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CANADA
LAW REPORTS

Supreme Court of Canada

Editors

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. THIBAUDEAU RINFRET, C.J.C.
" Hon. PATRICK KERWIN, J.
" " ROBERT TASCHEREAU J.
" " IVAN CLEVELAND RAND J.
" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRED ESTEY J.
" " CHARLES HOLLAND LOCKE J.
" " JOHN ROBERT CARTWRIGHT J.
" " GÉRALD FAUTEUX J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson, K.C.

60663—1½

ERRATA

in Volume 2 of 1952

Page 11, at line 33, (1) should read (2).
Page 11, at line 35, (2) should read (3).
Page 11, second fn. (1) should read (2).
Page 11, fn. (2) should read (3).
Page 423, fn. (1) should read: [1951] S.C.R. 31.

NOTICE

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.

Dansereau v. *Berget* and *Colin* v. *Berget* [1951] S.C.R. 822. Both petitions for special leave granted, 28th October, 1952.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, The Supreme Court of Canada, between the 1st of December, 1951, and the 22nd of December, 1952, delivered the following judgments which will not be reported in this publication:

Canadian Northern Railway Co. v. *Baker (B.C.):* Not reported. Appeal allowed, with costs here and in the Court of Appeal, and a new trial is ordered. The costs of the abortive trial, together with those of the new trial, will be disposed of by the presiding judge, 17th December, 1951.

Charles v. *Nevins (Ont.)*: Not reported. Appeal allowed in part. The order for a new assessment of damages will stand but judgment will be entered in favour of the respondent for seventy percentum of such damages. The respondent is entitled to his costs of the action and of the appeal to the Court of Appeal. The appellants are entitled to one-half of their costs of the appeal to this Court. The costs of the new assessment of damages will be in the discretion of the judge presiding thereat, 16th October, 1952.

Commonwealth Drilling Co. v. *Community Petroleums Ltd.* [1951] 4 D.L.R. 328. Case settled out of Court.

Die Plast Co. Ltd. v. *Myerson. Q.R.* [1951] K.B. 704. Appeal allowed and the judgment of the trial judge restored with costs both here and in the Court of Queen's Bench (Appeal Side), 7th October, 1952.

Forbes v. *Stewart (Ont.)*: Not reported. Appeal dismissed with costs, 3rd December, 1951.

Garbutt v. *Venables*, [1952] 2 D.L.R. 196. Appeal allowed and judgment at trial restored with costs here and in the Court of Appeal, 22nd December, 1952.

Haydon Warehouses and Storage v. *City of Toronto*, [1951] O.W.N. 466. Appeal allowed, judgment of the Court of Appeal and the award set

aside, and the matter referred to the Official Arbitrator for rehearing. The appellant is entitled to its costs throughout, Kerwin J. dissenting, 7th October, 1952.

Hébert v. *Sauvé*, Q.R. [1950] K.B. 275. The appeal is allowed, the judgment of the Court of King's Bench (Appeal Side) is set aside and the judgment of the trial judge is restored to the extent of directing

(a) that the appellants are entitled to an injunction restraining the respondent from disposing in any manner of her 216 shares or any of them without first offering them in sale to the appellants at the price provided by paragraph 6 of the agreement between them;

(b) that the injunction shall also apply to the mise-en-cause Photogravure Nationale Limitée and its secretary-treasurer, Armand Hébert, as to registering any transfer of shares arising out of any such sale hereby restrained;

(c) that the prothonotary of the Superior Court of the District of Montreal is authorized to pay out of court to the appellants the sum of $3,240 paid into court by them, less the usual commission.

The appellants shall have their costs in this court and in the Superior Court; the respondent shall have her costs in the Court of King's Bench. The order at trial as to costs shall stand, 3rd December, 1951.

Jameson v. *Krauss*, [1951–52] 4 W.W.R. (N.S.) 139. Appeal dismissed with costs, 7th October, 1952.

Landeryou v. *Campbell*, [1952] 1 D.L.R. 609. Appeal allowed with costs here and in the Appeal Division and judgment at trial restored, 7th October, 1952.

Lawrence v. *The Queen*, 102 Can. C.C. 121. Appeal dismissed, 5th December, 1952.

Mackenzie v. *Robar*, [1952] 2 D.L.R. 678. Appeal allowed and action dismissed with costs throughout, 22nd December, 1952.

Minister of National Revenue v. *Flintoft*, [1951] Ex. C.R. 211. Appeal dismissed with costs, 23rd May, 1952.

Montreal v. *National Harbours Board*, Q.R. [1952] K.B. 406. Appeal dismissed with costs, 9th December, 1952.

Oil City Petroleums v. *American Leduc Petroleums*, [1951] 3 D.L.R. 835. Appeal dismissed with costs, 30th June, 1952.

Page v. *The Queen* (Ont.): Not reported. Appeal dismissed, 2nd May, 1952.

Pintal v. *Rousseau*, Q.R. [1951] K.B. 783. Appeal allowed with costs both here and in the Court of Queen's Bench (Appeal Side), 16th June, 1952.

Pitre v. *The Queen*, Q.R. [1952] K.B. 559. Appeal dismissed, 15th December, 1952.

Queen, The v. *Boisvert* (Que.): Not reported. Appeal allowed with costs, 27th May, 1952.

Queen, The, v. *Town of Estevan,* [1952] 1 D.L.R. 362. Appeal dismissed, but in the circumstances of the case, without costs to either party, 11th November, 1952.

Ruest v. *The Queen,* Q.R. [1951] K.B. 708. Appeal dismissed. Locke and Cartwright JJ. dissenting, would have ordered a new trial, 12th May, 1952.

Walker v. *Brownlee and Harmon,* [1951] O.W.N. 166. The appeal is dismissed with costs and the cross-appeal of the plaintiff Brownlee is dismissed without costs.

The Chief Justice, dissenting, would have allowed the appeal and restored the judgment at trial, with costs throughout.

Taschereau and Kellock JJ. dissenting, would have allowed the appeal and cross-appeal and directed the entry of judgment in favour of the cross-appellant against the appellant and the respondent Harmon, on the basis that the negligence of the appellant contributed two-thirds to the accident and that of Harmon one-third, 5th February, 1952.

Woodward v. *Harris,* [1951] O.W.N. 221. Appeal allowed and new trial directed limited to the question of liability. Costs of the first trial shall follow the event of the new trial. The appellant is entitled to his costs in this Court but the respondent to the costs in the Court of Appeal. Kerwin and Estey JJ., while allowing the appeal, would have restored the judgment of the trial judge. The cross-appeal is dismissed without costs, 2nd October, 1951.

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THE SUPREME COURT OF CANADA

2nd October, 1952.

IT IS HEREBY ORDERED pursuant to the powers conferred by section 104 of the Supreme Court Act (R.S.C. 1927, c. 35, as amended) that, as of the 5th day of October, 1952, Rule 119 be amended by adding thereto the following words "except for the filing of the case as provided by Rule 37", so that said Rule 119 shall, as amended, read as follows:—

119. The time of the Long Vacation or the Christmas Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for the doing of any act, except for the filing of the case as provided by Rule 37.

(Signed)

" THIBAUDEAU RINFRET, C.J.C.
" P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGHT, J.
" GERALD FAUTEUX, J.

