whether evidence sufficient to justify verdict or whether it was a matter of pure conjecture or speculation by the jury.*]—An action was brought under *The Fatal Accidents Act,* R.S. Sask., 1930, c. 75, by the appellant, widow, of one John S. Danley, acting as executrix of his estate. Danley, an experienced railway trainman in the employ of the respondent company, was killed while engaged in his work of coupling and uncoupling of cars during switching operations on the night of October 8th, 1937. On that night, he was seen to approach the point where two cars were about to be coupled; and, a very short time later, his dead body was discovered badly crushed partly beneath one of the cars. There was no eye-witness of the accident, and therefore no direct evidence as to what the deceased actually did at the very moment he met his death or as to exactly how the accident happened; but counsel for both the appellant and the defendant exposed to the jury their respective theory as to the cause of the accident, according to the evidence. There was no exception taken to the charge to the jury by the trial judge. The jury found in favour of the appellant and awarded her $8,000 damages, bringing a verdict that Danley came to his death through the negligence of the respondent. The appellate court, setting aside the verdict, dismissed the appellant's action. The majority of the court, for the purpose of their determination of the appeal, assumed but did not hold that there was negligence on the part of the respondent company, Gordon J. being of opinion that there was no evidence of negligence; but the appellate court unanimously held that on the evidence the way in which Danley met his death was a matter of pure conjecture or speculation. On appeal to this Court, *Held,* Rinfret and Kerwin JJ. dissenting that the appeal should be allowed and the judgment of the trial judge restored. *Per* Davis J.—A reasonable view, consistent with the appellant's right to recover, could be taken by the jury on the evidence; and their verdict, a verdict which reasonable men acting judicially could arrive at, ought not to have been disturbed. As Viscount Dunedin said in *Simpson* v. *L.M. & S. Ry. Co.* ([1931] A.C. 351, at 364), "the question will always be whether

"the proved facts will reasonably sup- "port the conclusion which has rested "upon them." *Per* Hudson J.—There was evidence before the jury upon which they could reasonably have arrived at the conclusion that there was negligence on the part of the respondent. *Per* Rinfret and Kerwin JJ. dissenting.—Assuming negligence of the respondent and assuming Danley did not know that a coupling apparatus was in a defective condition, there was not evidence from which it might be reasonably inferred that the death of Danley was caused by such negligence of respondent. Upon the evidence the jury had before them, they could do no more than guess at the cause of the accident. DANLEY *v.* CANADIAN PACIFIC RY. CO. **290**

3——*Municipal corporations—Repairs to public buildings done by contract—Work of cleaning windows given by sub-contractor to independent contractor—Latter injured by fall—Transom bar of window frame giving way—Liability of city under paragraph 3 of article 1055 C.C.*]—The city respondent had a contract with one C. to effect certain repairs in its City Hall building, and those pertaining to painting and glazing were delegated to a sub-contractor. The appellant was engaged by the sub-contractor to clean the windows. While doing that work, the appellant attempted to support himself on the transom bar of a window frame and, the transom bar giving way, lost his balance and fell to the pavement below. The appellant brought an action for damages against the city. The answers of the jury contained in their verdict were to the effect that the accident had been occasioned by the common fault of the appellant and the respondent, the fault of the appellant consisting in "not taking sufficient precaution for his personal safety and using the transom bar for a purpose for which it was not intended," and the fault of the respondent being "the failure to keep the building in proper state of repair." The trial judge, confirming the verdict of the jury, awarded $12,600 damages; but that judgment was reversed by the appellate court. *Held* that the judgment appealed from should be affirmed. The effect of the jury's answers was to eliminate any responsibility under article 1053 C.C. and to place the respondent's liability under article 1055 (3) C.C. The respondent therefore could be held legally responsible only for failure to keep the building in proper state of repair for the purpose for which it was intended. The answer of the jury being that the appellant used the transom bar "for a purpose for which it was not intended," the jury thus negatived the application of article 1055

C.C. and the respondent cannot accordingly be held responsible: the jury could not find a legal foundation where there was no legal obligation. Judgment of the Court of King's Bench (Q.R. 66 K.B. 324) affirmed. LEZNEK *v.* THE CITY OF VERDUN **313**

4——*Motor vehicles — Collision — Trial judge's charge to jury—Alleged misdirection—Rate of speed—Question as to need of car lights burning—Substantial wrong or miscarriage—New trial.*]—The action arose from a collision between appellant's and respondent's motor cars. Each party claimed that the collision was caused entirely by the other's negligence and claimed damages. Judgment was given at trial on the jury's findings in favour of respondent and an appeal to the Court of Appeal for Ontario was dismissed. Appeal was brought to this Court on the ground of misdirection in the trial judge's charge to the jury. *Held* (the Chief Justice dissenting): There should be a new trial, on the ground of misdirection. *Per* Rinfret and Kerwin JJ.: On construction of the trial judge's charge, there was misdirection in that he told the jury that appellant's allegation that respondent was travelling at an excessive rate of speed under the circumstances was not open to them since respondent was not exceeding the statutory limit of 50 miles per hour; also in that he told the jury that respondent was under no obligation to have his car lights burning, and said: "As I remember it, every witness said that they could see 100 yards. Why would lights need be on if you could see 100 yards without lights. There is no law in this province requiring lights on under those circumstances—that is, at any rate, after dawn and before dusk—during the day-time." Such misdirection occasioned substantial wrong or miscarriage. Appellant was entitled to a finding from the jury, not merely on the question as to negligent driving of his own car but also on the question of respondent's negligence, and in particular as to whether both drivers were negligent. Two allegations of negligence on the part of respondent were really withdrawn from consideration of the jury, and the Court should not place itself in the position of attempting to determine what, on a proper direction, would be solely within the province of the jury on these vital matters. *Per* Davis J.: The trial judge's directions virtually withdrew from the jury a consideration of the vital question as to the degree of care reasonably to be expected from both drivers under the fog conditions existing at the time. *Per* the Chief Justice (dissenting): The trial judge told the jury in the most pointed

appealed to this Court. *Held:* Plaintiff was entitled to have his claims, both for damage to his car and for personal injuries, submitted to a jury. *Per* the Chief Justice, Davis and Taschereau JJ.: It was open to the jury to take the view that the train could have been stopped and that it was negligent not to stop it to avoid collision with the motor car on the ground that defendant's engine driver, seeing plaintiff and his car, his signals and attempts to move the car, had not exercised the reasonable care incumbent upon him to employ in order to avoid unnecessary injury to property and persons on the highway; and the jury might properly have considered that to this negligence was proximately due the emergency which plaintiff said confronted him when he first realized (if the jury accepted his evidence as to when he first realized) that the train was not going to stop. If on these questions of fact the jury found against defendant, then the question of fact would remain for the jury whether plaintiff's injuries were solely the result of negligent conduct of himself or were, in part at least, caused by the negligence of defendant. As to defendant's contention that, in view of plaintiff's direction in running and the way his injuries occurred, his injuries did not follow in the ordinary course of things from its negligence, if there was such—that issue depends upon the answer to the question (which was for the jury) whether or not plaintiff's conduct when he ran for safety was so unreasonable in the particular circumstances as to take it outside of the category, the ordinary course of things. While remoteness of damage in itself is no question for the jury, issues as to reasonable conduct are questions for the jury. Where the evidence is such that it should have been submitted to the jury, the power of the Court of Appeal to dismiss the action on the ground that on the whole of the facts in evidence only one reasonable conclusion could be arrived at (Ontario *Judicature Act*, s. 26) is a power which must be exercised with caution and, generally speaking, only when it is quite clear that the Court of Appeal has all the available evidence before it (*Paquin* v. *Beauclerk*, [1906] A.C. 148, at 161; *McPhee* v. *Esquimalt & Nanaimo Ry. Co.*, 49 Can. S.C.R. 43; *Skeate* v. *Slaters*, [1914] 2 K.B. 429). Sec. 48 of the *Highway Traffic Act*, R.S.O., 1937, c. 288, has no application to the present case, where the role of the automobile was simply that of a projectile moving under the impulse of a blow from a railway train delivered at a highway crossing. *Per* Crocket J.: There was sufficient evidence to go to the jury on the question whether defendant's engineer could have avoided

hitting the motor car by the exercise of due care; and it follows that there was sufficient evidence to leave to the jury upon the further issue as to whether plaintiff's injuries, which immediately followed, were the direct and natural consequences of the train hitting and throwing the car in the direction in which plaintiff ran; this involves consideration of the question whether plaintiff, when he realized or should have realized that the train would hit the car, could in the existing circumstances have avoided the injuries by exercise of reasonable care; and that was a question peculiarly for the jury. *Per* Hudson J.: There was some evidence which might properly have been submitted to the jury as to whether or not defendant's employees saw or reasonably should have seen plaintiff's predicament in time to stop the train and avoid the collision, and, this being so, the claims both for damage to the car and for personal injuries should have been submitted; it is a question of fact whether or not plaintiff acted reasonably under the circumstances, and on this he was entitled to have an expression of the jury's views. STORRY *v.* CANADIAN NATIONAL RY. CO. **491**

7——*Customers of recreation resort injured by collapse of bench, while attending concert—Concert not put on by proprietor of resort but with his permission —Liability of proprietor of resort—Relationship between customers and proprietor—Invitee, licensee with interest or bare licensee.*]—The respondents, while attending an open-air concert at an island summer resort and recreation grounds which were operated by the appellant for profit, were injured through the collapse of a wooden bench on which they were seated, the uprights of the bench having rotted. The concert was not provided by the appellant but by one S. with the permission of the appellant. A steamship company, a "sister" or subsidiary company of the appellant, which was transporting passengers to the resort, issued to the public an illustrated folder depicting and enlarging upon the attractions to be found on the grounds; and in it was a list of the recreations available and included in that list was a paragraph entitled "Open-air entertainment" with a detailed description of same. The area, known as the "Shell" area and comprised within the above No. 1 Picnic Grounds hereafter referred to, on which the concert was held, was free to the public and S.'s revenue was from collections which he took up from the audience. The appellant supplied the wooden benches and its employees placed them in position daily, but the appellant did not charge S. for the use of the stage or

PATENT—*Continued*

in the mold or after the formation of the tool has begun by the introduction of the molten metal into the mold). *R.C.A. Photophone Ld.* v. *Gaumont British Picture Corpn. Ld. et al.*, 53 R.P.C. 167, at 197, cited. Further, respondent at the time he applied for his patent could not have got a patent for the process which appellant employs in sticking the diamonds on a die plate by the adhesive and for that purpose making use of suction while arranging the diamonds and while applying the adhesive; in the state of the art, the employment of such process would have constituted no patentable advance. Such process of appellant could not be said to be the "equivalent" or operation in another form of respondent's process of pouring the metal and employing suction during it. Also, on consideration of those claims in respondent's specification alleged to be infringed, there was no description therein of a monopoly which clearly and plainly included a prohibition against anything the appellant does. (As to function and effect of claims in a specification, *Electric & Musical Industries Ld. et al.* v. *Lissen Ld. et al.*, 56 R.P.C. 23, at 39, cited.) J. K. SMIT & SONS, INC. *v.* MCCLINTOCK **279**

2——*Re-Issue — Vilidity — Claims.*]— Appellants sued (under s. 60 of the *Patent Act, 1935*) for a declaration that respondent's patent, a re-issue patent, relating to "frosted glass articles and methods of making same," was invalid and void, or a declaration that no valid claim thereof was infringed by the sale or use in Canada of appellants' electric incandescent lamps. The action was dismissed by Maclean J., President of the Exchequer Court, [1939] 1 D.L.R. 412, and appeal was brought to this Court. At the time of the re-issue, the relevant enactment in force as to re-issue of patents was s. 27 of the *Patent Act*, R.S.C., 1927, c. 150. In the re-issue patent no change was made in the specification but change was made in the claims. In the re-issue patent there were four claims, the first two having been in the original patent (as claims 8 and 9) and the other two being introduced by the re-issue patent. The claims were:—1. A bulb for electric lamps and similar articles having its inner surface covered with rounded etching pits or depressions. 2. An incandescent electric lamp bulb having on its inner surface rounded etching pits or depressions. 3. A glass electric lamp bulb having its interior surface frosted by etching to such an extent as to be free from objectionable glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices to such an extent

PATENT—*Continued*

that the strength of the etched bulb is sufficient to withstand shocks due to commercial handling. 4. A glass electric bulb having its interior surface frosted by etching to such an extent that the light is sufficiently diffused to obviate glare, said interior bulb surface being characterized by the presence of rounded as distinguished from sharp angular crevices, to such an extent that the strength of the bulb as compared to an unetched bulb of the same thickness has not been sufficiently reduced to preclude commercial handling. *Held:* The appeal should be allowed and respondent's patent declared invalid and void. *Per* the Chief Justice and Davis and Hudson JJ.: There may have been patentable invention in devising the method, dealt with in the specification, of strengthening frosted glass for the purpose (*inter alia*) of constructing glass bulbs; the real difficulty in respondent's case lay in the manner in which the claims are framed. As to claim 1: The word "covered" is an ordinary word and, using it in its ordinary sense, it is plain on the evidence that the surfaces of appellants' bulbs do not fall within that description (nor do the surfaces of respondent's bulbs as manufactured and sold by it), and therefore (apart from any question as to whether claim 1 embodies on its proper construction a patentable monopoly) there was no infringement. Claim 2 is too broad to constitute a valid claim, extending in its application (in the light of the evidence as to existence or production of rounded depressions) to bulbs which have not been submitted to respondent's strengthening treatment or to anything that could properly be described as a strengthening treatment. Claims 3 and 4 would have been invalid had they been introduced in the patent originally, and also they are such as would give a new character to the invention and the re-issue patent is invalid accordingly. The effect of the evidence is that the inventor had not produced a bulb which would "obviate glare" or be "free from objectionable glare" in the normal meaning of the words (and on the evidence "glare" is not a term definable by reference to any special usage in the art) and that he had not disclosed any means of doing so; further, as regards this characteristic the claim is too indefinite—the ordinarily skilled person is not given a sufficient guide as to its limits; further, on construction of the specification, the problem of glare was not one to which the inventor was applying himself. Nor in the original patent did the problem as to sufficiency of the bulb to withstand the shocks of commercial handling present itself to the inventor; in his specification he gives directions for producing a bulb with a

high degree of strength as determined by the "bump" test, but he did not apply himself to the relation between strength as shown by that test and the sufficiency of the bulb to withstand the shocks of commercial handling. As shown by the evidence, while the interior bulb surface of respondent's commercial lamp is (forming a contrast in this respect to the surface of the patent lamp) the surface of a lamp possessing, no doubt, the characteristic described in claims 3 and 4—a lamp combining resistance to shock sufficient for commercial purposes with a high degree of absence of glare, yet this was the result of much experimentation after the invention—experimentation directed to definite commercial ends which the inventor had not in mind and leading to a procedure different from his; and the re-issue provisions of the *Patent Act* cannot legitimately be employed for the purpose of ascribing this result to the inventor and remodelling his invention to make that invention conform to it. There was nothing to support the proposition that the specification in the original patent was "defective or inoperative" by reason of any of the causes mentioned in the statute. Moreover, as regards the re-issue patent as a whole, each of the four claims is in respect of an article, while the invention as described in the original patent is an invention of a process for strengthening frosted glass articles. *Per* Rinfret and Kerwin JJ.: Upon construction of the specification and claims in respondent's original patent it is evident that if there was invention it was in a strengthening treatment and not in an article strengthened by any means whatsoever. It is clear from the claims in the re-issue patent that what is now claimed is an article; it is not a correction of the original patent made "by reason of the patentee claiming more or less than he had a right to claim as new," but, if valid, is an entirely different invention; and this an inventor and those claiming under him are not entitled to do. A re-issue is not a grant of a new patent, but must be confined to the invention which the inventor attempted to describe and claim in the original patent. FUSO ELECTRIC WORKS ET AL. *v.* CANADIAN GENERAL ELECTRIC CO. LTD. **371**

3——*Infringement—Substance of the invention—Essential or non-essential elements.*]—This Court dismissed defendant's appeal from the judgment of Maclean J., [1939] Ex. C.R. 277, holding that the patent in question was valid and had been infringed by defendant. The patent was for improvement in fans and the invention related to fans for producing air currents and had for its principal object to provide

such a fan with flexible fan blades of suitable material and shape to give the blades stability for an efficient operation of the fan combined with sufficient flexibility to cause any portion of the moving blades to yield when a stationary rigid or semi-rigid member is brought in contact with them, and to be self-restoring to normal position when the intruded member is withdrawn. This Court *held* that the substance of the invention lay in shaping the blade in such fashion as to maintain the rigidity of its base and body while leaving the edges sufficiently flexible to be harmless; and in this there was novelty and invention, and in substance this has been taken by defendant; that the bow-like slot in which the rubber blades were inserted, an element not taken by defendant, was only a particular means for maintaining the cupped shape of the base and body of the blade and thereby imparting to it the necessary rigidity; and, as a particular means only for maintaining this rigidity which was the essential thing, it was non-essential. CANADIAN TIRE CORPORATION LTD. *v.* SAMSON-UNITED OF CANADA LTD. ET AL. **386**