COUR SUPRÊME DU CANADA

Le 2 octobre 1952

En vertu des pouvoirs conférés par l'article 104 de la Loi de la Cour suprême, chapitre trente-cinq des S.R.C. de 1927, modifié, il est par les présentes ordonné que, à compter du 5 octobre 1952, la règle 119 soit modifiée par l'adjonction des mots "sauf pour la production du dossier imprimé prévue par la règle 37", de manière que ladite règle 119, modifiée, se lise ainsi qu'il suit:

"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, sauf pour la production du dossier imprimé prévue par la règle 37."

(Signé)

" THIBAUDEAU RINFRET, J.C.C.
" P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGHT, J.
" GÉRALD FAUTEUX, J.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

WORLD MARINE & GENERAL INSURANCE COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

1951

*Oct. 19, 22
*Dec. 17

AND

YVON LEGER (PLAINTIFF) .....

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

Insurance, Fire—Sub-agent with no evidence of authority—Power to bind Principal—Effect of receipt of premium with application by such sub-agent—Loss occurring before application received by General Agent.

A sub-agent of a fire insurance company who has nothing from the company in the way of interim receipts or even official receipts with the name of the company on them and in fact nothing to indicate that he has any authority to enter into a binding contract of insurance on its behalf, is not an actual agent for the company so as to bind it to any insurance either in writing or orally. *Linford* v. *Provincial Horse & Cattle Insurance Co.*, 34 Beav. 291, followed. *Mackie* v. *European Assurance Society*, 21 L.T. (N.S.) 102; *Murfitt* v. *Royal Insurance*, 38 T.L.R. 334; *Kline Bros.* v. *Dominion Fire Insurance Co.*, 47 Can. S.C.R. 252 and *Grimmer* v. *Merchants' & Manufacturers' Fire Insurance Co.*, 4 M.P.R. 582, distinguished. *Potvin* v. *Glen Falls Insurance Co.*, [1931] 1 W.W.R. 380 at 390, approved.

Assuming that in the case at bar the sub-agent had authority to receive payment of the premium with the application, all that amounted to was, as pointed out in *Linford* v. *Provincial Horse & Cattle Insurance Co., supra*, at 293, that he had made "a proposal with a deposit which the company was entitled either to accept or reject, and the company never having accepted it, was not bound."

There is no authority binding upon this Court which lays down as a rule of presumption that one who testifies to an affirmative is to be credited in preference to one who testifies to a negative. Taschereau J. in *Lefeunteum* v. *Beaudoin* 28 Can. S.C.R. 89 at 93-94 was speaking only for himself and his statement, so far as it is inconsistent with this decision, cannot be supported.

Decision of the Supreme Court of New Brunswick, Appeal Division, 28 M.P.R. 59, reversed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1) reversing the judgment of Anglin J. dismissing respondent's action against appellant.

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock, Estey, Locke and Cartwright JJ.

(1) (1951) 28 M.P.R.; [1951] 3 D.L.R. 263.

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J. L. O'Brien K.C. for the appellant. The issues are limited to the question of whether Robidoux, if he told respondent that he was insured, bound appellant by so doing. The question of the liability of the other defendant Anderson is not in issue, as there has been no appeal from the judgment dismissing the action against Anderson. The questions in issue are essentially questions of fact to be decided on the evidence at trial, and the questions of fact to be decided are, 1. Whether Robidoux had ostensible authority to bind any one. 2. Whether, if he had such authority, it could be said to be authority to bind Anderson or to bind appellant.

In the judgment appealed from the question of whether Robidoux had authority to bind any one is dealt with very briefly with the following remarks:—"That is the usual custom among fire insurance agents. It would be detrimental to business if they did not have such authority." It is clear from the evidence that the custom of the insurance business in New Brunswick is such that power to bind on the part of an agent is the exception rather than the rule, only one of every twenty having such power, and that Robidoux did not have that power. In the light of the evidence it is difficult to understand how the Court of Appeal could have found as it did. Not only was the trial judge right in his finding that there was no evidence of Robidoux' power to bind, but that, on the contrary, the only evidence was to the effect that he had no such power and that it was not the usual custom for an agent to have such power. Hughes J. suggests that although Robidoux had only authority to canvass insurance, he could bind his principal if he exceeded that authority, quoting from *Mackie* v. *European Assurance Co.* (1). That case is not an authority for the finding that Robidoux with authority only to canvass for insurance could bind his principal if he exceeded this authority. Even if it could be said Robidoux had authority to bind, such authority was not on behalf of the appellant. There is no evidence that he had any authority to bind, but, if he had, it must have been on behalf of J. A. Anderson & Co. or other insurers with which that company placed risks. Not only is it clear from the record that the appellant never allowed Robidoux to hold

(1) 21 L.T. (N.S.) 102.

himself out as having authority, but that the respondent himself admits that he did not even know the name of the appellant until after the loss occurred. On the facts, this is not a case where the Appeal Court should have reversed the trial judge. *Roche* v. *Marston* (1) per Kerwin J. at 496. Hughes J., without expressly so stating, seems to imply from the authorities he quotes that in law an insurance agent when taking an application, is empowered to bind the insurer. In the present instance, if such were true, it would not be the appellant who would be bound. The case of *Kline Bros. & Co.* v. *Dominion Insurance Co.* (2) referred to, it is submitted, is of no authority in the present instance, nor *Grimmer* v. *Merchants & Manufacturers Insurance Co.* (3). In that case the sub-agent had the necessary powers or qualifications. The Court also held that the general agent had approved the sub-agent's binder.

The question of whether or not an insurance agent can bind the insurer is, in each case, a question to be decided on the particular facts of the case. Insurance agents, like other agents, may have very limited or very extensive powers. Welsford & Otter Barry's *Fire Insurance* 4th Ed. p. 84; Bowstead on *Agency* 4th Ed. 82-3, 273; *Potvin* v. *Glen Falls Insurance Co.* (4); *Newsholme* v. *Road Transport & General Insurance Co.* (5).

E. G. Gowling K.C. for the respondent. The respondent supports the judgment of the Court of Appeal. There was no restriction on Anderson's authority. If Anderson had dealt directly with the respondent and told him he was insured, the appellant would have been bound because Anderson was its general agent. That it was the only company for which both Robidoux and Anderson were acting in the transaction is conclusively proved by the fact that when Robidoux notified Anderson of the fire, the latter's immediate reaction was to telephone the appellant in Montreal and advise that the application had arrived, a fire had occurred, and he was disclaiming liability, to which the appellant agreed.

(1) [1951] S.C.R. 495.
(2) (1912) 47 Can. S.C.R. 252.
(3) [1932] 4 M.P.R. 582.
(4) [1931] 1 W.W.R. 380.
(5) [1929] 2 K.B. 356.

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MacGillivray on Insurance Law, 3rd Ed. at page 389 points out there is no absolute rule of law requiring a contract of fire insurance to be made out in any particular form; at 390, that there is nothing in law to prevent a valid contract of insurance being constituted by informal writing or even by mere oral communication; and at 391, if the contract may be fully performed with the year, the Statute of Frauds, does not apply.

Appellant's counsel submitted that the words in the application "All insurance subject to the approval of the company," placed the burden on the plaintiff to prove the approval. These words do not mean that the Head Office must approve. Such approval can be given by the general agent or the sub-agent if authorized to bind. If Head Office does not care for the risk it has the privilege of cancelling but until that is done the insurance is in force. One way of expressing approval is to tell the applicant he is covered, another is to accept the premium.

As to the sub-agent's authority. This is the issue in the case and is not to be decided by Anderson. His statement to the Court that Robidoux had no authority to bind was volunteered without his knowing any of the instructions given to the sub-agent. He left all the instructions to his office manager, who was not called; nor was any one from Head Office, which was notified of the appointment, called to state the nature of the authority. Anderson's statement that the sub-agent did not write policies is probably correct, but that the sub-agent did not have interim and renewal receipts may be questioned. Robidoux was a member of the Board of Fire Underwriters. Not only could he have got the application form but interim receipts from it as well. It is therefore quite conclusive that the sub-agent's authority did not depend on what forms were supplied him by his principal.

Anderson knew Robidoux was accepting premiums at the time of taking applications. If it is a fact that he told Robidoux to fill in the application and forward it to him and he would try and place it (which the respondent does not admit, but denies), he should have warned Robidoux then and there not to accept any premium or make any commitments until he had placed it.

It is open to this Court to find that the risk was approved then and there by Anderson. That in all probability he told Robidoux to cover and collect the premium. Welsford & Otter-Barry's Fire Insurance, 3rd Ed. p. 80 states: "The acceptance of the proposal by the insurers may be more or less conclusively shown in one or other of the following ways namely . . .

"(2) By accepting the premium. Where no policy has been issued to the proposers before the loss, the receipt of the premium and its retention by the insurers, though by no means conclusive may raise the presumption, in the absence of any circumstances leading to the contrary conclusion, that the insurers have definitely accepted his proposal. In such a case they are not entitled to refuse to issue a policy to him, and they are, therefore, liable to him in the event of a loss." at p. 191, "The insurers, by accepting the payment of the premium, may, even where no policy has been issued, be estopped from denying the existence of a contract of insurance between the assured and themselves."

McElroy v. *London Assurance Corp.* (1) per Lord Maclaren at 291.

Authority is a question of fact. *Murfitt* v. *Royal Insurance Co. Ltd.* (2). The receipt given comes within this category. Hals. 2nd Ed. 423. *Murfitt* v. *Royal Insurance Co. supra,* which it is stated was followed in *Parker & Co. (Southbank)* v. *Western Assurance* (3).

The judgment of the Court was delivered by:—

KERWIN J.:—This is an appeal by World Marine and General Insurance Company Limited (hereafter called the company), against a judgment of the Appeal Division of the Supreme Court of New Brunswick, allowing an appeal by the plaintiff, Yvon Leger, against the judgment at the trial which had dismissed his action. Suit was brought not only against the company but also against J. Arthur Anderson carrying on the business of an insurance agent at Saint John under the name of J. A. Anderson & Co. and the said J. A. Anderson & Co. As the trial judge's dismissal of the action against Anderson was affirmed by

(1) (1897) Ct. of Sess. 287. (2) (1922) 38 T.L.R. 334.
(3) (1925) W.C. & Ins. Rep. 82.

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the Appeal Division, and no appeal from that part of the latter's judgment has been taken by the plaintiff, we are not concerned with the claim against Anderson although it will be necessary to refer to his position in the events under review.

The claim before us is for the recovery of the sum of $7,000, for which amount the plaintiff claims the company insured him on May 30, 1947, against loss by fire of his portable sawmill near Shediac in New Brunswick. The mill was destroyed by fire the following day. No policy of insurance was issued but the plaintiff relies on an alleged verbal contract between himself and one Maurice Robidoux and claims that in making that contract Robidoux acted as the agent of the company so as to bind the latter. The company denies the contract and in any event, alleges that Robidoux had no authority either actual or implied to bind it. In order to determine these issues, it is necessary to examine the relevant facts in some detail.

At all material times the company was an insurer carrying on the business of fire insurance in New Brunswick. J. Arthur Anderson had an agency contract with the company by which he was appointed its general agent for the province in respect of all classes of fire insurance authorized by the company to be written in the province as it might from time to time determine. Clause 4 of this contract provides:

> The agent, in consideration of the remuneration hereinbefore specified, agrees faithfully to perform and observe the duties of a general agent. He may appoint sub-agents and accept applications for insurance in the classes which the company shall authorize the agent to undertake in the province of New Brunswick. He agrees to be governed by the judgment and opinion of the company as to lines and classes of hazards to be insured and to recognize at all times the authority of the company as to cancellation of certain lines or classes of hazards and to be governed by such rules and regulations as may from time to time be issued by the company.

Anderson had about 60 sub-agents, of whom 6 had specific power to bind on his behalf. In the entire province there are about 800 licensed insurance agents of whom only 41 have specific power to bind the insurance companies. Prior to January 1947, Maurice Robidoux had

been soliciting accident and sickness insurance for Anderson as a sub-agent. He never had a written contract with Anderson, nor did he ever have in his possession interim receipts or renewal applications. His powers as sub-agent were limited to taking applications. In connection with any business resulting in the issuing of a policy, he would be billed at the end of each month for the total of the premiums less his commissions. It was his responsibility to see that the premiums were collected and one feature greatly relied upon by the repondent is that, to Anderson's knowledge, Robidoux would, in many, if not all cases, receive the premium at the time the application was signed.

In January 1947, Robidoux commenced soliciting fire risks on behalf of Anderson and in April he submitted to Anderson an application for $4,000 fire insurance on a portable sawmill belonging to Thomas J. Kingston. On behalf of the company Anderson accepted this application and issued and delivered a policy. When the company learned of this it sent Anderson a letter on April 18th advising him that portable sawmills were in the category of risks upon which they looked with disfavour. This information was immediately conveyed to Robidoux in a letter from Anderson and finally, the Kingston matter was arranged by Anderson securing the cancellation of the policy and the issuance of a policy for $2,000 by the company and the issuance of policies by other insurers to cover the balance of the $4,000. Later Robidoux called Anderson and asked him if he could place insurance on a portable sawmill belonging to one Philias LeBlanc. This was arranged by $2,000 of the risk being placed with the company and the balance with other insurers.

We now come to the specific circumstances giving rise to the claim advanced by the respondent. In January 1947 Robidoux saw the respondent in connection with sickness and accident insurance and truck insurance and as he understood the respondent was going to purchase a portable sawmill, suggested that the respondent take out fire insurance on it. The respondent said that he would see

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Robidoux when he had purchased the mill. Either at this or a subsequent interview Robidoux handed the respondent a business card reading as follows:

cCc MAURICE ROBIDOUX
J. A. Anderson & Co.
86 Prince William St. Saint John, N.B.

(It was explained that "cCc" are the initials of another company, not a fire insurance company).

Soon after the purchase of the mill and between May 1st and May 20, 1947, the respondent saw Robidoux on the street at Shediac and asked him what the insurance would cost. Robidoux said that he would call Anderson on the telephone. This he did when Anderson told him to fill in the application and forward it "and I will try to place it." Anderson also told him that the premium for $7,000 coverage would be $315. According to the evidence of Robidoux at the trial he told the respondent not only the amount of the premium but also that Anderson had said that he would try to place the insurance, or as he put it in another way, "I told him they (fire insurance risks on portable sawmills) were very hard to place and would have to be brokered out." Not having the money, the respondent told Robidoux that he would see him later.