4——*Invalidity—Existing art—Analogous user—No invention—Patent granted in October, 1933, attacked under s. 61 (1) (c) of Patent Act, 1935, c. 32—Patentee's rights not governed thereby—Said Act, ss. 31, 32; Patent Act, R.S.C. 1927, c. 150, s.37A (as enacted in 1932, c. 21, s. 4); Interpretation Act, R.S.C. 1927, c. 1, s. 19 (1) (c).*]—This Court dismissed an appeal from the judgment of Maclean J., [1938] Ex. C.R. 152, holding that defendant's patent in question was invalid. The patent was for improvement in hosiery and the manufacture thereof, and the alleged invention for which it was granted was described in the specification as relating "to full-fashioned hosiery, particularly of real silk, and to methods of and means for making the same." *Per* the Chief Justice, Rinfret and Kerwin JJ.: It is a case of analogous user. The method in defendant's alleged invention was analogous to that already used in connection with other articles of wear; and the difference between the problem met by defendant's use of the method for his purposes and the problem solved a long time before by use of the method in connection with other articles was not sufficiently wide to justify the conclusion that defendant's application of the method involved invention. The trial judge's finding that the problem met by defendant had not earlier presented itself as an acute one in the trade (thus negativing, as a factor, any existence of a long-felt and unsatisfied want) was warranted upon the evidence as accepted by him. The

PRIVILEGE—*Continued*

against the Compagnie de Construction, rejecting therefore the award of the arbitrators, and also refused to grant the conclusion of that action against the city of Quebec to the effect that the reservoir and the land upon which it had been constructed were subject to a privilege. The Concrete Column Clamps appealed to the Court of King's Bench, and that Court dismissed the appeal on the question of privilege; but reversed the judgment of the trial judge and allowed this last company the sum of $25,622.74, being the amount awarded by the arbitrators. The ground raised in the first appeal is whether the appellant The Concrete Column Clamps is entitled to its claims against the city respondent on the ground that the reservoir and the land upon which it has been constructed were subject to a privilege; and the questions at issue are whether such privilege has been legally drafted, whether the necessary notices have been given within the prescribed delay and finally whether the reservoir and the land can be subject to a contractor's privilege. In the second appeal, the question at issue is whether the award of the arbitrators is valid and binding between the parties. *Held,* affirming the judgment appealed from (Q.R. 67 K.B. 536) that the maintaining of The Concrete Column Clamps's action against La Compagnie de Construction de Quebec for $25,622.74 by the Court of King's Bench should be affirmed, as well as its decision dismissing the demand of the Concrete Column Clamps against the city of Quebec for a declaration of a privilege. *Held* that the general rule, and it is an imperative one, that governs the registration of privileges (art. 2103 C.C.) and which stipulates that a notice or memorial to which a sworn deposition of the creditor is annexed must be deposited at the registry office, also applies in the case of a claim by a sub-contractor. Although supplementary formalities are imposed by article 2013 (*f*) in the case of a sub-contract, the sub-contractor must nevertheless perform the other essential formalities prescribed by the general rule contained in article 2103 C.C.—Sworn deposition must be given by the creditor whether registration is by way of notice or by way of memorial. In this case, no privilege could have been acquired by the claimant company as the latter has not accompanied its claim with the affidavit required by the Civil Code. Moreover, even assuming that the registration would be valid in law, no privilege could have been created, as there is no evidence in the record to establish that the amount awarded by the arbitrators were in payment of work done before or after the date on which notice of the contracts had been given to the city of Quebec. *Held,* also, that, although the land upon which the reservoir has been constructed cannot be made subject to a privilege, such land being the property of the Crown, the reservoir itself may be so subject as a distinct immoveable. But, in this case, such reservoir, being connected with the municipal aqueduct then in operation, forms part of the public domain and consequently cannot be made subject to a privilege. Such reservoir, from the very beginning of the work, and not from the date of the completion of the work, was part of public domain by destination. *Held,* further, that under the circumstances of this case, the award of the arbitrators should be declared to be binding upon the parties who have agreed to such submission. CONCRETE COLUMN CLAMPS LTD. *v.* THE CITY OF QUEBEC—LA COMPAGNIE DE CONSTRUCTION DE QUÉBEC LTÉE *v.* CONCRETE COLUMN CLAMPS LTD. **522**

PRIVILEGE—*Concluded*

PRIVY COUNCIL—*Appeals to, from Canadian Courts—Jurisdiction of Parliament of Canada to abrogate them*.. **49**

See CONSTITUTIONAL LAW 1.

PROMISSORY NOTE—*Signed by two or more persons—Payment in full by one of them—Action by the latter against co-debtors to recover their share of the debt—Nature of the claim—Whether commercial matter—Prescription of the action—Whether by five or thirty years—Articles 1117, 1118, 1156, 2242, 2260 (4) C.C.—Bills of Exchange Act, s. 139.*]—When a promissory note signed by two or more persons has been paid in full by one of them, an action by the latter to recover from any of the co-debtors the share or portion due by him is subject to the prescription of five years provided by Article 2260 (4) C.C. The claim of the holder against the signers, based upon a promissory note, is, at its origin, of the nature of a commercial matter; and the co-debtor who has paid it in full, having thus been subrogated in the rights of the creditor by operation of the law as to the share or portion of the note due by any of his co-debtors, has therefore acquired himself a claim of the nature of a commercial matter against such co-debtor. BERGERON *v.* LINDSAY..... **534**

PUBLIC DOMAIN.

See PRIVILEGE.

"PUBLIC WORK" — *Claim against Dominion Government for damage by fire through alleged negligence of persons employed in project organized and executed by Dominion Government*.. **263**

See CROWN 2.

REAL PROPERTY—*Action for reconveyance of land—Claim by defendant in respect of improvements made thereon—Right to relief—Parties—Joinder of defendant's wife as party defendant.*]—Under an arrangement between the executors of a deceased's will and C., the executors delivered a deed of conveyance (absolute in form but not intended to operate as an absolute conveyance) of certain land of deceased's estate to C., who, pursuant to the arrangement, mortgaged the land and turned over the proceeds to the executors for use in the administration of the estate. C. was given an option to purchase, but if he did not exercise it within the time fixed he was to reconvey the land to the executors. C. did not exercise the option as such; but, *bona fide* believing, though erroneously (as found at trial and by this Court), that the result of certain later negotiations was (or, *per* Davis J., was so close to as to make practically certain) a sale to him of the land, made considerable improvements thereon. He resisted the present action for a reconveyance, and alternatively claimed in respect of the improvements. *Held:* (1) C. must reconvey the land and account as to rents, profits, etc. (2) C. should be paid from the estate such amount as the land had been enhanced in value by said improvements. (3) The action as against C.'s wife, who, on the claim for reconveyance, had been made a defendant, should be dismissed. *Per* Crocket and Kerwin JJ.: The facts that C. had had the legal title in himself (though subsequently transferred to the mortgagee), and *bona fide* believed that he had become the purchaser, under which belief he made the improvements, brings him within s. 36 of *The Conveyancing and Law of Property Act,* R.S.O., 1937, c. 152. *Per* Davis J.: Good faith (found to exist in this case) is at the basis and of the essence of a claim for compensation in respect of improvements such as those made by C. Plaintiff's action was plainly a claim for an equitable right in the land (the legal estate had been conveyed to C. for the purpose of putting on the mortgage and had then passed to and remained in the mortgagee, and it was the beneficial ownership that plaintiff sought to be established), and the relief given to C. in respect of the improvements was one which a court of equity had the power to give under all the facts and circumstances of the case. C.'s wife could have no right to dower in the land, which was held by C. in trust for deceased's estate (the only basis upon which a reconveyance to the estate was sought), and therefore (on the plaintiff's own claim) was not a necessary party. CARTWRIGHT *v.* CARTWRIGHT **659**

REAL PROPERTY—*Concluded*

REVENUE—*Sales tax—Petition of right to recover money paid to the Crown for sales tax—Goods sold and delivered—Special War Revenue Act, R.S.C., 1927, c. 179, secs. 86, 87, 87 (d), 105.*]—By certain contracts entered into between the suppliant and His Majesty the King, represented by the Minister of Public Works for the province of Quebec, the suppliant undertook to erect the structural steel superstructure of three bridges in that province, in consideration of the sums set out in each contract. The suppliant erected the three bridges and was paid according to the contracts. In respect of the materials incorporated in the bridges, suppliant was assessed for sales tax, alleged due under the terms of the *Special War Revenue Act,* R.S.C., 1927, c. 17 and amendments. It paid under protest a proportion of the amounts so assessed to the Commissioner of Excise. The suppliant then claimed by way of a petition of right before the Exchequer Court of Canada a return of the moneys so paid on the grounds that no tax was payable by it in respect of the materials supplied in virtue of the contracts or, alternatively, that, if the materials were taxable, suppliant was entitled to a refund by reason of the fact that the materials were sold, if sold at all, to His Majesty the King in the right of the province of Quebec. *Held,* that the above transaction between the suppliant and the Crown in right of the province of Quebec must, by force of section 87 (*d*) of the *Special War Revenue Act,* be deemed to be a sale and that the suppliant was rightly chargeable accordingly for a sales tax. (*The King* v. *Fraser Companies,* [1931] S.C.R. 490 applied); but *Held,* also, that the suppliant was entitled to a refund of the money paid to the Crown appellant, pursuant to s. 105 of *The Special War Revenue Act.* The "transaction" in this case involved translation of the property in the goods to the provincial government, and, taking the provisions of sections 86 and 87 into account as a whole, such transaction must be deemed to fall within

plaintiff added in his statement of claim a plea that he purchased the gas and hired the tank, having made known to defendant the purpose for which they were required and relying upon defendant's skill or judgment, the gas and tank being goods which it was in the course of defendant's business to supply; that the gas was purchased and the tank hired by description; that "the said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired and were not of merchantable quality" and that plaintiff's damages were the direct and proximate result thereof. The trial judge found that the explosion "was due to some defect in the internal structure or set-up of the cylinder, using the words in their widest application" and "that the cylinder exploded by reason of extremely high internal pressure only, due to some internal structural defect," and gave judgment to plaintiff for damages. This judgment was reversed by the Court of Appeal for Ontario, ([1939] Ont. W.N. 367; [1939] 4 D.L.R. 199) which held, on their view as to the issue raised by the pleadings and the lack of proof to support plaintiff on that issue, it was not open to the trial judge to enter upon a consideration of all the possible causes of the explosion or "to find that the explosion was due to some unknown defect in the cylinder not alleged by the plaintiff, and the nature of which the evidence does not disclose." Plaintiff appealed. *Held* (Rinfret and Kerwin JJ. dissenting): Plaintiff's appeal should be allowed and the judgment at trial restored. *Per curiam:* Said amendment to plaintiff's pleadings at the trial was, having regard to the proceedings, discussions, and offering of terms to defendant, properly allowed, and plaintiff's pleadings, so amended, covered a claim founded in contract generally for breach of conditions implied under s. 15 of the *Sale of Goods Act*, R.S.O., 1937, c. 180. *Per* Crocket, Davis and Hudson JJ.: Upon all the evidence there was warrant for the trial judge's finding as to the cause of the explosion and (though on the printed record a doubt as to such cause might exist in the minds of an appellate court) his finding should not be disturbed; and on that finding, and as the facts essential to give rise to the conditions implied by said s. 15 of the *Sale of Goods Act* were established, plaintiff was entitled to judgment for damages. Though the tank was not actually sold but only the acetylene gas contained therein, yet both were "goods supplied under a contract of sale" within the meaning of said s. 15 of the *Sale of Goods Act*. *Geddling* v. *Marsh*, [1920] 1 K.B. 668, cited. *Per* Rinfret and Kerwin JJ. (dissenting): Upon the

evidence, the cause of the explosion of the tank in question was a prior volume explosion; and whether that was so or not, there was not sufficient in the evidence to warrant the inference that the tank (assuming, but not deciding, that said s. 15 of the *Sale of Goods Act* applied to it) and its contents were not reasonably fit for the purpose for which they were intended or that they were not of merchantable quality. MARLEAU *v.* PEOPLE'S GAS SUPPLY CO. LTD..... **708**

3——*Conditional sale.*

See CONDITIONAL SALE.

SALE OF LAND—*Action by vendor to recover from purchaser balance of purchase price—Inability of vendor to convey title because title lost through purchaser's default in covenant to pay taxes.*] —Where the vendor under an agreement for sale of land is unable to convey title to the land he cannot, by an action for enforcement of covenant, recover from the purchaser the balance of the purchase price, even though the vendor's inability to convey title is because his title was lost in consequence of default (known to the vendor) by the purchaser in his covenant to pay the taxes on the land (and, *per* the Chief Justice and Kerwin J., even though the purchaser had taken possession and accepted the vendor's title, or even if there were a primary obligation on the purchaser to the municipality to pay the taxes). But, *semble*, the vendor may have a right of action against the purchaser for damages for breach of the covenant to pay the taxes. *Royal Trust Co.* v. *Kennedy*, [1930] S.C.R. 602, applied. SOULLIERE *v.* AVONDALE MANOR LAND CO. LTD.... **680**

SALES TAX.

See REVENUE.

SHIPPING—*Yacht stranded—Refusal by owner of offer to haul it off the shore—Alleged contract with master of yacht to pull yacht off—Claim for salvage services—Whether yacht in imminent danger or distress—Liability of owner of yacht.*] — Respondent pleasure motor yacht, while on a cruise from Galveston, Texas, to Nova Scotia, stranded on the southwest coast four or five miles northeast of Yarmouth on a smooth ledge at approximately high tide; and at low tide, she was lying practically high and dry with but a foot or two of water under her stern. The owner of respondent yacht refused an offer made by the master of the appellant vessel to haul the yacht off the shore on the next tide for $1,000. Later on the same day, the managing

TRADE MARK—*Continued*

evidence at the trial was not developed sufficiently on this branch of the case to show explicitly how these bottling concerns or the retail dealers who purchased from them actually sold the beverage, and if said course of dealing were to be relied upon as an abandonment by plaintiff of its trade mark, the facts should have been plainly established. Plaintiff had not established a claim for infringement from defendant's use of the trade mark "Pepsi-Cola." In the general attitude taken by plaintiff, its objection really went to the registration by any other person of the word "cola" in any combination, for a soft drink; and if such objection were allowed, then plaintiff would virtually become the possessor of an exclusive proprietary right in relation to the word "cola"; and to this it was not entitled. (In this connection it was held that 30 certificates of registration of trade names or trade marks in which the word "cola" or "kola" in some form was used were admissible as some evidence of the general adoption of the word in names for different beverages or tonics.) It cannot be said by tests of sight and sound that "Pepsi-Cola" bears so close a resemblance to "Coca-Cola" as to be likely to cause confusion in the trade or among the purchasing public. Each case depends upon its own facts. In the present case further circumstances that might be taken into account were: that "Pepsi-Cola" as a registered trade mark in Canada had stood unimpeached since 1906, and the evidence disclosed that pepsin and cola flavour actually formed part of the ingredients of the beverage manufactured and sold by defendant as pepsi-cola; that no application in objection to defendant's corporate name was made by plaintiff following upon defendant's incorporation; that there was no evidence that anyone had been misled, and where a defendant's trade is of some standing the absence of any instance of actual confusion may be considered as some evidence that interference is unnecessary. Under all the circumstances of the case, commercial injustice would follow the injunction sought by plaintiff against defendant's use of the mark "Pepsi-Cola." While the rules of comparison for testing an alleged infringement of a registered mark resemble those rules by which the question of similarity on an application for registration is tested, it is necessary to establish a closer likeness in order to make out an actual infringement than would justify the refusal of an application to register; the burden on a plaintiff in an infringement action is to show reasonable probability of confusion, while an applicant for registration must establish, if challenged, the absence of all