The next meeting occurred on the night of Friday, May 30th, at Robidoux's house. The respondent paid the money and received a receipt on an ordinary receipt form which merely states that Robidoux had received from the respondent $315 "for fire insurance on mill." At the same time the respondent signed an "Application for Farm Risks and Country Dwellings", not addressed to any particular insurance company but "To the . . . . Insurance Company Limited." At the foot of the first sheet of this application immediately above the date and the respondent's signature appears in heavy type "All Insurances Subject to the Approval of the Company." The respondent's testimony that on this occasion Robidoux told him that "starting from that time I was insured," was denied by Robidoux.

It should here be explained that in his reasons for judgment the trial judge first came to the conclusion that the action against the company must be dismissed on the ground that there was no evidence of the authority of

anyone, and in particular of Robidoux, to effect the alleged insurance by the company. Undoubtedly, as the trial judge held, Robidoux's examination for discovery, part of which had been put in at the trial, was not evidence against the company and on the argument before this Court we announced our agreement with the trial judge that the order for the examination of J. Arthur Anderson "and Maurice Robidoux, agent of the above named defendant, J. A. Anderson & Co., for discovery," refers only to the defendants, J. Arthur Anderson and J. A. Anderson & Co.

After disposing of the claim against the company, the trial judge proceeded to discuss the claim against Anderson. It was in that connection that he decided that Robidoux had told the respondent on May 30th that the latter was insured. He did this on the basis that, being unable to say whether the story of Robidoux or the respondent was correct, one who testifies to an affirmative is to be credited in preference to one who testifies to a negative, referring to the remarks of Taschereau J. in *Lefeunteum* v. *Beaudoin* (1). In considering whether, at the meeting in Shediac between May 1st and 20th, Robidoux had told the respondent that Anderson would try to place the insurance, or whether, as the respondent testified no such statement was made, the trial judge also, as to the claim against Anderson, on the same basis decided that Robidoux had told the respondent that the insurance had to be "brokered out."

The remarks of Taschereau J. in the case referred to have been adopted and followed by trial judges in several decisions in Canada and it is therefore advisable to point out that Mr. Justice Taschereau was speaking only for himself. However, he referred to an extract from the judgment of the Master of the Rolls in *Lane* v. *Jackson* (1), and to what was said by Baron Parke speaking for the Judicial Committee in *Chowdry Deby Persad* v. *Chowdry Dowlut Sing* (2). I doubt that the Master of the Rolls or Baron Parke or Mr. Justice Taschereau were dealing with the matter otherwise than as set forth in 6 Law Magazine (1831) 348 at 370, referred to with approval in chapter 8 on Presumptions in Prof. Thayer's Preliminary Treatise on Evidence in a foot-note at page 313, i.e., that

(1) (1897) 28 Can. S.C.R. 89 at 93-94. (1) (1855) 20 Beav. 535 at 539-40.
(2) (1844) 3 Moo. Ind. App. 347 at 357.

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what was involved was a mere natural presumption which, according to Mr. Starkie as set forth in 6 Law Magazine, is derived wholly by means of the common experience of mankind, from the course of nature and the ordinary habits of society. The word "presumption" used by Mr. Starkie is unfortunate and liable to misconstruction and it is putting it too high to say, as Mr. Justice Taschereau is reported to have said, that it is a "rule of presumption." There is no decision binding upon this Court which lays down any such mechanical formula. It is in every case the duty of the tribunal of fact to ascertain the facts in the light of all the circumstances present in the particular case. It would appear perhaps more logical where the Court finds itself faced with a choice between two witneses testifying to the affirmative and negative, respectively, of a particular proposition, if it finds itself unable to choose, after taking into consideration all the circumstances, that the decision should be that the burden of proof has not been met, than that the finding should be for the affirmative. It may be that in all the circumstances of a given case the Court could come to the conclusion that the affirmative should be accepted, but it should not do so on the basis of the application of any rule of thumb.

In the present case we are willing to assume that Robidoux told the respondent on May 30 that the latter was insured but on a reading of the record we are satisfied that at the earlier interview Robidoux told the respondent that Anderson had said he would "try" to place the insurance, thus indicating to the respondent that the proposal had not been finally accepted.

On Saturday, May 31, the mill was destroyed by fire but the application had already been sent through the post office by Robidoux to Anderson and it was with the incoming mail on Anderson's desk in Saint John on the following Monday morning when Robidoux telephoned Anderson and advised him of the fire. A few days later Robidoux saw the respondent who asked him the name of the company he (Robidoux) was acting for, whereupon Robidoux handed him the heading of a printed copy of agents' returns showing the name of the appellant company. Undoubtedly, until that time the respondent did not know the name of the company but this fact is of no importance to the legal

problem involved. Robidoux sent a cheque for the amount of the premium to the respondent who, however, declined to accept it as that would prejudice his claim.

In these circumstances there can be no doubt that Robidoux was not an actual agent for the company so as to bind it to any insurance either in writing or orally but it is argued that he falls within that class of agent for whose contract with a proposed insured an insurer should be held liable. It is of the utmost importance that Robidoux had nothing from the company in the way of interim receipts or even official receipts with the name of the company on them and in fact nothing to indicate that he had any authority to enter into a binding contract of insurance on its behalf. Furthermore, the application form signed by the respondent clearly states "All Insurances Subject to the Approval of the Company," and as stated above the proper conclusion on the evidence is that Robidoux told the respondent that Anderson would "try" to place the proposed insurance or that it would be "brokered out." All cases such as this must be determined upon their own circumstances and the facts that on May 30th Robidoux received payment of the $315 and told the respondent he was insured do not separately or in conjunction add anything, no matter what effect they might have under other conditions. Estoppel was not pleaded but even if it were there is nothing to show that anything that happened in connection wtih the Kingston and LeBlanc applications ever came to the knowledge of the respondent and therefore he did not act upon any holding out that could possibly have been otherwise urged.

Hughes J. speaking for the Appeal Division referred to the decision of Vice Chancellor Malins in *Mackie* v. *The European Assurance Society* (1). There, however, as pointed out by McCardie J. in *Murfitt* v. *The Royal Insurance Company Limited* (2), the agent had been supplied with a book of printed forms and it was held that he was authorized to make contracts on behalf of The European Assurance Society in accordance with the terms in the forms. In *Linford* v. *The Provincial Horse & Cattle Insurance Company* (3), the Master of the Rolls held that it was not the ordinary duty of an agent of a company to

(1) (1869) 21 L.T. (N.S.) 102.
(2) (1922) 38 T.L.R. 334 at 336.
(3) (1864) 34 Beav. 291, 55 E.R. 647.

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grant or contract to grant policies of assurance. In that case the plaintiff had paid the agent 10s on account but it was held all the plaintiff had done was to make a proposal with a deposit, which the company was entitled either to accept or reject. In the *Murfitt* case McCardie J. stated the *Linford* decision to be good law but he then referred to the *Mackie* decision. McCardie J. pointed out that in the case before him the agent occupied a position in which he might well have been authorized to give oral cover and that he had been habitually giving it for 2 years before, to the knowledge of his superiors and with their consent. It was on that ground and on the special facts of the case that judgment was directed to be entered for Murfitt. The decisions in Murfitt and Mackie depend upon their own particular facts.

Hughes J. also referred to *Kline Bros. & Co.* v. *Dominion Fire Insurance Company* (1), and the remarks of Chief Justice Fitzpatrick at page 255. The quotation from that page must be read in connection with the preceding sentence and a perusal of all the reasons makes it clear that the Court was there dealing with the question of an agent admittedly qualified to bind the company at the inception of a risk. The only other decision referred to by Hughes J. is *Grimmer* v. *Merchants' and Manufacturers' Fire Insurance Company* (2). There, the sub-agent had been supplied with interim receipts and had power to issue them, but as he had none with him at the time he accepted the application for insurance, he gave a verbal binder and it was held that the insurer was liable as if the interim receipt had been issued. These circumstances show that the decision is quite distinguishable.

On behalf of the respondent we were referred to two extracts from Welford & Otter-Barry on Fire Insurance, which in the 4th Ed. appear at pages 80, 81 and 198, and read as follows:

p. 80:

> The acceptance of the proposal by the insurers may be more or less conclusively shown in one or other of the following ways, namely:

p. 81:

> (2) By accepting the premium. Where no policy has been issued to the proposer before the loss, the receipt of the premium and its retention by the insurers, though by no means conclusive, may raise the

(1) (1913) 47 Can. S.C.R. 252. (2) (1932) 4 M.P.R. 582.

presumption, in the absence of any circumstances leading to the contrary conclusion, that the insurers have definitely accepted his proposal. In such a case they are not entitled to refuse to issue a policy to him, and they are, therefore, liable to him in the event of a loss.

p. 198:

The insurers, by accepting the payment of the premium, may, even where no policy has been issued, be estopped from denying the existence of a contract of insurance between the assured and themselves.

There, however, the authors are discussing the effect of the acceptance of a premium by the insurers, that is, where no question arose as to the money having been received by the insurers or someone on their behalf. "Accepting" payment of the premium is, as explained in the text, "receipt and retention." At p. 193 the authors deal with payment of premiums to an agent who has no authority to accept applications, and at p. 85, where the application is not accepted, the applicant is entitled to a return of the premium as is stated. Even assuming in the present case that Robidoux had authority to receive payment of the premium with the application, all that this amounts to from the standpoint of the respondent is, as pointed out by Sir John Romilly M.R. in *Linford* v. *Provincial Horse and Cattle Insurance Company* (*supra*), that he had made "a proposal with a deposit which the company was entitled either to accept or reject, and the company never having accepted it, was not bound."

More to the point are the remarks of Ford J. in a case referred to by Counsel for the appellant, *Potvin* v. *Glen Falls Insurance Co.* (1). We agree with Mr. Justice Ford's statement therein that in all cases where it was held that an agent of an insurance company had implied authority to bind the company, the agent either had in his posession some *indicia* of authority, some forms to implement his promise of an interim covering, or the course of dealing between the agent and his principal showed that, with the knowledge and consent of his superiors, he had been habitually exercising the authority he assumed. The same principle may, we think, be deduced from the statement in MacGillivray on Insurance Law, 3rd Ed. page 381. These remarks appear in an earlier edition of the textbook referred to by Ford J. except for a few additions, one of which is

(1) [1931] 1 W.W.R. 380 at 390

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that acceptance of a premium by an agent who has no actual or apparent authority to contract, does not bind the company.

In the reasons for judgment in the Appeal Division, after referring to the fact that Robidoux was paid the premium and thereupon informed the plaintiff that he was insured it is stated "That is a usual custom among fire insurance agents." We are unable to find any evidence in the record to support that statement.

The appeal should be allowed, the judgment of the Appeal Division set aside and that of the trial judge restored. The appellant is entitled to its costs in this Court and the Appeal Division.

Appeal allowed with costs.

Solicitors for the appellants: *Ritchie, McKelvey & Mackay.*

Solicitors for the respondent. *Inches & Hazen.*

PHYLLIS BOUCK (APPELLANT) .....APPELLANT; 1952

*Feb. 22, 25
*March 22

AND

THE MINISTER OF NATIONAL REVENUE (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Trusts—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Whether money paid into an "income account" in trust for the support of a widow and her children and the education of the latter subject to the sole control of the widow is income within the meaning of The Income War Tax Act.

A testator by his will directed that his trustee pay to the credit of an "income account" the annual net profit from a trust until all his children should have attained the age of twenty-five years. The moneys to the credit of the account to be under the sole control of his wife to be used by her to maintain herself and the children, and educate the latter, as the wife in her sole discretion from time to time determined.

The appellant, widow of the testator, in 1944 received payment from the income account and the whole amount so paid her was assessed for income tax purposes as her income.

Held: (Rinfret C.J. and Kerwin J. dissenting)—That although the income in question was under the sole control of the appellant it was not hers absolutely but impressed with the obligation that it be devoted to the objects provided for as set out above. It could not therefore be said that the entire income was to be regarded as hers for the purpose of *The Income War Tax Act*. *Singer* v. *Singer* 52 Can. S.C.R. 447; 33 O.L.R. 602 at 611; *Allen* v. *Furness* 20 Ont. App. R. 34; *In re Booth* 2 Ch. 282. The wife being obligated to apply the income needed for the benefit not only of herself but also of the children, although her discretion was absolute, had an interest limited to that which she appropriated for herself, and the children became entitled to the remainder in the proportions she from time to time determined *Re Coleman* 39 Ch. D. 443.

Per Rinfret C.J. and Kerwin J. dissenting—The decision in *Singer* v. *Singer, supra* prevented a holding that under the will either child was entitled to an aliquot part of the income. Even if that were not so, the income received by the appellant from the "income account" was her income. She was not a trustee and the mere fact that there was the responsibility upon her as such as described in the *Singer* case did not make the money any less her income than if she had received the income from "B" though she might be bound by bond to "C" to pay the latter a certain annual sum. *Manning v. Federal Commissioner of Taxation* 40 C.L.R. 506; *Cohen* v. *Commissioners of Inland Revenue* 26 Tax. C. 472.

Decision of the Exchequer Court [1951] Ex. C.R. 118, reversed.

*PRESENT: Rinfret C.J., and Kerwin, Rand, Kellock and Locke JJ.

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APPEAL from the judgment of the Exchequer Court of Canada, Graham J., Deputy Judge (1), dismissing the appeal of the appellant from an assessment made in respect of the appellant's income for the year 1944.

R. A. MacKimmie for the appellant. The judgment appealed from is erroneous in the following respects:

1. In holding that the moneys received by the appellant from the income account of the Estate of Charles Bouck is her income within the meaning of *The Income War Tax Act.*

2. In holding that the control over the moneys paid by the appellant was sufficiently absolute in its nature to constitute income as defined by s. 3 of the Act.

3. In failing to apportion the moneys paid by the Trustee into the income account of the Estate as income received between the appellant and her two children *or* remitting the assessment back to the respondent for re-assessment under s. 65 of the Act.

This appeal, briefly, is to determine whether the money earned by the Estate and placed by the Trustee in an income account and subject to the sole control of the appellant for the specific purposes provided by the Will is income in her hands or a fund which she administers for the actual benefit of herself and her two children.

S. 3 of *The Income War Tax Act* defines income: "Annual net profit or gain or gratuity" are the defining words. S. 9 of the Act is the charging section: "There shall be assessed, levied and paid upon the income during the preceding year of every person . . ." Use of the word "of" denotes absolute ownership. *Poe* v. *Seaborn* (2). From the wording of ss. 3 and 9, it is submitted a fair definition of income within the meaning of the Act is "annual net profit or gain or gratuity" of the taxpayer. It is well established law that title to the bequest is determined from the intention of the testator as declared in his Will. *Lewin on Trusts* 14 Ed. 82-87. Hansbury's *Modern Equity* 5 Ed. 127. *Comiskey* v. *Bowring-Hanbury* (3).