TRADE MARK—*Continued*

reasonable prospect of confusion. Cases cited with regard to principles applicable to the use of trade marks included: *In re Crosfield*, etc., [1910] 1 Ch. 130 at 45-6; the *Reddaway* case, [1927] A.C. 406, at 413; *Hall* v. *Barrows*, 33 L.J. (N.S.) Ch. 204, at 207-8; the *Payton* case, 17 R.P.C. 628, at 634; the *Pianotist* case, 23 R.P.C. 774, at 777; the *"Peps" and "Pan-Pep"* case, 40 R.P.C. 219, at 223, 224. *Per* Kerwin J.: A comparison of the words "Coca-Cola" and "Pepsi-Cola," their appearance in script, and their sound as pronounced and as likely to be pronounced by dealers and users of the wares of the parties, do not indicate that they are "similar" within the definition in s. 2 (*k*) of *The Unfair Competition Act, 1932*, (c. 38). The question in each case is one of fact (*Johnston* v. *Orr Ewing*, 7 App. Cas. 219, 220, cited), and in this case that question must be answered adversely to plaintiff's claim. Defendant's counterclaim against the 1905 registration of "Coca-Cola" should be dismissed, but solely on the ground that there is no evidence that would warrant the court declaring that it was not registrable or ordering that the registration be cancelled. In view of s. 28 (1) (*b*) of said Act (without determining its precise meaning) and of the course that the trial took, neither party should be precluded in a properly framed action from litigating the question whether under s. 28 (1) or otherwise plaintiff could apply for and secure registration of the compound word "Coca-Cola," although the same compound word in script form had already been registered by it as a trade mark; the judgment at trial dismissing the counterclaim's attack against the 1932 registration should be set aside, and it should be declared that this Court makes no order with respect to it. PEPSI-COLA COMPANY OF CANADA LTD. *v.* THE COCA-COLA COMPANY OF CANADA..... **172**

——Action for alleged infringement—Use of surname—Plaintiff's registration of specific trade mark to be applied to named kinds of articles including articles not manufactured or sold by plaintiff but later manufactured and sold by defendant—Effect of agreements—Amendment of trade mark—Right of defendant to use of name—Word mark or design mark—"Design mark"—Condition for reliance upon trade mark as word mark—Distinction of goods—Similarity of goods—Conduct of parties—Production of certified copy of record of registration as conclusive evidence of certain facts—Unfair Competition Act, 1932 (Dom.), c. 38, ss. 2 (c), 2 (k), 2 (l), 18, 19, 23 (1), 23 (5) (c), 52; Trade Mark and Design Act, R.S.C. 1927, c. 201, ss. 11 (e), 42, and Rules 10, 11, made under s. 42.]—Plaintiff company, which had assignments of patents and

TRADE MARK—*Continued*

patent applications from, and agreements with one Schick, an inventor, registered in Canada on August 3, 1927 (on application dated March 21, 1927), under the *Trade Mark and Design Act* (R.S.C. 1927, c. 201), a specific trade mark "'Schick', as per the annexed pattern and application," to be applied to the sale of razors and other articles, including "shaving machines." "Shaving machines" (operating by electric motor and without a blade) were patented by Schick (and called "Schick dry shavers") in November, 1928; there had been and were subsequently agreements between Schick and plaintiff in respect thereto; but plaintiff never manufactured or sold "shaving machines." In 1930 Schick, who had been released by plaintiff from all obligations relative to shaving machines, assigned his interest in patents and patent applications relating to shaving machines, and granted the sole and exclusive right to use the name "Schick" in connection with shaving machines, to a company then recently incorporated, which rights, defendant claimed, were subsequently acquired by defendant, Schick Shaver Ltd. Defendant manufactured and sold shaving machines and used the word "Schick" in association therewith. Plaintiff (and its co-plaintiff, to which it had assigned its said trade mark) brought action in 1938, claiming that defendant had infringed its trade mark. Defendant, by counterclaim, asked (*inter alia*) that plaintiff's trade mark be modified to exclude therefrom shaving machines. By the judgment in the Exchequer Court (Maclean J., [1939] Ex. C.R. 108) the registration of plaintiff's trade mark was amended by striking therefrom the words "shaving machines"; plaintiff's action was dismissed, except that defendant was restrained from using the word "Schick" otherwise than in a way specified. Plaintiff appealed from the judgment. Defendant cross-appealed, asking removal of said restraint. *Held:* Plaintiff's appeal should be dismissed and defendant's cross-appeal allowed. *Per* the Chief Justice and Hudson J.: Plaintiff could not rely upon its trade mark as a word mark unless, at all events, it had established that the word "would at the date of registration have been registrable independently of any defined form or appearance and without being combined with any other feature" (*Unfair Competition Act, 1932,* c. 38, s. 23 (5) (*c*)). No attempt was made to comply with that condition. Moreover, of the Rules made under authority of s. 42 of the *Trade Mark and Design Act* (R.S.C. 1927, c. 201), it is not seriously open to dispute that the registration of plaintiff's trade mark was a registration under R. 11 (of surname "presented in a distinctive form, or accompanied by a distinctive device") and not under R. 10 (registration of surname upon evidence that the mark has "through long-continued and extensive use thereof in Canada acquired a secondary meaning, and become adapted to distinguish the goods of the applicant"); it would have been difficult to the point of practical impossibility to show that the surname "Schick" had in its very brief period of use prior to the application for the trade mark become distinctive in Canada of the applicant's wares in the sense of R. 10. R. 10 was validly made and was intended to, and did, give effect to s. 11 (*e*) of the *Trade Mark and Design Act,* which provided for refusal of registration "if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking" and thus imposed a condition for valid registration (*Canadian Shredded Wheat Co. Ld.* v. *Kellogg Co. of Canada Ld.,* 55 R.P.C. 125). It follows that plaintiff's mark was only a "design mark having the features described in the application therefor but without any meaning being attributed to the words" (s. 23 (5) (*c*) of the *Unfair Competition Act, 1932*)—"a trade mark consisting of an arbitrary and in itself meaningless mark or design" (s. 2 (*c*) of that Act, defining "design mark"); it is in this sense only that plaintiff could have any exclusive rights in respect of its trade mark; it has no exclusive rights in respect of the use of the surname "Schick" because for the purpose of determining its rights the letters in its mark are to be emptied of all such meaning; the design is the only thing which plaintiff is entitled to have protected; and defendant is entitled to use the name "Schick", provided that its design is not the same or "similar" (as defined in s. 2 (*k*) of that Act) to plaintiff's design; and the evidence quite failed to establish such sameness or similarity. On the evidence, "shaving machines" are recognized by the trade as entirely distinct from any goods made or sold at any time by plaintiff and it cannot be rightly affirmed that at the date of registration of plaintiff's mark it was carrying on or had any intention of presently carrying on any business which included the manufacture or sale or dealing in or with such machines in the trade mark sense. The trade mark registered was a specific trade mark and, as the trade mark of plaintiff, it could not, in the circumstances, have any meaning as applied to such machines. Plaintiff could not have a trade mark in respect of such machines within the meaning of the provisions of said *Trade Mark and Design Act,* and consequently its registered mark was not valid in relation to such goods.

TRADE MARK—*Continued*

It was not established (as a basis for alleged infringement of plaintiff's mark, even as amended by striking out "shaving machines") that "shaving machines" are goods similar to the goods in which plaintiff deals, within the tests of similarity set forth in s. 2 (*l*) of the *Unfair Competition Act, 1932*. Moreover, as regards the whole issue of infringement, plaintiff's conduct in permitting until a quite recent date the Schick companies to use the name "Schick" in connection with their goods justifies the conclusion that it was not seriously apprehensive of any risk of confusion that could be of any commercial importance. With regard to plaintiff's contention based on ss. 18 and 23 (1) of the *Unfair Competition Act, 1932*, that the production of a certified copy of the record of registration was conclusive evidence of certain facts, questions as to the meaning and effect of those enactments were discussed; but decision on those questions was deemed unnecessary because (1) plaintiff's argument left untouched the point that its mark was a design mark and the consequences thereof; and (2) ss. 18 and 19 of said Act must be read together, and as "it appears" (s. 19) from the undisputed facts that plaintiff was not entitled to register its mark as a trade mark for shaving machines, effect must be given to s. 19 against plaintiff's contention. *Per* Kerwin J.: Even if plaintiff was entitled to rely upon s. 18 of the *Unfair Competition Act, 1932*, s. 18 must be read in conjunction with s. 19. Defendant is entitled to succeed on its counterclaim that said registration of plaintiff's trade mark should be amended by striking therefrom the words "shaving machines" and therefore the foundation of plaintiff's action disappears. It appears from the history and the agreements (discussed in the judgment) of Schick, plaintiff company, and the companies bearing Schick's name, that plaintiff's registration "does not accurately express or define" (s. 52 of said Act) plaintiff's existing rights with reference to shaving machines, and that the rights to manufacture and sell shaving machines and use the name "Schick" as a trade mark in connection therewith is now vested in defendant company, which is, therefore, an interested party under s. 52 of said Act and is entitled to the order made by the Exchequer Court amending the plaintiff's registration as aforesaid. *Per* Taschereau J.: In view of the fact that the articles which were understood to be referred to by the words "shaving machines" were not patented until after registration of plaintiff's trade mark, and in view of the agreements (discussed in the judgment) between Schick and plaintiff company and of the

TRADE MARK—*Concluded*

transactions of Schick and the companies bearing his name, plaintiff's registration, in so far as it covers "shaving machines", is irregular and should be amended by striking those words from it, and defendant has the right to use the word "Schick" in connection with such machines. MAGAZINE REPEATING RAZOR COMPANY OF CANADA ET AL. *v.* SCHICK SHAVER LTD. **465**

TRANSFER OF PROPERTY.

See CONTRACT.

USUFRUCT.

See WILL.

WATER-COURSE — *Dams — Lease from Government—Order in Council—Flooding of lands—Damages—Jurisdiction to entertain claims—Whether Superior Court or Quebec Public Service Commission—Work connecting two provinces — Watercourse Act, R.S.Q., 1925, c. 46, s. 12.*]—The Montreal Engineering Company, later replaced by the Chats Falls Power Company whose name was subsequently changed to that of the respondent company, was authorized by Order in Council to erect, operate and maintain a dam in the river Ottawa, at Chats rapids, such Order purporting to be given pursuant to sections 4 *et seq.* of the Quebec *Watercourse Act*. The appellants, alleging that they were riparian proprietors of certain properties situated west of Chats Falls and although admitting that the water level of the river was not in consequence of these works raised above the ordinary high water mark, claimed that they were nevertheless entitled to recover damages in virtue of section 12 of the *Watercourse Act* on several grounds mentioned in their statement of claim. Section 12 enacts that "(1) The owner or lessee of any such work shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood gates or otherwise. (2) Such damages shall be assessed and fixed by the Quebec Public Service Commission." The respondent contested the appellants' right to claim damages and further alleged that the Superior Court had no jurisdiction to entertain the claim under paragraph (2) of section 12. The trial judge dismissed the appellants' action, finding upon the evidence that no damages had been sustained. The appellate court affirmed that decision on many grounds, holding *inter alia* that the Superior Court had no jurisdiction because such damages should have been assessed by the Quebec Public Service Commission under section 12 of the Act. The appellants also advanced before this Court a new contention that the dam of the respondent

WATER COURSE—*Continued*

company, being part of a single work connecting the province of Quebec with the province of Ontario, was, therefore, part of a work which the former province was without legislative competence to authorize. *Held* that the finding of the trial judge that no damages had been sustained by the appellants should not be disturbed, such finding being amply supported by the evidence. *Held*, also, reversing the judgment of the appellate court on that point, that under articles 7295 and 7296 of R.S.Q. (1909) the Superior Court possessed jurisdiction to entertain an action for damages such as the present and to give judgment for such damages as might be assessed. Section 12 of the present *Watercourse Act* is not new legislation; similar legislation having been passed in 1856 (19-20 Vict., ch. 104), subsequently appearing as chapter 51 of the Consolidated Statutes of Lower Canada (1861) and again as articles 5535 and 5536 R.S.Q. (1888). Since the first enactment in 1861, there has been a series of decisions in the province of Quebec in which it was held that the right to damages given by the statute was one which could be enforced by action in any competent court; and the legislature of Quebec by re-enacting in 1888 and again in 1909 the legislation first passed in 1856 and later embodied in chapter 51 of the Consolidated Statutes of Lower Canada (1861) must be taken to have given statutory sanction to the course of decision culminating in the judgment of this Court in *Breakey* v. *Carter* (Cassels Digest, 2nd ed. 463). By force of articles 7295 and 7296 of R.S.Q. (1909) the Superior Court would have been, so long as that legislation remained unchanged, competent to entertain such an action as the present. It must be taken that, by these articles, the legislature declared an action for damages under article 7296 (1) to be competent in the Superior Court. Terms more explicit than those contained in paragraph 2 of section 12 would be required to deprive the courts of Quebec of the jurisdiction they possessed under the then existing statute. Subsection 2 of section 7296 R.S.Q. (1909) was providing for the ascertainment of damages by experts; and by enacting section 12 of the *Watercourse Act* to replace ss. 2 of s. 7296 R.S.Q., the legislature must be deemed not to have taken away the jurisdiction of competent courts. The more natural interpretation of the action of the legislature in enacting section 12 would be that recourse to experts for assessing damages was being replaced by the Public Service Commission and that competent courts had not been deprived of jurisdiction. *Held*, further, that the appellants' ground of appeal based on the

WATER COURSE—*Concluded*

contention that the dam was part of a simple work connecting the province of Quebec with the province of Ontario was not open to the appellants in this court. Upon the facts, the dam was a work wholly situated within the province of Quebec, constructed there under the authority of a provincial statute and the property in relation to which the appellants allege they had suffered prejudice was also situated in that province. *Prima facie*, therefore, the reciprocal rights and liabilities of the parties must be governed by the law of that province. It was not alleged in the pleadings that this dam affected the flow of the river south of the interprovincial boundary, and the issues of fact which might have to be considered for the purpose of examining this contention of the appellants are not among the issues to which an order was directed, or which were considered by the courts below, or presented to those courts by the pleadings or otherwise. Judgment of the Court of King's Bench (Q.R. 65 K.B. 504) aff. STREET *v.* OTTAWA VALLEY POWER CO..... **40**

WILL—*Substitution—Legacy of usufruct to grandchildren—Right by substitutes to dispose by will under certain conditions—Lapsing of such legacy—Interpretation—Intention of testator—Arts. 756, 831, 893, 944, 956 C.C.*]—By his will in authentic form one L. C. Gravel bequeathed to his wife the usufruct of the remainder and residue of all his estate; and by clause four of his will he bequeathed, subject to his wife's right of usufruct, the remainder and residue of the same property to his daughter, Maria Gravel, wife of Louis Joseph Lajoie, to hold and enjoy as institute, subject to the obligation of delivering over the ownership thereof to her issue in the first degree. By clause nine of his will he disposed as follows: "It is my will and intention that any substitute inheriting the ownership of my property, in the event of the opening of his legacy, be placed in possession thereof as actual owner only when he has attained the age of thirty, and that until then he have only the use and usufruct thereof, without power to sell, pledge or alienate any part of his share of capital or of realty, while being allowed to dispose thereof by will, in the event of death before attaining such age providing it be in favour of his children of full age or, in default thereof, in favour of any one of the substitutes of his choice under the said substitution, while nevertheless having the right to bequeath the right of enjoyment of his share to his consort, but during widowhood only, whether he have issue or not, and in default of such

a will, the share of any of the said substitutes under the said substitution dying while of age but under thirty shall devolve to his children or, in default of children, to the other substitutes under the said substitution, according to the conditions hereinbefore provided in the event of the decease under age of any substitute under the said substitution without leaving issue of full age." L. C. Gravel's wife died in Montreal on August 16th, 1900, and her daughter Maria Gravel also died in Montreal on September 16th, 1916. By this last decease the substitution created by L. C. Gravel's will became open and the property thereby affected devolved to the seven children of Maria Gravel. Marguerite Lajoie, one of these children, who was one of the substitutes, made on December 13th, 1919, at the age of 24 years and some months, a will in authentic form whereby she disposed of the estate she inherited from her grandfather, in the following terms: "3. Desiring to avail myself of the rights conferred upon me by clause nine of the solemn will of my grandfather, the late Louis Charles Gravel, * * * to dispose by will of my share in his estate as one of the substitutes under the said will, I give and bequeath to my above-named husband the use and usufruct during his lifetime, or until his remarriage, of my share in the said estate of my late grandfather above named, as one of the substitutes under the said will, and to my two sisters Hortense Lajoie and Blanche Lajoie, in equal parts, the ownership of my said share in the said estate, subject to the said usufruct of my said husband during his lifetime or until his remarriage." When she made her will Marguerite Lajoie was childless; and it is only on August 21st, 1925, that is at the age of thirty years and nearly ten months, that she gave birth to her first child, Louise Clerk. Marguerite Lajoie, left a widow in 1926 at the age of thirty-two, married the appellant at the age of thirty-five and died at the age of forty leaving no other will but the one above mentioned. Her lawful heirs, that is, her daughter Louise Clerk and her husband Oscar Benoit, accepted her succession. In his own name, as well as in his capacity of tutor to his minor daughter, the appellant asked that the bequest to the respondent be declared null and void. *Held*, reversing the judgment of the Court of King's Bench (Q.R. 68 K.B. 117), that clause 3 of Marguerite Lajoie's will was to take effect only in the event of her dying under the age of thirty without leaving any children; and that, this contingency not having occurred, the legacy dependent upon it remained without effect: it lapsed from the moment that

the condition to which it was subject was fulfilled and on Marguerite Lajoie's attaining the age of thirty.—In order to determine "what was the real intention of" the testatrix, a "fair and literal meaning" must be given to the terms and expressions which she used to manifest it (*Auger* v. *Beaudry*, [1920] A.C. 1010); and in doing so, the conclusion must be that the testatrix did not intend to avail herself of the unlimited right to dispose by will and the general power conferred upon her by the Civil Code, but that she only wished to "avail herself of the rights" conferred upon her by her grandfather's will, i.e., that she wished merely to provide for the contingency arising in the event of her dying before the age of thirty years. BENOIT *v.* LAJOIE..... **318**

2——*Construction—Provisions for benefit of testator's wife and direction that "all income taxes which may be payable in respect of" said provisions "shall be paid out of my estate by my trustees"—Wife receiving income from other sources also —Extent of indemnification by the trustees in respect of wife's income taxes, in view of effect of taxing Acts in increasing rate of tax on gradual scale as amount of net income increases, in imposing surtax, and in treating sum paid by trustees for income tax as part of wife's income.*]— By clause 3 of the testator's will, he gave and devised to his trustees his residence in Toronto known as "Castle Frank" upon the following trusts: During his wife's lifetime, so long as she remained his widow, and so long as she desired to use Castle Frank as her residence, they were to keep it up in suitable condition; pay all taxes, insurance, repairs, etc.; allow her to occupy it free of rent (the furniture, etc., were given to her outright); bear the expense of maintenance and management, to cover the cost of which they were to pay her $2,250 monthly. If she should cease to occupy it as her home, she was to be paid $75,000 out of the general estate, the monthly allowance of $2,250 should cease and in lieu thereof she was to be paid $2,000 monthly during her widowhood. After the testator's death she continued to occupy Castle Frank as her residence and home. Clause 4 of the will directed (*inter alia*) that "all income taxes which may be payable in respect of the said above provisions for my wife shall be paid out of my estate by my trustees." The testator's wife received also under the will (clause 16) a portion of the residuary estate and the income (not given free from income tax), during life and widowhood respectively, from two other portions thereof. Also she had income of her own. Under

RÈGLES

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RÈGLES DE LA COUR SUPRÊME DU CANADA

1939

INTERPRÉTATION

RÈGLE 1.—Dans les règles suivantes, à moins que le contexte ne s'y oppose, l'expression "juge" ou "juge de la cour" signifie tout juge de la Cour suprême, et l'expression "juge de la Cour suprême en chambre" ou "juge en chambre" comprend aussi le registraire siégeant en chambre en vertu des pouvoirs à lui conférés par les règles 82 à 89 inclusivement.

RÈGLE 2.—Dans les règles ci-dessous, les expressions suivantes ont les significations particulières qui leur sont attribuées outre leurs diverses significations ordinaires, à moins que, dans le sujet ou contexte, il ne se trouve quelque chose qui s'oppose à une telle interprétation, savoir:

(1) Les mots écrits au singulier comprennent le pluriel, et les mots écrits au pluriel comprennent le singulier;

(2) Les mots qui impliquent le genre masculin comprennent les personnes du sexe féminin;

(3) L'expression "partie" ou "parties" comprend un corps politique ou constitué en corporation, ainsi que Sa Majesté le Roi et le Procureur général de Sa Majesté;

(4) L'expression "affidavit" comprend une affirmation;

(5) L'expression "la loi" signifie "la Loi de la Cour suprême";

(6) L'expression "mois" signifie le mois civil lorsqu'il n'est pas fait de mention spéciale des mois lunaires.

MOTIONS EN ANNULATION D'APPEL

RÈGLE 3.—En tout temps après qu'une ordonnance est rendue en conformité de la Loi de la Cour suprême, acceptant le cautionnement exigé par la loi, l'intimé peut demander à la cour une ordonnance en annulation d'appel.

RÈGLE 4.—Lorsque l'appel est annulé, l'appelant peut, à la discrétion de la cour, être enjoint de payer la totalité ou une partie des frais de l'appel.

RÈGLE 5.—Après signification d'un avis de motion en annulation, toutes les procédures ultérieures de l'appel sont suspendues jusqu'à ce qu'il ait été disposé de la motion, sauf ordonnance contraire de la cour ou d'un juge. Une semblable motion doit être inscrite pour audition sans retard évitable.

LE DOSSIER IMPRIMÉ DOIT RENFERMER LES NOTES DU JUGEMENT

RÈGLE 6.—Le dossier imprimé prévu par la Loi de la Cour suprême et portant en attestation le sceau de la cour dont appel est interjeté doit être produit au bureau du registraire, et en plus des procédures mentionnées dans ladite loi, il doit invariablement renfermer une transcription de toutes les opinions ou notes à l'appui du jugement prononcé par les juges du tribunal ou des tribunaux inférieurs, ou un certificat signé par le greffier de ce tribunal ou de ces tribunaux ou un affidavit attestant que cette transcription ne peut être obtenue, et mentionnant les démarches faites pour l'obtenir.

LE DOSSIER IMPRIMÉ DOIT RENFERMER LA COPIE DES JUGEMENTS DES TRIBUNAUX INFÉRIEURS ET TOUTE ORDONNANCE DE PROROGATION DE DÉLAI

RÈGLE 7.—Le dossier imprimé doit aussi renfermer une copie de tous les jugements rendus par les tribunaux inférieurs, ainsi qu'une copie de toute ordonnance prorogeant le délai d'appel que peut avoir rendue le tribunal inférieur ou un juge dudit tribunal.

LE DOSSIER IMPRIMÉ PEUT ÊTRE REMIS AU TRIBUNAL INFÉRIEUR

RÈGLE 8.—La cour ou un juge de la Cour suprême en chambre peut ordonner le renvoi du dossier imprimé au tribunal inférieur pour y être corrigé ou complété par l'addition de toute pièce supplémentaire.

MOTION EN ANNULATION D'APPEL POUR RETARD

RÈGLE 9.—Si l'appelant ne produit pas son dossier imprimé en appel au bureau du registraire dans les quarante jours après la réception du cautionnement prévu par la loi, il est considéré comme ne poursuivant pas convenablement son appel, et l'intimé peut demander le rejet de l'appel conformément aux dispositions de la loi à cet égard.

CERTIFICAT DE CAUTIONNEMENT

RÈGLE 10.—Lorsqu'un cautionnement a été fourni à la cour dont appel est interjeté, le dossier imprimé doit être accompagné d'un certificat scellé par la cour inférieure attestant que l'appelant à fourni un cautionnement convenable à la satisfaction de la cour dont le jugement est porté en appel, ou d'un juge de ladite cour, et indiquant la nature du cautionnement au montant de cinq cents dollars, tel que requis par la loi. Est jointe au certificat une copie de toute obligation ou autre document en vertu duquel le cautionnement peut être fourni.

LE DOSSIER DOIT ÊTRE IMPRIMÉ ET TRENTE EXEMPLAIRES DÉPOSÉS AU BUREAU DU REGISTRAIRE

RÈGLE 11.—L'appelant doit faire imprimer le dossier et en déposer trente exemplaires au bureau du registraire, à l'usage des juges et des fonctionnaires de la cour.

2. Dès que le dossier est imprimé, le procureur de l'appelant, sur demande, doit en faire parvenir trois exemplaires au procureur de l'intimé.

FORMAT DU DOSSIER IMPRIMÉ

RÈGLE 12.—Le dossier imprimé doit avoir le format demi-quarto. Il doit être imprimé sur du papier de bonne qualité, sur un seul côté de la feuille, les pages imprimées se trouvant à la gauche. Le caractère cicéro (pica) doit être employé (cependant le petit romain (long primer) est utilisé pour les états de comptes et les tableaux). Le format du dossier imprimé est de onze pouces sur huit pouces et demi, et chaque dixième ligne est numérotée à la marge. Chaque page imprimée doit avoir 47 lignes ou environ et comporter au moins 500 mots.

2. Lorsque des témoignages sont imprimés, chaque page doit porter un en-tête énonçant le nom du témoin et par qui il est cité, et indiquant que la déposition est un interrogatoire, un contre-interrogatoire, ou selon le cas.

3. Tous les documents imprimés ou écrits produits comme pièces sont réunis et imprimés au dossier dans l'ordre chronologique, et quand plusieurs documents ont été produits au tribunal inférieur à titre de pièce unique, ils doivent, pour les fins du dossier, être considérés comme pièces distinctes.

4. Les plaidoiries écrites, jugements et autres documents sont imprimés in extenso, sauf dispense du registraire.

5. La page liminaire indique le nom de la cour et de la province d'où émane l'appel, ainsi que l'intitulé de la cause avec le nom de l'appelant en premier lieu, comme suit:

A. B.
(Demandeur ou défendeur, selon le cas.)

Appelant.

et

C. D.
(Défendeur ou demandeur, selon le cas.)

Intimé.

Sont aussi ajoutés les noms des procureurs et correspondants.

6. Lorsque le dossier excède 300 pages, il doit être relié en volumes distincts d'au plus 200 pages environ chacun.

7. Le prix fixé pour l'impression de 30 exemplaires selon la forme prescrite par les présentes règles ne doit pas excéder 50 cents pour chaque 100 mots imprimés dans une page de cicéro (pica) ou son équivalent, mais, dans certains cas, il est loisible au registraire d'accroître ce montant.

8. Le début du dossier comporte une table alphabétique énonçant en détail tout le contenu du dossier en quatre parties, ainsi qu'il suit:

Partie I.—Chaque plaidoirie écrite, décision, ordonnance, inscription ou autre document avec sa date, dans l'ordre chronologique.

Partie II.—Le nom de chaque témoin, en indiquant s'il est cité par le demandeur ou défendeur, son interrogatoire, contre-interrogatoire, ou selon le cas, avec le numéro de la page.

Partie III.—Chaque pièce avec sa description, sa date et son numéro, dans l'ordre de sa production.

Partie IV.—Tous les jugements des tribunaux inférieurs, ainsi que les notes à l'appui, et le nom du juge qui les a déposées.

Lorsque le dossier est relié en plus d'un volume, chacun de ces derniers doit renfermer au commencement une table alphabétique de tout le dossier, sauf ordonnance contraire du registraire .

9. Sous réserve de la disposition concernant l'impression des documents dans l'ordre chronologique, si l'appelant le désire, le dossier peut être imprimé conformément aux règlements qui s'appliquent aux format et caractère d'imprimerie dans les appels interjetés à Sa Majesté en conseil.

LE DOSSIER IMPRIMÉ NE PEUT ÊTRE REÇU SI LES RÈGLES NE SONT PAS OBSERVÉES

RÈGLE 13.—Le registraire ne doit pas recevoir le dossier imprimé sans l'autorisation de la cour, ou d'un juge, lorsque l'ordre précité n'a pas été suivi ou qu'il appert que les fautes d'impression n'ont pas été convenablement corrigées, et il n'est pas taxé de frais pour un dossier non préparé selon les règles.

2. Tout dossier produit et chaque exemplaire dudit dossier que les présentes règles enjoignent de produire sont accompagnés d'un certificat (Formule O), signé par un procureur de l'appelant ou son correspondant à Ottawa, attestant que l'imprimé a été collationné sur les originaux et reconnu conforme.

DISPENSE D'IMPRESSION. DOSSIER ORIGINAL

RÈGLE 14.—La cour ou un juge en chambre peut dispenser de l'impression ou de la reproduction de l'un quelconque des documents ou plans faisant partie du dossier.

2. Le dossier original de la cour dont le jugement est porté en appel ainsi que les pièces et la preuve documentaire produites dans la cause, doivent être transmis au registraire avec le dossier certifié prévu par la loi.

FORMULE DE CONVOCATION SPÉCIALE DE LA COUR

RÈGLE 15.—L'avis convoquant la cour pour l'audition des appels en matière d'élection ou en matière criminelle, des appels relatifs à l'*habeas corpus*, ou pour toute autre fin visée par un article de la loi à cet égard, doit être publié par le registraire dans la *Gazette du Canada*, conformément aux instructions du juge en chef ou du doyen des juges puînés, selon le cas, et y être inséré pendant le délai précédant le jour fixé pour cette session spéciale que ledit juge en chef ou doyen des juges puînés peut prescrire. L'avis peut être selon la Formule A de l'Annexe des présentes Règles.

AVIS D'AUDITION DE L'APPEL

RÈGLE 16.—Après la production du dossier imprimé, un avis de l'audition de l'appel doit être donné par l'appelant pour la session alors prochaine de la cour, telle que fixée par la loi ou convoquée spécialement pour l'audition des appels conformément aux dispositions de ladite loi, s'il y a un délai suffisant à cette fin. Si, entre la production du dossier imprimé et le premier jour de la session alors prochaine, le délai ne suffit pas pour permettre à l'appelant de signifier l'avis ci-dessus prescrit, alors l'avis d'audition doit être donné pour la session qui suit la session alors prochaine.

FORMULE DE L'AVIS D'AUDITION

RÈGLE 17.—L'avis d'audition peut être selon la Formule B de l'Annexe des présentes Règles.

DÉLAI DE SIGNIFICATION

RÈGLE 18.—L'avis d'audition doit être signifié au moins douze jours avant le premier jour de la session au cours de laquelle l'appel doit être entendu.

MODE DE SIGNIFICATION DE L'AVIS D'AUDITION

RÈGLE 19.—L'avis est signifié à l'avocat ou procureur qui a occupé pour l'intimé au tribunal inférieur, à son lieu ordinaire d'affaires, ou à son correspondant désigné, ou au domicile élu dudit avocat ou procureur en la cité d'Ottawa. Si ce dernier n'a pas de correspondant désigné ni de domicile élu en la cité d'Ottawa, l'avis peut être signifié en l'affichant dans quelque endroit bien en vue au bureau du registraire et en en déposant à la poste le même jour une copie affranchie et adressée audit avocat ou procureur.

2. Lorsque la validité d'une loi du Parlement du Canada est contestée dans un appel à la Cour suprême, il doit être signifié au Procureur général du Canada un avis d'audition énonçant la question de juridiction soulevée.

3. Lorsque la validité d'une loi d'une législature provinciale du Canada est contestée dans un appel à la Cour suprême, il doit être signifié au Procureur général du Canada et au Procureur général de la province un avis d'audition énonçant la question de juridiction soulevée.

"RÉPERTOIRE DES CORRESPONDANTS"

RÈGLE 20.—Il est tenu au bureau du registraire de cette cour un livre intitulé "Répertoire des correspondants" dans lequel les avocats, procureurs, avoués et avoués-procureurs exerçant près la Cour suprême peuvent inscrire le nom d'un correspondant en la cité d'Ottawa (ledit correspondant ayant lui-même droit d'exercer à ladite cour), ou élire un domicile en ladite cité.

DÉCLARATION DE L'APPELANT OU INTIMÉ QUI COMPARAÎT EN PERSONNE

RÈGLE 21.—Si un appelant ou intimé qui s'est fait représenter par avocat ou procureur au tribunal inférieur désire comparaître en personne dans l'appel, il doit, dès que la cour dont le jugement est porté en appel, ou un juge de ladite cour, a accepté le cautionnement requis par la loi, transmettre au registraire une déclaration en ces termes:

"A. *v.* B.

"Je, C.D., me propose de comparaître en personne dans le présent appel.

(Signé) C.D."

SI AUCUNE DÉCLARATION N'EST PRODUITE

RÈGLE 22.—Si aucune déclaration semblable n'est produite et tant qu'une ordonnance concernant le changement de procureur ou avocat n'a pas été obtenue tel que prévu ci-après, le procureur ou avocat qui a comparu pour une partie quelconque au tribunal inférieur est censé son procureur ou avocat dans l'appel à cette cour.

DÉCLARATION DE L'APPELANT OU INTIMÉ QUI CHOISIT DE COMPARAÎTRE PAR AVOCAT

RÈGLE 23.—Lorsqu'un appelant ou intimé a comparu en personne au tribunal inférieur, il peut choisir de comparaître dans l'appel par ministère d'avocat ou de procureur. En ce cas, l'avocat ou le procureur doit produire une déclaration à cet effet au bureau du registraire, et dès lors toutes les pièces de procédure sont signifiées audit avocat ou procureur tel que ci-dessus prévu.