(1) [1951] Ex. C.R. 118; C.T.C. 119.

(2) 75 L. ed. 239; 282 U.S. 101.

(3) [1905] L.J. 74 Ch. 263 at 268.

Clause 5 of the Will creates the fund in question. (Clause 5 and the other relevant clause of the will are fully set out in the reasons for judgment which follow). The significant features of clause 5 are:

(i) The Trustee is directed to pay into an income account and not to pay any amount directly to the Appellant until both children have attained the age of 25 years;

(ii) Use of the words "under the sole control of my wife" in para. 1 are words of administration and not of gift;

(iii) The concluding sentence in para. 1 says: "Any moneys from time to time to the credit of the said income account and not required by my wife for the purposes aforesaid may be taken by my Trustee and shall become part of the capital of the trust hereby created." This is clear evidence negativing intention of absolute gift. Note the use of the words "for purpose aforesaid."

Clause 7 of the Will when read in conjunction with clause 5 gives further weight to the interpretation that the testator never intended an absolute gift to the appellant in clause 5 until she was to receive her share when both children attained the age of 25 years. The significant feature of clause 7 is the change of procedure now directing the Trustee to make payments directly to the appellant and no longer into the income account. Here are clear words of gift. The effect of the clause is that when the responsibilities and obligations to the children are satisfied on their attaining the age 25 years, the widow (Appellant) then receives one-half of the income earned by the estate. This is not only evidence negativing absolute gift to the appellant in clause 5 but is evidence of apportionment between the widow and children. It would be repugnant to the tenor of the whole Will to find the testator intended his widow to reduce her standard of living when the youngest children reached the age of 25 years.

The use of the words in clause 4 of the Will of "each of my beneficiaries" and "but not including my wife in the event of her remarrying" show the testator was thinking of his children as well as the appellant. If he was thinking only of his widow the clause is meaningless for clauses 5 and 7 provide for the widow's remarriage and the children attaining the age of 25 years. It is submitted that reading

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clauses 5 and 7 together and giving them their normal meaning, the money paid into the income account for the purposes named is not net gain, profit or gratuity of the appellant and is not income in her hands. It is obvious the testator intended by the choice of words and procedure in the first paragraph of clause 5 of the Will to make a different disposition of the money earned by the estate than he intended in making the gift under clause 7 of the Will.

Looking at the Will in its entirety there is no intention expressed nor can one be implied to support the view that the testator intended the funds paid into the income account under clause 5 of the Will were to be given to the appellant absolutely. Had he had such an intention he could have used simple words to achieve such a purpose. Had he intended that his widow was only to use so much of the income produced by his estate for specific purposes he could not have used more effective wording or procedure to carry out such a purpose. Conversely had he intended an absolute gift to his widow of the income produced by the estate until his youngest child was 25 he would have said so in the clearest terms.

Decided cases, apart from their general reasoning and explanation of rules of construction are of little assistance, for each Will must be treated in accordance with its own terms. The following cases are of general assistance.– *Raikes* v. *Ward* (1); *In re Harris* (2); *Bibby* v. *Thompson* (3); *Crockett* v. *Crockett* (4); *Newill* v. *Newill* (5); *In re G* (6); *Booth* v. *Booth* (7).

H. W. Riley, Q.C. and *F. J. Cross* for the respondent. The point in issue is—Are the moneys received by the appellant pursuant to para. 5 of the Will income of the appellant within the meaning of the *Income War Tax Act*?

The onus is on the appellant to demolish the basic fact on which the taxation rests. *Johnson* v. *Minister of National Revenue* (8). The appellant has not kept accounts or made any accounting of the said sum of $3,797.26 and must fail for the reason she is unable to discharge the onus.

(1) (1842) 1 Hare 445; 66 E.R. 1106.
(2) (1852) 21 L.J. Ex. 92.
(3) (1863) 32 Bear. 646; 55 E.R. 253.
(4) (1847) 2 Ph. 553; 41 E.R. 1057.
(5) (1872) 41 L.J. N.S. 432.
(6) (1899) 68 L.J. Ch. 374.
(7) (1894) 63 L.J. N.S. 560.
(8) [1948] S.C.R. 486 at 489; 4 D.L.R. 321 at 323.

By para. 5 of the Will there is an absolute gift to the appellant of the moneys the Trustee is directed to place to the credit of the Income Account coupled with the express desire of the testator that the appellant occupy with respect to the children after his decease the same position that he would have occupied; the manner of her so doing being expressly let in her sole discretion. The principles applicable to the construction of para. 5 is well put in Snell's *Principles of Equity* 21st Ed., 77; *Comiskey* v. *Bowring-Hanbury* (1).

In construing the Will as a whole the following points support the respondent's contention:

(*a*) The fact that The Royal Trust Co. is appointed executor;

(*b*) The general scheme of the Will is such that whenever a trust is created the same is expressly created in clear, apt and unequivocal language. In para. 5 thereof there is a complete absence of any words creating a trust expressly or impliedly.

(*c*) Particular attention is drawn to the words *"under the sole control of my wife"* and *"in her sole discretion"*. By para. 5 the moneys are placed under the sole control of the appellant to be expended in her sole discretion.

(*d*) After placing the said moneys in her sole control the testator merely states what in his opinion is a reasonable method for the exercise of her sole control and in no sense creates a trust. The remaining words in the said para. merely express the motive for the gift to the wife (the appellant). *Hill* v. *Hill* (2).

The Agreement as to Facts, para. 4 reads:

"4. That the said Appellant, Phyllis Bouck, has since the death of her husband the late Charles Bouck, occupied substantially the same position toward the said children as the late Charles Bouck occupied himself in his lifetime and in particular..." In this connection reference is made

(1) [1905] A.C. 84.

(2) [1897] 1 Q.B. 483 at 488.

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to *Singer* v. *Singer* (1) and the reasons of Anglin J., as he then was, at 458 and 460. He agrees with and quotes the reasons of Middleton J. as to the testator's intention. His judgment and the portion quoted by him from the judgment of Middleton J. is very much in point in view of para. 4 of the Agreement of Facts quoted *supra*. See also *Lambe* v. *Eames* (2); *Thorp* v. *Owen* (3); *Manning* v. *Federal Commrs. of Taxation* (4).

The cases cited in support of the appellant's contention have been discredited or over-ruled insofar as they conflict with the modern trend of authority as indicated by the case cited above and by *In re Diggles* (5). See also Hanbury, *Modern Equity* 2 Ed. 133. No injustice results from the respondent's view herein:

(*a*) Irrespective of the terms of the Will the infant children were entitled to support from the appellant. *Singer* v. *Singer, supra.*

(*b*) The testator undoubtedly had unbounded confidence in the appellant. His dominant intention was that during her lifetime she would occupy substantially the same position toward the children as he had. *Singer* v. *Singer, supra.* Para. 4, Statement of Facts.

(*c*) Had the testator lived the income in his hands would no doubt have been taxable even though expended for the support of his wife and children.

(*d*) Had the appellant earned the income and expended it on the maintenance of herself and the children she would have been taxable, and because the income is unearned and used for their respective maintenance does not mean she is freed from income tax with respect to the whole or any portion of the said money.

The dissenting judgment of the Chief Justice and Kerwin J. was delivered by:—

KERWIN J.:—The appellant, Mrs. Phyllis Bouck, was assessed to income tax for the year 1944 in an amount that she considers unauthorized by the provisions of the *Income War Tax Act*. She is the widow of Dr. Charles Bouck,

(1) (1916) 52 Can. S.C.R. 447.
(2) (1871) 6 Ch. App. 597.
(3) 2 Hare 607; (1843) 67 E.R. 250.
(4) (1928) 40 C.L.R. 506.
(5) (1888) 39 Ch. Div. 253.

who died at Calgary, July 19, 1944, leaving an estate of the aggregate value of $867,111.72 and net value of $845,940.72. Probate of Dr. Bouck's last will and two codicils thereto was duly granted to the executors named therein, viz., the Royal Trust Company and the appellant. While this is not a proceeding commenced in the Courts of Alberta to construe these documents, it is necessary to come to a conclusion as to the position thereunder of Mrs. Bouck in connection with the income of the estate since it is the assessment on that income, paid to her in the year 1944, that is in question.

By the testamentary documents, she was devised and bequeathed the testator's interest in their city and summer residences, together with such of their contents as already did not belong to her, and all personal property, including automobiles, and the sum of $5,000. While the Royal Trust Company was by the will appointed executor, the second codicil appointed the appellant an executrix to act with it. No such change was made in the designation of the Trust Company as trustee to which the testator devised and bequeathed all the rest and residue of his assets and property upon trust for realization and investment and to pay out of the capital of the trust during the lifetime of the appellant, and so long as she should occupy their family residence and summer residence, and so long as she should not remarry, all taxes that might be assessed against the two residences, and the premiums on all policies against loss or damage thereto by fire. By clause 4 of the will the trustee was to pay all taxes upon income assessed or levied in each year against each of the beneficiaries of the trust, but not including the appellant in the event of her remarrying. Then comes clause 5, the first paragraph of which is the important one:—

5. To pay to the credit of an "income account" all the net revenue of the trust hereby created (after payment of the cost of administration and the said income taxes) in every year until all of my children shall have attained the age of twenty-five (25) years. The moneys to the credit of the said account shall be under the sole control of my wife to be used by her to maintain a home for herself and my children, for the maintenance of my wife and my children, for the proper education of my children and otherwise for the benefit of my wife and my children as my wife in her sole discretion may from time to time determine. In every such year in which the said net revenue is less than the sum of TEN THOUSAND ($10,000) DOLLARS, my Trustee shall pay to the credit of the said income account out of the capital of the trust an additional sum which

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with the revenue for such year will equal the said sum. If through any unforeseen cause the sum above mentioned should in any such year or years prove insufficient for the said purposes, then my Trustee may in its discretion pay in to the said income account such additional moneys out of the capital of the trust as may be reasonably required for the said purposes. Any moneys from time to time to the credit of the said income account and not required by my wife for the purposes aforesaid, may be taken by my Trustee and shall become part of the capital of the trust hereby created.

Provision is made in case the widow remarried and for various other contingencies.

The case was heard in the Exchequer Court on an agreed statement of facts. There were two children, a girl and boy, issue of the marriage of Dr. Bouck and the appellant and, at the death of the testator, they were respectively sixteen and thirteen years of age. The appellant has not remarried. Since the death of her husband she has "occupied substantially the same position towards the said children as the late Charles Bouck occupied himself in his lifetime and in particular:—

(*a*) She has maintained, supported, educated and borne all expenses in bringing up her son, the said John Bouck, from the date of her husband's death until the present time;

(*b*) She has maintained, supported, educated and borne all expenses in bringing up her daughter, Marilyn (Bouck) McDaniel, from the date of her husband's death until the marriage of the said Marilyn (Bouck) McDaniel in the month of October, A.D. 1948. Subsequent to the said marriage she has contributed varying amounts to the welfare of her said daughter;

(*c*) She has maintained a large home at the premises municipally known in the City of Calgary, in the Province of Alberta, as 1014-Prospect Avenue, the same having been the family residence for a number of years prior to the death of the late Charles Bouck. Further she maintains a summer home at Sylvan Lake, in the Province of Alberta, for her own use and for the use of her children, John and Marilyn, although apart from occasional visits Marilyn has not made use of the said residences since the date of her said marriage;

Although it is the 1944 income that is in question, the assessment thereon was not made until 1948. Included in the total income upon which the respondent assessed the appellant to income tax for 1944 is the sum of $3,797.26, being moneys received by the appellant pursuant to clause 5 of the will. Paragraphs 6, 7, 8 and 9 of the agreed statement of facts are as follows:—

6. That the Appellant did in fact receive the whole of the said sum of $3,797.26, which said sum was under her sole control, and was expended and used by the Appellant in her sole discretion, and pursuant to said

Clause 5 of the said Last Will and Testament to maintain a home for herself and the said children, for the maintenance of herself and the said children for the proper education of the said children, and otherwise for the benefit of herself and her children, and as the Appellant in her sole discretion did from time to time determine.

7. The Appellant has not kept accounts or made any accounting whatever of the said sum of $3,797.26, nor has the Appellant furnished nor is she able to furnish any accounts to the Minister as to the portions thereof:—

(*a*) Expended by her in maintaining a home for herself and children;
(*b*) For the maintenance of herself and her children;
(*c*) For the proper education of the children;
(*d*) Otherwise for the benefit of herself and her children;
(*e*) For her separate use;
(*f*) For the direct or indirect use of John Bouck and Marilyn Bouck, or either of them;

8. The Appellant pays for services of a hired man in the maintenance of her home in the City of Calgary, in the Province of Alberta.

9. That presently:
(*a*) The Appellant maintains two automobiles for the use of herself and her son John Bouck;
(*b*) If the Appellant had not the responsibility of the maintenance and control of her children she would not require to maintain the large home now maintained by her;
(*c*) She estimates that as a minimum her expenses would have been reduced annually by $5,000 had she not supported and maintained her said children.

It is understood and agreed that paragraph (*c*) supra is merely an estimate which the Appellant would make of the position at the present time if she were called to give evidence on her own behalf, and that nothing in the said paragraph 9 is to prejudice or affect the Respondent's position that the assertions made in the said paragraph are inadmissible in evidence and irrelevant, the Respondent's position being that the appeal solely concerns that portion of the year 1944 subsequent to the 19th day of July, A.D. 1944, and that period alone.

It should be noted that in case both children died, or either of them, there is no provision whereby the appellant, during her widowhood, should receive less than the moneys to the credit of the "income account" so long as they are "required". The decisions as to what words create a trust are legion but, in each case, the intention is to be gathered from the document as a whole. In *Singer* v. *Singer* (1), the will of the late Jacob Singer directed:—

"my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children. Should however my wife remarry then such annuity shall cease."

(1) (1915) 33 O.L.R. 602.

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Middleton J. who heard the originating motion for the construction of the will in the first instance, held:—

> The said Annie Singer is not entitled to the net annual income arising from the said estate to her own use absolutely, but subject to the obligation to use the same not only for her maintenance, but also for the maintenance of the children of the testator, and that the right of any child to maintenance does not cease on attaining majority or marriage;

and he directed a reference to determine what allowance, if any, should be made to each of the children of Jacob Singer out of the income of the estate.

The Appellate Division varied this judgment by declaring:—

> The said Annie Singer is entitled to the net annual income arising from the said estate during her widowhood for her own use absolutely, but subject to an obligation to provide thereout for the maintenance of the children of the testator or such of them as in her discretion to be exercised in good faith she shall deem to require the same, but such obligation does not extend to any child who has or shall be married or otherwise be forisfamiliated.