ÉLECTION DE DOMICILE PAR L'APPELANT OU INTIMÉ QUI COMPARAÎT EN PERSONNE

RÈGLE 24.—Un appelant ou intimé qui comparaît en personne peut, au moyen d'une déclaration produite au bureau du registraire, élire un domicile ou endroit en la cité d'Ottawa où tous avis et pièces de procédure peuvent lui être signifiés. La signification audit endroit de tous avis et pièces de procédure est réputée valable.

SIGNIFICATION QUAND L'APPELANT OU L'INTIMÉ COMPARAÎT EN PERSONNE SANS ÉLIRE DOMICILE

RÈGLE 25.—Si un appelant ou intimé qui a comparu en personne devant la cour dont appel est interjeté ou qui a produit une déclaration sous le régime de la règle 21 n'a pas, avant la signification, élu un domicile en la cité d'Ottawa, toutes les pièces de procédure peuvent être signifiées par affichage dans un endroit bien en vue au bureau du registraire.

CHANGEMENT D'AVOCAT OU PROCUREUR

RÈGLE 26.—Une partie à un appel peut, sur requête *ex parte* au registraire, obtenir une ordonnance pour changer son avocat ou procureur, et après la signification de ladite ordonnance à la partie adverse, tous les avis et autres pièces de procédure sont signifiés au nouvel avocat ou procureur.

SIGNIFICATION PAR SUBSTITUTION

RÈGLE 27.—Lorsque la signification personnelle d'un avis, ordonnance ou autre document est requise par les présentes règles, ou autrement, et qu'il est démontré à la cour ou à un juge en chambre que l'exécution d'une prompte signification personnelle est impossible, la cour ou un juge en chambre rendra l'ordonnance qui peut être équitable pour signification par substitution ou autre, ou pour la substitution d'un avis à signifier par lettre, annonce publique ou autrement.

AFFIDAVIT DE SIGNIFICATION

RÈGLE 28.—Les affidavits doivent mentionner, quand, où, comment et par qui a été effectuée la signification.

FACTUMS À DÉPOSER AU BUREAU DU REGISTRAIRE

RÈGLE 29.—Au moins quinze jours avant le premier jour de la session à laquelle l'appel doit être entendu, l'appelant et l'intimé doivent chacun déposer au bureau du registraire, à l'usage de la cour et de ses fonctionnaires, trente exemplaires de son factum ou de ses motifs de discussion en appel.

TENEUR DU FACTUM

RÈGLE 30.—Le factum ou les motifs de discussion en appel doivent comprendre les trois parties suivantes:

Partie I.—Un exposé concis des faits.

Partie II.—Dans le cas d'un factum de l'appelant, un exposé concis énonçant avec clarté et en détail à quel égard le jugement est réputé erroné. Lorsque la prétendue erreur a trait à l'admission ou au rejet de la preuve, la preuve admise ou rejetée doit être citée au long. Quand l'erreur présumée se rapporte au résumé des débats que fait le juge au jury, le texte de l'allocution du juge et les objections de l'avocat sont énoncés *verbatim*.

Dans le cas du factum de l'intimé, un exposé concis des questions en litige dans l'appel et de l'attitude de l'intimé à leur égard.

Partie III.—Un exposé condensé des débats énonçant les points de droit ou de fait à discuter, avec renvoi particulier à la page et à la ligne du dossier, ainsi qu'aux autorités invoquées à l'appui de chaque point. Lorsqu'une loi, règlement, règle, ordonnance ou statut est cité ou invoqué, il doit en être imprimé au long toute partie qui peut être nécessaire à la décision de la cause.

MODE D'IMPRESSION

RÈGLE 31.—Le factum ou les motifs de discussion en appel doivent être imprimés dans le format et de la manière prévus ci-dessus pour le dossier imprimé en appel, et ils ne sont recevables par le registraire que s'ils se conforment à toutes les exigences susmentionnées relatives à ce dossier.

MOTION EN REJET D'APPEL PAR L'INTIMÉ POUR CAUSE DE RETARD DANS LA PRODUCTION DU FACTUM

RÈGLE 32.—Si l'appelant ne produit pas son factum ou ses motifs de discussion en appel dans le délai prescrit (Règle 29), il est loisible à l'intimé de demander, sous le régime des dispositions de la loi à cet égard, le rejet de l'appel pour cause de retard indû.

L'APPELANT PEUT INSCRIRE *EX PARTE* SI LE FACTUM N'EST PAS PRODUIT

RÈGLE 33.—Si l'intimé omet de produire, dans le délai prescrit, son factum ou ses motifs de discussion en appel, l'appelant peut inscrire la cause pour audition *ex parte*.

ANNULATION DE L'INSCRIPTION *EX PARTE*

RÈGLE 34.—Cette inscription *ex parte* peut être rejetée ou annulée sur requête à un juge en chambre, suffisamment appuyée par affidavits.

LE REGISTRAIRE SCELLE LES FACTUMS PRODUITS EN PREMIER LIEU

RÈGLE 35.—Le registraire doit garder le factum ou les motifs de discussion en appel produits en premier lieu et les sceller; il ne doit dans aucun cas les communiquer à la partie adverse tant que cette dernière n'a pas elle-même apporté et produit son propre factum ou ses propres motifs.

ÉCHANGE DE FACTUMS

RÈGLE 36.—Dès que les parties ont déposé leursdits factums ou motifs de discussion en appel, chacune d'elles doit, à la demande de l'autre, lui en transmettre trois exemplaires.

LE REGISTRAIRE DOIT INSCRIRE LES APPELS POUR AUDITION

RÈGLE 37.—Le registraire doit inscrire les appels pour audition dans un livre qu'il tient à cette fin, au moins quatorze jours avant le premier jour de la session de la cour fixée pour l'audition de l'appel. Mais nul appel dont le dossier imprimé n'a pas été produit vingt jours francs avant le premier jour de ladite session ne doit être ainsi inscrit sans l'autorisation de la cour ou d'un juge en chambre.

AVOCATS À L'AUDITION

RÈGLE 38.—Sauf par autorisation pour des motifs particuliers, chaque partie dans un appel ne peut faire entendre que deux avocats. Un seul a le droit de réplique.

AJOURNEMENT DE L'AUDITION

RÈGLE 39.—La cour peut, à sa discrétion, remettre ou ajourner l'audition à une date ultérieure pendant la même session, ou à toute session subséquente.

DÉFAUT PAR LES PARTIES DE COMPARAÎTRE À L'AUDITION

RÈGLE 40.—*a*) Les appels sont entendus dans l'ordre de leur inscription, et si l'une ou l'autre partie néglige de se présenter au jour voulu pour poursuivre ou contester l'appel, la cour peut entendre la partie adverse et rendre jugement sans l'intervention de la partie qui néglige ainsi de comparaître, ou elle peut ajourner l'audition aux conditions, quant au paiement des frais ou autrement, qu'elle prescrit.

b) Chaque fois que jugement est réservé, les avocats occupant pour les parties sont censés assister au prononcé de ce jugement, et à défaut de cette présence, le prononcé du jugement peut être différé.

COMMENT SIGNER LES JUGEMENTS

RÈGLE 41.—Les ordonnances et jugements de la cour sont déterminés et signés par le registraire.

DÉTERMINATION ET ENREGISTREMENT DU JUGEMENT

RÈGLE 42.—Le procureur de la partie qui a gain de cause doit obtenir du registraire une convocation pour déterminer le jugement, et il doit en signifier une copie avec une copie du projet des minutes au procureur de la partie adverse au moins deux jours francs avant la date fixée pour la détermination du jugement. Le registraire doit vérifier, de la manière qu'il croit utile, que les minutes du jugement et l'avis de convocation ont été dûment signifiés.

RÈGLE 43.—Si, après convocation du registraire, une partie manque de se présenter lors de la détermination d'un projet de jugement, le registraire peut procéder en l'absence de ladite partie au règlement du projet.

RÈGLE 44.—Si la partie qui a gain de cause néglige ou refuse d'obtenir une convocation pour déterminer les minutes du jugement, le registraire peut confier la conduite des procédures à la partie adverse.

RÈGLE 45.—Le registraire peut ajourner à la date qu'il croit convenable toute convocation pour déterminer le projet d'un jugement ou ordonnance, et les parties qui se sont présentées à la convocation sont tenues d'assister sans autre avis à cette convocation ajournée.

RÈGLE 46.—Nonobstant les règles précédentes, le registraire doit, chaque fois que la cour ou un juge l'estime opportun, déterminer tout jugement ou ordonnance sans convocation et sans avis aux parties.

RÈGLE 47.—Une partie mécontente des minutes du jugement telles que déterminées par le registraire peut demander à la cour de les modifier après avoir signifié au procureur de la partie adverse un avis de motion de deux jours francs. Ladite motion est inscrite pour audition à la session de la cour la plus rapprochée et la plus commode. Toutefois, à moins qu'un juge de la Cour suprême n'en ordonne autrement, ladite motion ne saurait suspendre l'inscription du jugement si le registraire est d'avis qu'elle est futile ou causerait un préjudice déraisonnable à la partie qui a gain de cause. Cette motion doit reposer seulement sur le motif que les minutes telles que déterminées, pour une ou plusieurs raisons spécifiées dans l'avis de motion, ne concordent pas avec le jugement prononcé par la cour ou qu'une question qui aurait dû être décidée a été oubliée ou omise accidentellement du jugement ainsi prononcé.

RÈGLE 48.—Chaque jugement doit porter la date du jour auquel il a été prononcé, sauf ordonnance contraire de la cour, et il devient opérant à compter de cette date. Toutefois, sur autorisation spéciale de la cour ou d'un juge, un jugement peut être antidaté ou postdaté.

RÈGLE 49.—Chaque jugement ou ordonnance dans une cause ou affaire enjoignant à une personne d'accomplir un acte y prescrit doit spécifier l'époque, ou le délai après la signification du jugement ou ordonnance, pour l'accomplissement dudit acte; et sur toute copie du jugement ou de l'ordonnance à être signifiée à la personne tenue de s'y conformer, il doit être inscrit un mémorandum ainsi conçu ou à l'effet suivant, savoir: "Si vous, ledit A.B. nommé aux présentes, négligez de vous conformer au présent jugement (ou à la présente ordonnance) dans le délai y prescrit, vous devenez sujet à une procédure en exécution aux fins de vous contraindre à vous y conformer."

ADDITION DE PARTIES PAR DÉCLARATION OU AUTREMENT

RÈGLE 50.—Dans chaque cas non déjà prévu par la loi où il devient nécessaire d'ajouter, comme appelante ou intimée, une partie additionnelle à l'appel, que cette procédure s'impose par suite du décès ou de l'insolvabilité d'une partie déjà inscrite, ou pour toute autre cause, cette partie additionnelle peut être ajoutée à l'appel par la production d'une déclaration qui peut être selon la Formule C de l'Annexe des présentes Règles.

2. Dans tout appel, la cour peut, sur ou sans la requête de l'une des parties, ordonner qu'il soit ajouté une partie ou des parties intimées, lorsque, de l'avis de la cour, une telle ordonnance est juste, opportune et nécessaire pour lui permettre de juger et régler efficacement et complètement la question en jeu dans l'appel, et lorsque, d'après les faits produits devant elle, la cour est d'avis que ladite partie ou lesdites parties intimées auraient dû être ajoutées par le tribunal dont la décision fait l'objet de l'appel.

Ladite ordonnance doit être rédigée dans les termes et doit contenir les instructions pertinentes que la cour estime équitables.

LES DÉCLARATIONS PEUVENT ÊTRE REJETÉES

RÈGLE 51.—La cour ou un juge peut, sur motion, rejeter la déclaration mentionnée à la règle précédente.

SIGNIFICATION DE L'AVIS

RÈGLE 52.—L'avis de production de cette déclaration doit être signifié à l'autre partie ou aux autres parties dans l'appel.

DÉCISION DES QUESTIONS DE FAIT DÉCOULANT D'UNE MOTION

RÈGLE 53.—Sur une motion tendant à faire rejeter une déclaration, la cour ou un juge peut, à discrétion, ordonner que soient entendus les témoignages devant un fonctionnaire ad hoc ou prescrire que les parties procéderont devant le tribunal compétent pour y faire juger et décider toute question; en pareil cas, toutes les procédures en appel peuvent être suspendues jusqu'après l'audition, et l'adjudication sur ladite question.

MOTIONS

RÈGLE 54.—Toutes requêtes interlocutoires en appel doivent s'effectuer par voie de motion appuyée par des affidavits à produire au bureau du registraire. L'avis de motion est signifié au moins quatre jours francs avant la date de l'audition.

Les affidavits et pièces devant servir à une motion doivent être produits au bureau du registraire au moins deux jours francs avant l'audition de la motion. L'avis de motion doit énoncer au long les motifs qu'elle invoque. Dans les motions en annulation pour défaut de compétence, une copie des plaidoiries écrites et des jugements des tribunaux inférieurs doit faire partie des matériaux déposés.

MODE DE SIGNIFICATION DE L'AVIS DE MOTION

RÈGLE 55.—Cet avis de motion peut être signifié à l'avocat ou procureur de la partie adverse en en remettant une copie au correspondant désigné, ou au domicile élu de l'avocat ou procureur à qui il est adressé, en la cité d'Ottawa. Si l'avocat ou procureur n'a pas de correspondant désigné ou n'a aucun domicile élu en la cité d'Ottawa, ou si une partie à qui doit être signifié l'avis de motion n'a pas élu de domicile dans la cité d'Ottawa, cet avis de motion peut être signifié en en affichant une copie dans quelque endroit bien en vue au bureau du registraire de cette cour.

AFFIDAVITS À L'APPUI D'UNE MOTION

RÈGLE 56.—La signification d'un avis de motion doit être accompagnée de copies des affidavits produits à l'appui de la motion.

INSCRIPTION DES MOTIONS

RÈGLE 57.—Les motions à présenter à la cour doivent être inscrites sur une liste ou papier et avoir la préséance sur l'audition des appels le premier jour d'une session quelconque et le premier jour de chaque semaine où la cour est en session.

INTERROGATOIRE SUR AFFIDAVIT

RÈGLE 58.—Une partie qui désire contre-interroger un témoin qui a fait un affidavit produit pour le compte de la partie adverse peut, avec l'autorisation d'un juge en chambre, signifier à la partie qui a produit cet affidavit, ou à son procureur, un avis par écrit demandant la production du témoin pour contre-interrogatoire devant le registraire ou un commissaire autorisé à déférer les serments et désigné par ce juge en chambre. Ledit avis est signifié dans le délai que le registraire peut prescrire spécifiquement; et à moins que ce témoin ne soit produit en conséquence, son affidavit ne peut servir à la preuve que si la cour ou un juge en chambre l'autorise spécialement. La partie qui produit ce témoin pour être contre-interrogé n'est pas admise à réclamer de celle qui exige cette production les dépenses occasionnées en premier lieu, sauf autorisation du registraire.

ABANDON DE L'APPEL POUR CAUSE DE RETARD

RÈGLE 59.—A moins que l'appelant n'inscrive l'appel pour audition dans l'année qui suit la réception du cautionnement, l'appel est censé avoir été abandonné sans que soit nécessaire une ordonnance de rejet, sauf si la cour ou un juge en ordonne autrement, et le registraire, à la demande de l'intimé, peut taxer les frais et émettre un certificat d'annulation.

INTERVENTION

RÈGLE 60.—Sur autorisation de la cour ou d'un juge, une personne intéressée dans un appel entre d'autres parties peut y intervenir aux termes et conditions et avec les droits et privilèges que la cour ou le juge peut prescrire.

2. Les frais de cette intervention sont payés par la partie ou les parties, selon que l'ordonne la Cour suprême.

NOUVELLE AUDITION

RÈGLE 61.—Aucun appel ne doit être entendu de nouveau, sauf avec l'autorisation de la cour sur requête spéciale, ou à la demande de la cour.

DÉSISTEMENT

RÈGLE 62.—Lorsque l'appelant a donné un avis de désistement à l'intimé, ce dernier est admis à faire taxer ses frais par le registraire sans aucune ordonnance, à moins que l'avis de désistement ne soit signifié après que l'appel a été inscrit pour audition à la Cour suprême. Dans le dernier cas, la cour doit rendre l'ordonnance, quant aux frais et autrement, qu'elle juge appropriée.

RÈGLES APPLICABLES AUX APPELS DE LA COUR DE L'ÉCHIQUIER

RÈGLE 63.—Les règles précitées s'appliquent aux appels émanant de la cour de l'Echiquier du Canada, sauf dans la mesure où la Loi de la cour de l'Echiquier le prescrit autrement.

LES RÈGLES NE S'APPLIQUENT PAS AUX APPELS EN MATIÈRE CRIMINELLE NI D'*HABEAS CORPUS*

RÈGLE 64.—Sauf les prescriptions ci-dessus, les règles précitées ne s'appliquent pas aux appels en matière criminelle ni aux appels en matière d'*habeas corpus* prévus à l'article 57 de la loi.

DOSSIER DANS LES APPELS EN MATIÈRE CRIMINELLE ET D'*HABEAS CORPUS*

RÈGLE 65.—Les appels en matière criminelle peuvent être entendus sur un dossier écrit ou dactylographié et certifié sous le sceau de la cour dont le jugement est porté en appel, lequel dossier doit renfermer tous les jugements et opinions prononcés par les tribunaux inférieurs. L'appelant doit aussi produire sept exemplaires dactylographiés ou imprimés du dossier, et l'appelant et l'intimé doivent produire chacun sept exemplaires d'un mémoire des motifs de discussion, sauf dans la mesure où le registraire en accorde la dispense.

2. Dans les appels en matière d'*habeas corpus* prévus à l'article 57 de la loi, il est produit un dossier imprimé ou dactylographié renfermant les matériaux qui se trouvaient devant le juge dont la décision est portée en appel, ainsi que le jugement dudit juge et un mémoire des motifs de discussion de l'appelant et de l'intimé, sauf dans la mesure où le registraire en accorde la dispense, et sept exemplaires desdits dossier et mémoire doivent être déposés au bureau du registraire.

QUAND PRODUIRE LE DOSSIER

RÈGLE 66.—A moins d'un ordre contraire de la cour ou d'un juge en chambre, le dossier écrit ou dactylographié dans les appels en matière criminelle et en matière d'*habeas corpus* aux termes de l'article 57 de la loi, doit être produit quinze jours francs avant celui de la session de la cour où l'appel doit être entendu.

AVIS D'AUDITION DANS LES APPELS EN MATIÈRE CRIMINELLE ET D'*HABEAS CORPUS*

RÈGLE 67.—Dans les appels en matière criminelle et dans les appels en matière d'*habeas corpus* prévus à l'article 57 de la loi, avis de l'audition doit être signifié au moins cinq jours avant celui de la session où l'appel doit être entendu.

APPELS EN MATIÈRE D'ÉLECTION

RÈGLE 68.—Sauf dispositions contraires de la Loi des élections fédérales contestées et des trois règles suivantes, les Règles de la Cour suprême, dans la mesure où elles sont applicables, s'appliquent aux appels en matière d'élections contestées.

RÈGLE 69.—Dans les appels en matière d'élections contestées, l'appelant doit obtenir du registraire, sur paiement des droits ordinaires prévus à cette fin, une copie certifiée du dossier ou la partie dudit dossier qu'un juge en chambre peut ordonner d'imprimer, et faire imprimer quarante-cinq (45) exemplaires de ladite copie certifiée selon la forme prévue aux présentes pour le dossier dans les appels ordinaires. Dès que l'impression est terminée, il doit en communiquer au registraire trente-cinq (35) exemplaires imprimés, dont trente (30) à l'usage de la cour et de ses fonctionnaires, et cinq (5) à l'usage de l'intimé. Le registraire doit les remettre, sur demande à cette fin, à l'intimé, à son procureur ou à son correspondant désigné.

2. Pour l'impression dans les appels en matière d'élection, il est accordé sur taxation les mêmes allocations que pour l'impression du dossier dans les appels ordinaires.

FIXATION DE LA DATE D'AUDITION

RÈGLE 70.—Dès que le registraire a reçu le dossier imprimé dûment certifié par le greffier de la cour *a quo*, l'appelant, après avis, doit demander à un juge en chambre de fixer une date pour l'audition et d'inscrire l'appel. Après défaut d'une semaine, l'intimé peut demander l'annulation de l'appel.

DISPENSE D'IMPRESSION DU DOSSIER OU FACTUM DANS LES APPELS EN MATIÈRE D'ÉLECTION

RÈGLE 71.—Dans les appels en matière d'élection, un juge en chambre, sur requête de l'appelant ou de l'intimé, peut rendre une ordonnance dispensant de l'impression de la totalité ou d'une partie du dossier, et peut aussi dispenser de la transmission d'un factum ou des motifs de discussion en appel.

HABEAS CORPUS

RÈGLE 72.—Les requêtes pour brefs d'*habeas corpus ad subjiciendum* se formulent par voie de motion à l'effet d'obtenir une ordonnance qui, si le juge le prescrit, peut être rendue *ex parte* d'une manière absolue pour l'émission du bref en premier lieu; ou le juge peut ordonner une assignation pour l'émission du bref et, à sa discrétion, déférer la requête à la cour. Cette assignation et cette ordonnance peuvent être selon les Formules D et E énoncées respectivement à l'Annexe des présentes Règles.

RÈGLE 73.—Si une assignation est accordée pour l'émission du bref, une copie doit en être signifiée au Procureur général de la province dans laquelle a été émis le mandat d'incarcération, et elle est rapportable dans le délai que l'assignation prescrit.

RÈGLE 74.—Lors du débat provoqué par l'assignation pour l'émission d'un bref, le juge, à sa discrétion, peut prescrire que soit rédigée une ordonnance pour la libération du prisonnier au lieu d'attendre le rapport du bref. Ladite ordonnance constitue une autorisation suffisante pour le geôlier, constable ou autre personne de libérer le prisonnier.

RÈGLE 75.—Le bref d'*habeas corpus* doit, si possible, être signifié à la personne même à qui il est adressé. Si la chose est impossible ou si le bref est adressé à un geôlier ou autre fonctionnaire public, la signification s'effectue en remettant le bref à un serviteur ou représentant de la personne qui a opéré l'emprisonnement ou la contrainte par corps, à l'endroit où le prisonnier est incarcéré ou emprisonné. Si le bref est adressé à plusieurs personnes, l'original est communiqué ou remis à la personne principale, et des copies sont signifiées ou remises à chacune des autres personnes de la même manière que le bref. Ce bref d'*habeas corpus* peut être selon la Formule F énoncée à l'Annexe des présentes Règles.

RÈGLE 76.—Si la personne à qui est adressé un bref d'*habeas corpus* ne s'y conforme pas, le juge ou la cour, sur un affidavit de signification et de désobéissance, peut être saisie d'une demande d'arrêt pour résistance au tribunal. L'affidavit de signification peut être selon la Formule G énoncée à l'Annexe des présentes Règles.

RÈGLE 77.—Le rapport du bref d'*habeas corpus* doit renfermer une copie de tous les motifs de l'incarcération du prisonnier inscrits sur le bref ou sur une feuille de papier détachée y annexée.

RÈGLE 78.—Avec l'autorisation de la cour ou d'un juge, le rapport peut être modifié ou remplacé par un autre.

RÈGLE 79.—Lorsque le bref d'*habeas corpus* est rapporté, lecture est donnée du rapport en premier lieu, puis est présentée la motion pour la libération du prisonnier ou pour son renvoi à une autre audience, ou pour modifier ou annuler le rapport.

QUESTIONS DÉFÉRÉES

RÈGLE 80.—Lorsqu'une question est déférée à la cour par le gouverneur en conseil ou par la Commission des transports du Canada, le registraire ne doit inscrire l'affaire que sur les instructions et l'ordre de la cour ou d'un juge, après avis à tous les intéressés. Toutes les parties à la question déférée produisent ensuite leurs factums de la manière, selon la forme et dans le délai prescrits pour les appels à la cour.

APPELS DES DÉCISIONS DE LA COMMISSION DES TRANSPORTS

RÈGLE 81.—Lorsqu'un appel est interjeté d'une décision de la Commission des transports du Canada, conformément aux dispositions de la Loi des chemins de fer, l'appel a lieu sur un dossier dont les parties conviennent, ou advenant un désaccord, que la Commission ou son président doit régler, et le dossier doit renfermer la décision qui fait l'objet de l'opposition, et ce qui des affidavits, de la preuve et des documents est nécessaire pour soumettre la question à la décision de la cour.

2. Les règles 1 à 62 de la Cour suprême, les deux inclusivement, s'appliquent aux appels émanant de la Commission des transports du Canada, sauf dans la mesure où la Loi des chemins de fer le prescrit autrement.

JURIDICTION DU REGISTRAIRE

RÈGLE 82.—Sauf l'octroi des brefs d'*habeas corpus* et la décision sur ces derniers, ainsi que l'octroi des brefs de *certiorari*, le registraire peut accomplir toute chose et exercer toute autorité et juridiction à cet égard qu'un juge de la cour siégeant en chambre, en vertu d'une loi ou coutume ou conformément à la pratique de la cour, pouvait, le 23e jour de juin 1887, ou, par la suite, aurait pu accomplir, effectuer ou exercer.

RÈGLE 83.—Si le registraire est d'avis qu'une question est du ressort d'un juge, il peut la lui déférer, et le juge peut la décider ou la renvoyer au registraire avec les instructions qu'il croit utiles.

RÈGLE 84.—Sous réserve de la règle 86, une ordonnance ou décision rendue par le registraire siégeant en chambre est aussi valable et exécutoire pour tous les intéressés que si elle avait été rendue par un juge en chambre.

RÈGLE 85.—Le registraire signe toutes les ordonnances rendues par lui siégeant en chambre.

RÈGLE 86.—Sauf dispositions contraires des présentes Règles, quiconque est lésé par une ordonnance ou décision du registraire peut en appeler à un juge de la Cour suprême.

RÈGLE 87.—Les appels interjetés d'une décision du registraire à un juge de la cour s'effectuent par voie de motion après qu'un avis énonçant les motifs d'opposition a été signifié dans les quatre jours qui suivent la décision formant l'objet de la plainte et deux jours francs avant la date fixée pour l'audition de la motion, ou signifié dans tout autre délai qu'un juge de ladite cour ou le registraire peut accorder.

RÈGLE 88.—Les appels interjetés d'une décision du registraire à un juge de la cour sont présentés pour audition le premier lundi qui suit l'expiration des délais prévus à la règle précédente, ou dès qu'ils peuvent être entendus par la suite, et inscrits au plus tard le samedi précédent dans un registre tenu à cette fin au bureau du registraire.

RÈGLE 89.—Pour l'expédition des affaires sous le régime des présentes Règles, le registraire, à moins qu'il ne soit absent de la ville ou empêché par la maladie ou autre cause valable, doit siéger tous les jours juridiques, sauf durant les vacances de la cour, à dix heures du matin ou à toute autre heure qu'il peut désigner au besoin par un avis affiché dans son bureau.

HONORAIRES À VERSER AU REGISTRAIRE

RÈGLE 90.—Les honoraires mentionnés dans la formule H énoncée à l'Annexe des présentes Règles sont versés au registraire sous forme de timbres préparés à cette fin.

FRAIS

RÈGLE 91.—Les frais de l'appel entre parties sont taxés conformément au tarif d'honoraires mentionné dans la Formule I énoncée à l'Annexe des présentes Règles.

RÈGLE 92.—La cour ou un juge peut ordonner le paiement d'une somme fixe pour les frais au lieu de prescrire le paiement de frais à taxer.

RÈGLE 93 —Lorsque, en vertu d'une ordonnance ou d'instructions de la cour, d'un juge, ou autrement, une partie admise à recevoir des frais est susceptible d'en payer à une autre, le registraire peut taxer les frais que cette partie est ainsi

susceptible de payer et peut en opérer le remaniement par voie de déduction ou de compensation, ou, s'il le juge à propos, il peut retarder l'allocation des frais que cette partie est en droit de recevoir jusqu'à ce qu'elle ait payé ou offert les frais qu'elle est susceptible de payer; ou ce fonctionnaire peut allouer ou certifier les frais à payer et en ordonner le paiement, et la partie qui y a droit peut les recouvrer de la même manière que peuvent être recouvrés les frais dont le paiement a été ordonné.

RÈGLE 94.—Le registraire peut, lorsqu'il le juge à propos, réserver une question découlant de la taxation des frais à la décision d'un juge.

RÈGLE 95.—Pour les fins de toute procédure dont il est saisi, le registraire a le pouvoir et l'autorité de déférer des serments et d'interroger des témoins et, quant à la taxation des frais, il est autorisé à demander la production des livres, papiers et documents qu'il estime nécessaires.

RÈGLE 96.—Quiconque est mécontent de l'admission ou du rejet par le registraire de la totalité ou d'une partie des item que renferme un mémoire de frais taxé par ce dernier, peut, en tout temps avant la signature du certificat d'admission de frais ou à toute date antérieure que le registraire peut fixer dans un cas quelconque, remettre à l'autre partie qui y est intéressée et présenter au registraire, par écrit, les motifs qu'il y a de s'opposer à cette admission ou à ce rejet, en y spécifiant au moyen d'une liste rédigée dans une forme brève et concise les item ou parties d'item contestés, ainsi que les motifs et raisons de ces objections, et dès lors il peut demander au registraire d'en reviser la taxation. S'il le juge à propos, le registraire, en attendant l'étude de ces objections, peut émettre un certificat de taxation ou d'admission de frais pour le solde du mémoire de frais ou à compte, et tel autre certificat de taxation ou d'admission de frais qui peut être nécessaire après qu'il aura rendu sa décision sur ces objections.

RÈGLE 97.—Sur une requête à cet effet, le registraire doit considérer et examiner de nouveau sa taxation à la lumière desdites objections, et il peut, s'il le juge opportun, admettre d'autres preuves à leur égard.

RÈGLE 98.—Une partie mécontente du certificat d'admission de frais par le registraire à l'égard d'un item qui a fait l'objet d'une opposition comme susdit, peut, dans les deux jours qui suivent la date du certificat d'admission de frais, ou dans tout autre délai que le registraire peut accorder lorsqu'il signe le certificat d'admission de frais, interjeter appel à un juge de la Cour suprême de la taxation relative audit item, et le juge peut alors émettre l'ordonnance qui lui paraît équitable; mais le certificat d'admission de frais par le registraire est définitif et péremptoire quant à toutes les matières qui ne sont pas contestées de la manière susdite.

RÈGLE 99.—Cet appel doit être entendu et décidé par le juge sur la preuve qui aura été produite devant le registraire, et il ne doit être reçu aucune preuve supplémentaire pour son audition, à moins que le juge ne l'ordonne autrement; les frais dudit appel sont à la discrétion du juge.

CONTRE-APPELS

RÈGLE 100.—Il n'est pas nécessaire, en aucune circonstance, qu'un intimé donne avis de motion par voie de contre-appel, mais si un intimé a l'intention, lors de l'audition d'un appel, d'alléguer que la décision du tribunal inférieur devrait être modifiée, il doit, dans les quinze jours qui suivent la réception du cautionnement, ou dans tout autre délai que peut prescrire la cour ou un juge en chambre, notifier son intention à toutes les parties qui peuvent y être inté-

ressées. Le défaut de donner ledit avis ne peut en aucune manière restreindre le pouvoir de la cour, lors de l'audition d'un appel, de considérer la cause entière comme ouverte; mais il peut, à la discrétion de la cour, constituer un motif pour l'ajournement de l'appel, ou pour une ordonnance spéciale quant aux frais.

RÈGLE 101.—L'intimé qui donne un avis de contre-appel doit produire au bureau du registraire, et de la manière ci-dessus prescrite quant à l'appel principal, un factum imprimé ou les motifs de discussion en appel, et les parties à qui ledit avis a été signifié doivent aussi déposer leur factum imprimé de la manière ci-dessus prescrite à l'égard de l'appel principal. Les parties doivent échanger entre elles les factums sur le contre-appel, et ce, de la manière prescrite ci-dessus pour l'appel principal. Le factum sur le contre-appel peut être inclus dans le factum sur l'appel principal.

TRADUCTION DU FACTUM

RÈGLE 102.—Un juge peut exiger la traduction, dans la langue qui lui est la plus familière, du factum ou des motifs de discussion en appel de toute partie, et enjoindre au registraire de les faire traduire; il doit déterminer le nombre d'exemplaires de la traduction à imprimer et le délai dans lequel ils doivent être déposés au bureau du registraire; la partie qui dépose ledit factum doit en conséquence le faire imprimer immédiatement à ses frais, et elle n'est pas censée avoir déposé son factum tant que le nombre requis d'exemplaires imprimés de la traduction n'a pas été déposé au bureau du registraire.

TRADUCTION DE DÉCISIONS ET D'OPINIONS DE JUGES D'UN TRIBUNAL INFÉRIEUR

RÈGLE 103.—Un juge peut aussi exiger que le registraire fasse traduire les décisions et les opinions des juges du tribunal inférieur. En ce cas, le juge doit fixer le nombre d'exemplaires de la traduction à imprimer et le délai dans lequel ils doivent être déposés au bureau du registraire; et ladite traduction doit dès lors être imprimée aux frais de l'appelant.

CONSIGNATION EN JUSTICE

RÈGLE 104.—Les deniers à consigner en justice doivent être versés à la Banque de Montréal, succursale d'Ottawa, ou à toute autre banque autorisée par le ministre des Finances.

2. La personne qui consigne des deniers en justice doit obtenir du registraire l'instruction, adressée à la banque, de recevoir les deniers.

3. La banque recevant l'argent au crédit d'une cause ou d'une affaire doit délivrer à cet effet un récépissé en double; le premier exemplaire est remis à la partie déposante, et le second est envoyé par la poste ou remis le même jour au registraire.

4. Les timbres pour les droits exigibles sur les consignations en justice doivent être apposés sur le récépissé que la présente règle ordonne d'envoyer par la poste ou de remettre au registraire.

PAYEMENT DE DENIERS HORS DE COUR

RÈGLE 105.—Si des deniers doivent être payés hors de cour, il est nécessaire d'obtenir à cette fin une ordonnance de la cour ou d'un juge en chambre une fois qu'il en a été donné avis à la partie adverse.

RÈGLE 106.—L'argent à verser hors de cour doit l'être sur le chèque du registraire, contresigné par un juge.

VICES DE FORME

RÈGLE 107.—Aucune procédure devant la cour ne peut être rejetée pour vices de forme.

DÉLAI PROROGÉ OU ABRÉGÉ

RÈGLE 108.—Dans tout appel ou autre procédure devant la cour, cette dernière ou un juge en chambre peut, par ordonnance, proroger ou abréger le délai imparti pour l'accomplissement de tout acte ou l'introduction de toute procédure, aux conditions (le cas échéant) que la justice de la cause exige; et cette ordonnance peut être décernée bien que la requête à cette fin ne soit présentée qu'après l'expiration du délai désigné ou accordé.

INOBSERVATION DES RÈGLES

RÈGLE 109.—La cour ou un juge peut, dans des circonstances spéciales, soustraire une partie à l'observation de l'une quelconque des dispositions des présentes Règles.

LE REGISTRAIRE DOIT TENIR LES REGISTRES NÉCESSAIRES

RÈGLE 110.—Le registraire doit tenir dans son bureau tous les registres appropriés pour inscrire les procédures de toutes les poursuites et affaires dont la Cour suprême est saisie.

AJOURNEMENT POUR DÉFAUT DE QUORUM

RÈGLE 111.—Si, à quelque moment, il n'y a pas en cour le nombre nécessaire de juges pour constituer quorum, afin d'expédier les affaires dont la cour est saisie, le juge ou les juges alors présents peuvent ajourner la séance au lendemain ou à un jour ultérieur, et ainsi de suite, de jour en jour, jusqu'à ce qu'il y ait quorum.

SUPPUTATION DES DÉLAIS

RÈGLE 112.—Dans tous les cas où les règles précédentes prescrivent un nombre de jours particulier non spécifiés comme jours francs, leur supputation doit exclure le premier jour et inclure le dernier, à moins que celui-ci ne tombe un dimanche ou un jour désigné par le gouverneur général comme jour public de jeûne ou d'action de grâces, ou tout autre jour de fête légale ou non juridique prévu par les statuts du Dominion du Canada.

RÈGLE 113.—Lorsqu'il est fixé ou accordé, pour accomplir un acte ou intenter une procédure, un délai limité à moins de six jours à compter d'une date ou d'un événement, les dimanches et autres jours où les bureaux sont fermés ne doivent pas être comptés dans la supputation de ce délai limité.

RÈGLE 114.—Si le délai pour accomplir un acte ou faire une procédure expire un dimanche ou un autre jour où les bureaux sont fermés, et qu'en conséquence cet acte ne puisse être accompli ni cette procédure faite ce jour-là, alors, en ce qui concerne le délai à son sujet, l'acte est censé avoir été régulièrement accompli ou la procédure régulièrement faite si le fait se produit le premier jour où les bureaux sont ensuite ouverts.

DÉLAI DE SIGNIFICATION DES AVIS, ETC.

RÈGLE 115.—La signification des avis, assignations, ordonnances et autres procédures doit se faire avant six heures du soir, sauf le samedi où elle doit avoir lieu avant deux heures de l'après-midi. La signification faite après six heures du soir les jours de semaine, sauf le samedi, est censée, aux fins de supputer tout délai postérieur à ladite signification, avoir eu lieu le jour suivant. La signification effectuée le samedi après deux heures de l'après-midi est censée, pour les mêmes fins, avoir eu lieu le lundi suivant.

HEURES DE BUREAU

RÈGLE 116.—Le greffe de la Cour suprême est ouvert de dix heures du matin à quatre heures de l'après-midi (sauf le samedi où la fermeture a lieu à une heure) tous les jours de l'année sauf les congés statutaires, les grandes vacances et les vacances de Noël.

2. Pendant les vacances, le greffe est ouvert de dix heures du matin à une heure de l'après-midi.

VACANCES DE NOËL

RÈGLE 117.—Les vacances de Noël commencent le 15 décembre et expirent le 10 janvier.

GRANDES VACANCES

RÈGLE 118.—Les grandes vacances comprennent les mois de juillet et d'août.

LES VACANCES DANS LA SUPPUTATION DES DÉLAIS

RÈGLE 119.—Il n'est pas tenu compte de la durée des grandes vacances ni des vacances de Noël dans la supputation des délais fixés ou accordés par les présentes Règles pour l'accomplissement d'un acte.

BREFS

RÈGLE 120.—Un jugement ou ordonnance, pour le paiement de deniers, émis contre toute partie à un appel autre que la Couronne, peut être exécuté au moyen d'un bref de *fieri facias* à l'encontre des biens meubles et d'un bref de *fieri facias* à l'encontre des biens immeubles.

RÈGLE 121.—Un jugement ou ordonnance enjoignant à une personne d'accomplir un acte autre que le paiement de deniers ou de s'abstenir de tout acte, peut être exécuté au moyen d'un bref d'arrêt ou par mandat de dépôt.

RÈGLE 122.—Les brefs de *fieri facias* à l'encontre des biens meubles et immeubles doivent être exécutés selon leur teneur et peuvent être selon la formule J de l'Annexe des présentes Règles.

RÈGLE 123.—Sur le rapport du shérif ou d'un autre fonctionnaire, selon le cas, de "biens ou effets non vendus faute d'acquéreurs", il peut être émis un bref de *venditioni exponas* pour forcer la vente des biens saisis. Ledit bref peut être selon la formule K de l'Annexe des présentes Règles.

RÈGLE 124.—Dans la manière de vendre et d'annoncer pour vente des biens et effets, le shérif ou autre fonctionnaire doit, sauf dans la mesure où la teneur du bref l'exige autrement, ou sauf dispositions contraires des présentes Règles, observer les lois de sa province applicables à l'exécution de brefs semblables émanant du plus haut tribunal ou des plus hauts tribunaux de première instance qui s'y trouvent.

RÈGLE 125.—Un bref d'arrêt doit être exécuté selon sa teneur.

RÈGLE 126.—Aucun bref d'arrêt ne doit être émis sans une ordonnance de la cour ou d'un juge. Il peut être selon la formule L de l'Annexe des présentes Règles.

RÈGLE 127.—Dans les présentes Règles, l'expression "bref d'exécution" comprend les brefs de *fieri facias* à l'encontre de biens meubles et immeubles, de saisie-arrêt, et tous les brefs subséquents qui peuvent être émis pour leur donner effet. Et l'expression "émission d'exécution contre une partie" signifie l'émission de toutes telles procédures contre sa personne ou ses biens applicables en l'espèce.

RÈGLE 128.—Tous les brefs doivent être préparés au bureau du Procureur général ou par le procureur ou avocat qui les fait émettre. Le nom et l'adresse du procureur ou avocat qui les fait émettre, et, s'ils sont émis par l'entremise d'un représentant, le nom et la résidence du représentant, doivent être inscrits sur ledit bref. Chacun de ces brefs doit, avant son émission, être scellé au bureau du registraire et un *præcipe* à cette fin est laissé audit bureau; dès lors, dans un registre tenu à cette fin au bureau du registraire, il doit être fait une inscription de l'émission dudit bref, ainsi que de la date de l'apposition du sceau et du nom du procureur ou avocat le faisant émettre, et tous les brefs doivent être attestés comme des jour, mois et un an de leur émission. Un *præcipe* pour un bref peut être selon la formule M de l'Annexe des présentes Règles.

RÈGLE 129.—Aucun bref d'exécution n'est émis sans la production, au fonctionnaire qui l'émet, du jugement ou ordonnance sur lequel il repose, ou d'une ampliation du susdit indiquant la date de l'enregistrement. Et le fonctionnaire doit vérifier que le temps requis pour accorder le droit d'exécution au créancier en vertu du jugement s'est écoulé.

RÈGLE 130.—Dans toute exécution la partie qui y a droit peut prélever l'intérêt, sa commission (*poundage fees*) et les frais d'exécution, en plus de la somme recouvrée.

RÈGLE 131.—Chaque bref d'exécution pour le recouvrement de deniers doit porter à l'endos des instructions au shérif ou autre fonctionnaire auquel le bref est adressé, de prélever les deniers réellement dus et exigibles et dont le recouvrement est recherché en vertu du jugement ou ordonnance, en en énonçant le montant, et aussi de prélever l'intérêt sur ce montant si le recouvrement en est recherché, au taux de cinq pour cent l'an, à compter du jour de l'enregistrement du jugement ou ordonnance.

RÈGLE 132.—Un bref d'exécution, s'il n'est pas exécuté, ne reste en vigueur qu'un an à compter de son émission, sauf s'il est renouvelé de la manière prévue ci-après; mais ledit bref peut, en tout temps avant son expiration, sur autorisation de la cour ou d'un juge, être renouvelé par la partie qui le fait émettre pour une année à compter de la date de ce renouvellement, et ainsi de suite au besoin pendant la durée du bref renouvelé, soit par une annotation à la marge avec une inscription du registraire de la cour, énonçant les jour, mois et an dudit renouvellement, soit par un avis écrit dudit renouvellement, donné par cette partie au shérif, lequel avis est signé par la partie ou par son procureur et revêtu de la même inscription. Un bref d'exécution ainsi renouvelé est exécutoire et a droit à priorité suivant la date de sa délivrance initiale.

RÈGLE 133.—La production d'un bref d'exécution ou de son avis de renouvellement, censé porter l'annotation mentionnée à la règle précédente, indiquant qu'il a été renouvelé, constitue une preuve *primâ facie* de son renouvellement.

RÈGLE 134.—A l'égard des parties originaires à un jugement ou à une ordonnance, il peut en tout temps être émis une exécution dans les six années de l'obtention du jugement ou de la signature de l'ordonnance.

RÈGLE 135.—S'il s'est écoulé six années depuis le jugement ou l'ordonnance, ou qu'un changement se soit produit pour cause de décès ou autrement dans les parties ayant droit à l'exécution ou qui en sont passibles, la partie qui prétend y avoir droit peut demander à la cour ou à un juge l'autorisation d'émettre une exécution en conséquence. Et la cour ou le juge peut, s'il est convaincu que la partie requérante a droit de faire décerner un bref d'exécution, rendre une ordonnance à cet effet. La cour ou le juge peut imposer les conditions, quant aux frais ou autrement, qui lui paraissent équitables.

RÈGLE 136.—Une partie contre qui un jugement est prononcé ou une ordonnance rendue peut demander à la cour ou à un juge un sursis d'exécution ou autre recours contre ledit jugement ou ladite ordonnance, et la cour ou le juge peut accorder ledit recours aux conditions tenues pour équitables.

RÈGLE 137.—Un bref peut en tout temps être modifié sur une ordonnance de la cour ou d'un juge, aux termes et conditions, quant aux frais et autrement, qui sont tenus pour équitables, et toute modification d'un bref peut, par l'ordonnance qui l'autorise, être déclarée rétroactive depuis la date de son émission ou depuis toute autre date ou délai.

RÈGLE 138.—Les shérifs et coroners ont droit aux honoraires et commissions énoncés dans la formule N de l'Annexe des présentes Règles.

RÈGLE 139.—L'ordonnance d'un juge en chambre peut être exécutée de la même manière qu'une ordonnance de la cour au même effet, et il n'est pas nécessaire, dans aucun cas, qu'une ordonnance d'un juge devienne une décision ou une ordonnance de la cour avant son exécution.

RÈGLE 140.—Aucune exécution ne peut être décernée sur un jugement ou une ordonnance rendue contre la Couronne pour le paiement de deniers. Lorsque, dans un appel, il peut y avoir un jugement ou une ordonnance contre la Couronne enjoignant le versement de deniers pour des frais ou autrement, le registraire peut, sur requête de la partie ayant droit aux deniers, attester au ministre des Finances la teneur et la portée du jugement ou de l'ordonnance, et ladite attestation doit être expédiée ou déposée par le registraire au bureau du ministre des Finances.

REGISTRAIRE SUPPLÉANT

RÈGLE 141.—En l'absence du registraire pour cause de maladie ou autrement, le juge en chef ou le juge en chef suppléant peut nommer un registraire suppléant qui exerce les fonctions du registraire. Tous les pouvoirs et prérogatives attribués au registraire peuvent être exercés par le registraire suppléant.

ANNEXE DES RÈGLES DE LA COUR SUPRÊME

FORMULE A (R. 15)

AVIS DE CONVOCATION D'UNE SESSION SPÉCIALE

Dominion du Canada.

La Cour suprême tiendra une session spéciale en la cité d'Ottawa le jour d 19 , pour l'audition des causes et l'expédition des autres affaires qui peuvent être portées devant elle (ou pour l'audition des appels en matière d'élections, ou des appels en matière criminelle, ou des appels dans les causes d'*habeas corpus*, ou pour le prononcé de jugements seulement, selon le cas).

Par ordre du juge en chef ou de M. le juge

(Signé) P. L.
Registraire.

Daté du jour d 19 .

FORMULE B (R. 17)

AVIS D'AUDITION D'APPEL

Cour suprême du Canada.

J. A., appelant, *v.* A. B., intimé. Vous êtes avisé que le présent appel sera entendu à la prochaine session de la cour, qui aura lieu en la cité d'Ottawa, le jour d 19 .

A , procureur ou avocat de l'appelant, ou appelant en personne.

Daté du jour d 19 .

FORMULE C (R. 50 (1))

AVIS DE DÉCÈS, D'INSOLVABILITÉ, ETC.

A. *v.* B.

Est requise (par suite de décès, d'insolvabilité, ou selon le cas), la mise en cause de (comme appelant ou intimé) au présent appel.

(Signé) C. D.

FORMULE D (R. 72)

ASSIGNATION POUR BREF D'*habeas corpus ad subjiciendum*

Cour suprême du Canada.

L'honorable juge

(Intitulé de la cause)

Après lecture des divers affidavits de , etc., produits le jour d 19 et après avoir entendu M. avocat (ou procureur de):

Il est ordonné que toutes les parties intéressées comparaissent devant moi (ou devant l'honorable juge , ou devant la cour, selon le cas), à l'édifice de la Cour suprême, Ottawa, le jour d 19 , à heure de l' midi, aux fins d'établir pourquoi un bref d'*habeas corpus* ne devrait pas être émis enjoignant à de représenter immédiatement la personne de devant un juge de la Cour suprême, édifice de la Cour suprême, en la cité d'Ottawa, pour etc.

Datée, etc.

FORMULE E (R. 72)

ORDONNANCE POUR BREF D'*habeas corpus ad subjiciendum*

Cour suprême du Canada.

Après lecture des divers affidavits de , etc., produits le jour d 19 , et après avoir entendu les avocats (ou procureurs des deux parties ou, selon le cas):

Il est ordonné qu'un bref d'*habeas corpus* soit émis enjoignant au d'amener la personne de A. B. devant moi (ou l'honorable juge) à l'édifice de la Cour suprême, en la cité d'Ottawa, le jour d 19 , à heure, pour subir et recevoir, etc....

Datée, etc.

FORMULE F (R. 75)

BREF D'*habeas corpus ad subjiciendum*

GEORGE VI, par la grâce de Dieu, etc.....à Salut:

Nous vous commandons d'amener à la Cour suprême du Canada devant l'honorable juge , édifice de la Cour suprême, en la cité d'Ottawa, le jour d 19 , la personne de A. B.,

sous quelque nom qu'il puisse y être désigné, que vous détenez sous votre garde, ainsi que de révéler la date et les causes de son emprisonnement et de sa détention, afin qu'il y soit traité suivant que Notre Juge, là et alors, en décidera, et d'y rapporter, là et alors, notre présent bref.

Témoin, etc.....

A inscrire.

Par ordre de M. le juge
le présent bref est émis par, etc....

FORMULE G (R. 76)

AFFIDAVIT DE SIGNIFICATION D'UN BREF

D'*habeas corpus ad subjiciendum.*

COUR SUPRÊME DU CANADA

Je, A.B., de etc., étant dûment assermenté, jure et déclare:

1. J'ai signifié personnellement, le jour d 19 , à C.D. un bref d'*habeas corpus* émis sous le sceau de cette Honorable Cour, adressé audit C.D., lui enjoignant de conduire immédiatement la personne de devant ( ) pour subir, etc. (décrire l'ordre et la partie injonctive du bref) en remettant ledit bref d'habeas corpus audit C.D. en personne, à , dans la province d

Déclaré sous serment, etc....

FORMULE H (R. 90)

TARIF D'HONORAIRES ALLOUÉS AU REGISTRAIRE DE LA COUR SUPRÊME DU CANADA

Sur l'entrée de chaque appel	$ 10 00
Sur l'enregistrement de tout jugement, décret ou ordonnance de la nature d'un jugement définitif	10 00
Sur l'enregistrement de tout autre jugement, décret ou ordonnance	2 00
Sur dépôt de tout document ou papier	10
Pour chaque recherche	25
Pour chaque convocation	50
Pour chaque prorogation d'une convocation, ou requête en chambre	50

Les item ci-dessus ne s'appliquent pas aux appels en matière criminelle ni aux appels en matière d'habeas corpus découlant d'une accusation criminelle.

Pour sceller tout bref (outre le dépôt)	2 00
Modification de tout document, bref ou autre papier	50
Pour taxer tout mémoire de frais (outre le dépôt)	1 00

Pour tout certificat d'admission de frais	1 00
Pour chaque fiat	50
Pour chaque renvoi, enquête, interrogatoire ou autre matière spéciale déférée au registraire, pour chaque séance n'excédant pas une heure	1 00
Pour chaque heure additionnelle ou moins	1 00
Pour chaque rapport du registraire sur un tel renvoi, etc.	1 00
Pour la consignation de deniers en justice, ou de deniers déposés au bureau du registraire, jusqu'à $200.00 inclusivement	1 00
Au-dessus de $200.00, il est versé un pourcentage au taux de un pour cent, jusqu'à une somme n'excédant pas dix dollars.	
Récépissé pour deniers	25
Collation, examen et attestation du dossier transcrit pour appel au Conseil privé	10 00
Collation de tout autre document, écrit ou pièce de procédure avec l'original versé au dossier ou déposé au bureau du registraire, le folio	02½
Pour tout autre certificat exigé du registraire	1 00
Pour copie ou tout extrait d'un document, écrit ou pièce de procédure, le folio	10
Pour chaque affidavit, affirmation ou serment déféré par le registraire	25
Pour toute commission ou ordonnance en vue de l'interrogatoire de témoins	1 50

FORMULE I (R. 91)

TARIF D'HONORAIRES

Taxables de partie à partie à la Cour suprême du Canada:

Pour l'exposé de la cause exigé par l'article 68 de la Loi lorsqu'il est préparé et agréé par les parties dans la cause, y compris la vacation auprès du juge en vue de la régler, le cas échéant, pour chaque partie	25 00
Avis d'appel	4 00
Sur consentement à un appel direct du tribunal de première instance à la Cour suprême	3 00
Avis de cautionnement	2 00
Vacation pour fournir le cautionnement	3 00
Sur motion pour réception du cautionnement, le cas échéant	10 00
Sur motion en annulation de procédures en vertu de l'article 45, à la discrétion du registraire, jusqu'à	100 00
Sous réserve d'augmentation sur l'ordonnance de la cour ou d'un juge.	
Sur motion *ex parte* devant le registraire siégeant en chambre, y compris les affidavits, etc.	10 00
Peut être augmenté, à la discrétion du registraire, jusqu'à une somme d'au plus	15 00
Sur les motions contestées devant le registraire siégeant en chambre, y compris les affidavits	15 00

Sous réserve d'augmentation, à la discrétion du registraire, dans les cas spéciaux, jusqu'à une somme d'au plus	40 00
Sur motions devant un juge en chambre, y compris les affidavits, etc...	20 00
Sous réserve d'augmentation, à la discrétion du juge, jusqu'à une somme d'au plus	100 00
Les honoraires pour motions comprennent toutes les procédures préliminaires, avis, certificats, correspondances, rédaction d'ordonnance, leur règlement, et leur émission, mais ne comprennent pas les déboursés.	
Sur les factums, à la discrétion du registraire, jusqu'à	50 00
Sous réserve d'augmentation sur l'ordonnance de la cour ou d'un juge en chambre.	
Pour grossoyer, à l'usage de l'imprimeur, la copie du dossier, tel que réglé, lorsque ladite copie grossoyée est réellement et strictement nécessaire, le folio de 100 mots.....	10
Pour la correction et la surveillance des impressions, les 100 mots ...	05
Sur le rejet de l'appel, si la cause n'est pas continuée, à la discrétion du registraire, jusqu'à	25 00
Sous réserve d'augmentation sur l'ordonnance de la cour ou d'un juge.	
Déclarations aux termes des articles 78, 79 et 80, y compris la copie et la signification	10 00
Avis d'intention de continuer les procédures aux termes de l'article 82 .	4 00
Sur dépôt de deniers, aux termes de l'article 65 de la Loi des élections fédérales contestées	2 50
Avis d'appel dans les causes d'élections limitant l'appel à des questions spéciales et définies en vertu de l'article 66 de la Loi des élections fédérales contestées	6 00
Allocation pour comprendre tous les honoraires au procureur et avocat pour audition de l'appel, à la discrétion du registraire, jusqu'à ...	200 00
Sous réserve d'augmentation sur l'ordonnance de la cour ou d'un juge en chambre.	
Pour l'impression des factums, les mêmes honoraires que pour l'impression du dossier.	
Outre les honoraires du registraire, le fonctionnaire taxateur fixe les frais raisonnables pour affranchissement postal et les déboursés nécessairement encourus dans les procédures en appel.	
Pour vacation du procureur au prononcé du jugement	25 00
Allocation, dans tout appel, au représentant dûment inscrit	25 00
Sous réserve d'augmentation, pour des circonstances spéciales, à la discrétion du registraire, jusqu'à concurrence de	100 00

Dans les causes où les procureurs au dossier sont domiciliés à Ottawa, ces derniers ont droit à la moitié de la présente allocation.

L'allocation ci-dessus n'est pas censée couvrir les services rendus comme avocat-conseil.

FORMULE J (R. 122)

BREF DE *fieri facias*

CANADA
PROVINCE D

Cour suprême du Canada
ENTRE

A.B., (Demandeur, *ou selon le cas*) Appelant,

ET

C.D. (Défendeur, *ou selon le cas*) Intimé.

GEORGE VI, par la grâce de Dieu roi de Grande-Bretagne, d'Irlande et des territoires britanniques au delà des mers, défenseur de la foi, empereur des Indes.

Au shérif de , *SALUT*:

Nous vous commandons de prélever sur les biens personnels de C.D., dans votre juridiction, la somme de $ ainsi que l'intérêt sur ladite somme au taux de six pour cent l'an, à compter du jour d

(*date du jugement ou de l'ordonnance, ou date à laquelle il est ordonné de payer des deniers, ou date à partir de laquelle l'ordonnance prescrit de compter l'intérêt, selon le cas*), lesquels deniers et intérêts, dans une certaine action (ou certaines actions, *selon le cas*) où A.B. est le demandeur et appelant, et C.D. et al, sont défendeurs et intimés (ou dans une certaine affaire y pendante, intitulée "Dans l'affaire de E.F.", *selon le cas*), par jugement (ou ordonnance, *selon le cas*) de Notre Cour suprême du Canada, en date du jour d , nous avons récemment dans Notredite Cour, décidé (ou ordonné, *selon le cas*) de faire payer par ledit C.D. à A.B. ainsi que certains frais mentionnés dans ce jugement (ou cette ordonnance, *selon le cas*), lesquels frais ont été fixés et alloués par l'officier taxateur de Notre Cour, au montant de , tel qu'il ressort du certificat dudit officier taxateur, en date du jour d . Et de prélever en outre sur les biens et effets dudit C.D., dans votre juridiction, ladite somme de (frais), de même que l'intérêt sur ladite somme au taux de pour cent l'an, à compter du jour d

(*Date du certificat de taxation. Le bref doit être rédigé de manière à suivre la teneur du jugement ou de l'ordonnance*) et de rapporter lesdits deniers et intérêts, devant Nous en Notredite Cour, dès l'exécution du présent bref, afin de les verser audit A.B. conformément audit jugement (ou à ladite ordonnance, *selon le cas*) et de Nous indiquer, en Notredite Cour, dès son exécution, la manière dont vous aurez exécuté Notre bref, et d'y rapporter alors le présent bref.

Témoin, l'honorable , juge en chef de Notre Cour suprême du Canada, à Ottawa, ce jour d , en l'an de Notre Seigneur mil neuf cent , et dans la année de Notre règne.

FORMULE K (R. 123)

BREF DE *venditioni exponas*

Canada }
Province d }

Cour suprême du Canada

Entre

A.B., (Demandeur, *ou selon le cas*) Appelant,

et

C.D., (Défendeur, *ou selon le cas*) Intimé.

GEORGE VI, etc., (comme dans le bref *fieri facias*)

Au shérif de , *Salut:*

Attendu que par Notre bref, Nous vous avons récemment commandé de prélever sur les biens et effets de C.D. (*énoncer ici tout le reste du bref de fieri facias*), et que le jour d vous Nous avez fait rapport, à Notredite Cour suprême du Canada, qu'en vertu dudit bref à vous adressé vous aviez saisi les biens et effets dudit C.D. pour la valeur des deniers et intérêts susmentionnés, lesquels biens et effets demeurent invendus entre vos mains faute d'acheteurs. En conséquence, désireux que ledit A.B. obtienne les deniers et intérêts susdits, Nous vous commandons de mettre en vente et de vendre, ou de faire vendre, les biens et effets dudit C.D. par vous saisis en la manière susdite, et toute partie de ces derniers, au meilleur prix qui puisse en être obtenu, et de Nous rapporter, à Notredite Cour suprême du Canada, dès l'exécution du présent bref, les deniers provenant de cette vente pour qu'ils soient remis audit A.B., et d'y rapporter là et alors le présent bref.

Témoin, etc. (*Terminer comme dans le bref de fieri facias*).

FORMULE L (R. 126)

BREF D'ARRÊT

GEORGE VI, etc., (comme dans le bref *fieri facias*)

Au shérif de , *Salut:*

Nous vous commandons de saisir la personne de afin qu'il comparaisse devant Nous, en Notredite Cour suprême du Canada, pour Nous rendre compte, non seulement de l'outrage au tribunal qu'il a, d'après ce qui est allégué, commis envers Nous, mais aussi de toutes autres matières qui lui seront là et alors imputées; et, en outre, de vous conformer et vous en tenir à l'ordonnance que Notredite Cour pourra rendre à cet égard, et à cela ne manquez pas; et d'apporter ce bref avec vous.

Témoin, etc. (*Terminer comme dans le bref de fieri facias*).

FORMULE M (R. 128)

PRÆCIPE POUR BREF

Canada }
Province d}

Cour suprême du Canada

Entre

A.B., (Demandeur, *ou selon le cas*) Appelant,

et

C.D., (Défendeur, *ou selon le cas*) Intimé.

Scellez un bref de *fieri facias* adressé au shérif de pour prélever, sur les biens et effets de C.D., la somme de $ avec intérêt sur ladite somme au taux de pour cent l'an, à compter du jour d (et $ pour les frais, *ou selon le cas,* d'après le bref demandé).

Jugement (ou ordonnance) en date du jour d

(Certificat de l'officier taxateur, daté du).

(X.Y., procureur de *la partie pour le compte de laquelle le bref doit être émis*).

FORMULE N (R. 138)

HONORAIRES DES SHÉRIFS ET CORONERS

Chaque mandat pour exécuter une procédure, adressé au shérif, lorsqu'il est confié à un huissier	$ 75
Signification d'une procédure, chaque défendeur (aucun honoraire n'étant alloué pour l'affidavit de signification en pareils cas à moins que la signification ne soit effectuée ou reconnue par le shérif)	1 50
Pour signifier d'autres pièces outre le parcours milliaire	75
Pour signification à chaque partie *additionnelle*	50
Pour recevoir, enregistrer, inscrire et endosser tous brefs, avis ou autres pièces, chacune	25
Rapport de toutes procédures et de tous brefs (sauf un subpoena), avis ou autres pièces	50
Pour toute recherche qui n'est pas effectuée par une partie dans une cause ou par son avocat	30
Certificat attestant le résultat d'une pareille recherche, lorsqu'il est requis (une recherche pour un bref émis contre les biens immobiliers d'une partie comprend les ventes effectuées en vertu d'un bref contre cette même partie et pour les derniers six mois)	1 00
Commission sur les exécutions et sur les brefs revêtant la forme d'exécutions, lorsque la somme réalisée n'excède pas $1,000, six pour cent.	

Lorsque la somme est supérieure à $1,000 et inférieure à $4,000, trois pour cent; lorsque la somme est de $4,000 et plus, un et demi pour cent, en plus de la commission allouée jusqu'à concurrence de $1,000, à l'exclusion du parcours milliaire, pour aller saisir et vendre; et sauf tous déboursés nécessairement occasionnés par l'entretien et le déménagement des biens.

Inventaire pris lors de l'exécution ou autre procédure, y compris la copie pour le défendeur, d'au plus cinq folios..... 1 00

Chaque folio additionnel au-dessus de cinq..... 10

Pour rédiger les annonces à publier dans la Gazette officielle ou autre journal lorsque la loi le requiert, ou pour les afficher dans un palais de justice ou autre endroit, et les transmettre, dans chaque poursuite..... 1 50

Pour chaque avis nécessaire de vente d'effets, dans chaque poursuite. 75

Pour chaque avis d'ajournement de vente, dans chaque poursuite..... 25

La somme effectivement déboursée pour les annonces que la loi enjoint d'insérer dans la Gazette officielle ou autre journal.

Pour amener un prisonnier contraint par corps ou sur *habeas corpus*, outre les frais de déplacement réellement déboursés, par jour.... 6 00

Parcours milliaire réel et nécessaire du palais de justice jusqu'à l'endroit de la signification de toute procédure, écrit ou pièce, le mille 13

Le registraire doit déterminer les déboursés raisonnables et nécessaires, ainsi que les allocations, pour transporter ou retenir les biens.

Pour rédiger le cautionnement garantissant les biens saisis, s'il est préparé par le shérif..... 1 50

Pour chaque lettre écrite (y compris copie) exigée par une partie ou son avocat concernant des brefs ou procédures, lorsque l'affranchissement en a été préalablement acquitté..... 50

Pour rédiger chaque affidavit nécessaire, s'il est préparé par le shérif.. 25

Pour services non prévus plus haut, le registraire peut taxer et allouer les honoraires qui lui paraissent raisonnables.

CORONERS

Sont taxés et alloués aux coroners, pour services rendus par eux lors de la signification, de l'exécution et du rapport d'une pièce de procédure, les mêmes honoraires que ceux accordés aux shérifs pour les mêmes services susmentionnés.

FORMULE O (R. 13 (2))

DOSSIER À CERTIFIER PAR UN PROCUREUR

(*Intitulé de la cause*)

Je, , atteste par les présentes que j'ai personnellement collationné l'imprimé ci-annexé du dossier porté en appel à la Cour suprême du Canada, sur les originaux, et que cet imprimé est une copie exacte et fidèle desdits originaux.

(Signé) C. D.
Procureur de l'appelant
(*ou son correspondant à Ottawa*)

ORDONNANCE GÉNÉRALE

Conformément aux pouvoirs conférés par l'article 104 de la Loi de la Cour suprême (S.R.C. 1927, c. 35), il est par les présentes ordonné que toutes les règles et ordonnances de la Cour suprême du Canada, actuellement en vigueur, soient abrogées, et que les Règles qui précèdent, y compris l'Annexe des formules, soient et les susdites sont par les présentes les Règles régissant la pratique et la procédure dans et pour la Cour suprême du Canada et dans les causes où appel est interjeté de tribunaux inférieurs ou autrement.

Datée à Ottawa ce quinzième jour de décembre, A.D. 1939.

(Signé) LYMAN P. DUFF, juge en chef du Canada.

T. RINFRET, juge,

L.-A. CANNON, juge,

OSWALD S. CROCKET, juge,

H. H. DAVIS, juge,

P. KERWIN, juge,

A. B. HUDSON, juge.

INDEX

(Voir *"Elections"*, *"Cour de l'Echiquier"*, *"Appels en matière criminelle"*, *"Habeas Corpus"*, *"Commission des transports du Canada"* et *"Renvois"*)

14