An appeal to this Court (1), was dismissed. The Chief Justice and Duff J. expressed no views upon the point; Sir Louis Davies accepted the Appellate Division's opinion as the correct one, as did Idington J., Anglin J. and Brodeur J. As Anglin J. points out, the difference between the orders made by Middleton J. and by the Appellate Division was that under the latter the discretion of the mother was wider and enabled her, for reasons that seemed to her sufficient, to exclude any child from maintenance.

Here, to adapt the language of Sir William Meredith, at page 611 of 33 O.L.R., the appellant was entitled to receive the income, subject to an obligation on her part to maintain and educate the children out of it but leaving to her discretion the manner in and the extent to which provision should be made for any child, a discretion not subject to control or interference by the Court so long as it should be exercised in good faith.

We are, of course, dealing with the position in 1944 when the appellant had not remarried and the children were under the age of twenty-five years. As has been pointed out, this is not a proceeding to construe Dr. Bouck's will and codicils in which the widow and children are represented. Consequently, we do not know anything about

(1) (1916) 52 Can. S.C.R. 447.

such things as medical expenses for any of the family, charitable donations and entertainment expenses of the appellant, or the cost of help in and around the Calgary home or the summer home although, in March, 1951, when the agreed statement of facts was signed, we know that the appellant was paying for the services of a hired man in the maintenance of the Calgary house. We also know that at that time the appellant maintained two automobiles for the use of herself and John,—the daughter having by that time been married. No doubt in the year of the daughter's marriage, the appellant would have incurred considerable expense with respect to the preparation therefor, a great part of which it could no doubt be asserted was her expense as head of the family. In truth, the money spent by the appellant for the maintenance, education and benefit of either child might be very slight in one year and considerably greater in another. There are such things as premiums on insurance on the automobiles and many other expenses which Dr. Bouck would presumably have in mind as being incurred by the appellant and which it would be difficult to say were for anyone's benefit except her own. In a proceeding upon the construction of the will, these are matters that might be gone into but we know practically nothing about them for the year 1944, which is the year of the income in question.

In the first income tax return made by the appellant in April, 1945, although it was a mere estimate of the income of her husband's estate for that part of the year 1944 remaining after his death, the total amount of such estimated income was returned by her as being her income. It was only in January, 1946, that a new return was made in which the income of the appellant from her husband's estate for the relevant part of 1944 was arbitrarily put by her at one-third of the total income. She had, of course, received the total amount in accordance with the provisions of the will and we are not called upon to deal with a case where she received a certain amount from the trustee of the income account for herself and other specific amounts therefrom for each child. Nothing is said as to whether this is possible under the will, or as to the result if it in fact occurs. As the trial judge states, the appellant may find some comfort in the fact that if she succeeded

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in these proceedings, she would be taxed as a single person without a deduction for each child; to which might be added that in the possible circumstances envisaged above, each child might be subject to tax upon what would be found to be his or her income.

While clause 7 of the will commences:—"From and after the time when all of my children shall have attained the age of twenty-five years", and that event might not happen because one might die before attaining that age, provision is subsequently made for the death of either child without issue. Then finally comes clause 14:—

14. In the event of the death of both of my children without issue then the entire income shall be payable to my wife during her lifetime and after her death the capital of the trust hereby created shall be distributed to my heirs according to the laws of the Province of Alberta then in force with respect to the devolution of intestate estates.

Reading the whole of the will, it appears that if both children died before the ages of twenty-five, clause 14 would operate.

However, the appellant points to clause 7 of the will, dealing with the situation where the children would have attained the age of 25 years. It reads:—

7. From and after the time when all of my children shall have attained the age of twenty-five (25) years. To pay to my wife during her lifetime in monthly instalments without power of anticipation, one-half the net income of the trust hereby created (after the payment of the cost of administration), and to pay to each of my children during their respective lifetimes, in monthly instalments without power of anticipation, one-quarter of the said net income.

Provided that in the event of my wife remarrying the said net income shall be thereafter divided one-third to my wife and one-third to each of my children.

Provided further that if the aggregate amount of the net income payable to my wife and my children in any year is less than the sum of ten thousand ($10,000) dollars, my Trustee shall in every such year pay out of the capital, of the trust hereby created to my wife and my said children a further sum which with the share of income received by them in such year shall amount to the said sum, and such further sum shall be divided among them in the same proportion as the income is divided.

Provided further that if through any unforeseen cause the sum mentioned in the proviso next preceding should not be sufficient for the proper maintenance of my wife and my children, my Trustee may in its discretion pay to my wife and to my children such additional moneys out of the capital of the trust as may be reasonably required for their respective maintenance.

It is said that the change in procedure whereby the trustee is directed to make payments directly to the appellant and no longer into the income account is significant and that in clause 7, as compared with clause 5, are clear words of absolute gift. However, the testator was dealing with an entirely different situation and I am unable to perceive that the manner in which he directed the trustee to deal with the income under those circumstances can affect a matter arising under clause 5.

The appellant then refers to clause 4, reading as follows:

> 4. To pay in each and every year out of the income of the trust hereby created all taxes upon income assessed or levied in such year against each of the beneficiaries of the said trust with respect to the share of the income of the said trust payable in such year to each respective beneficiary, but not including my wife in the event of her remarrying.

The use of the words "each of the beneficiaries of the said trust" indicates that the testator had in mind not only his wife, under whose sole control the moneys in the income account should be in accordance with clause 5, but also the children when they should have attained the age of twenty-five years, in accordance with clause 7.

The case of *Drummond* v. *Collins* (1), has no application. There, the trustees of a deceased United States man were required to exercise their discretion as to providing money for the maintenance of the testator's grandchildren who were, at the time in question, minors. In pursuance of this authority the trustees exercised their discretion and remitted to Mrs. Drummond, the mother of these children, certain sums of money for their maintenance. It was held that, within the meaning of the British Income Tax Act, these sums were derived from remittances from the United States payable in Great Britain, or from money or value received in Great Britain and arising from property that had not been imported into Great Britain. It was also held that they came within the words of Schedule D as profits or gains accruing from property to a person residing in the United Kingdom. There it was the income of the children that was in question.

(1) [1915] A.C. 1011.

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More to the point is the decision of Sir Adrian Knox, Chief Justice of the High Court of Australia, in *Manning* v. *Federal Commissioner of Taxation* (1), where a testator devised and bequeathed the whole of his property to his wife in trust for his children—the wife during her life to receive the income thereof for the support and maintenance of herself and the children and after her death the proceeds of the sale of such property to be equally divided between the children. It was held that the wife was entitled to receive the income of the estate subject to no liability to account for its application, provided she discharged the duty of supporting and maintaining the children, following *Browne* v. *Paull* (2):—

> Where the interest of the children's legacies is given, to a parent, to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children.

It was also held by Macnaghten J. in *Waley Cohen* v. *Commissioners of Inland Revenue* (3), that sums payable under a trust to a father (the settlor) towards the upkeep of a joint establishment with his sons (the beneficiaries) are income of the father.

The decision in *Singer* v. *Singer* prevents a holding that under Dr. Bouck's will either child is entitled to an aliquot part of the income. Even if that be not so, the income received by the present appellant in the year 1944 from the "income account" is her income. She is not a trustee and the mere fact that there is the responsibility upon her such as is described in the *Singer* case does not make the money any less her income than if she had received income from B though she might be bound by bond to C to pay the latter a certain annual sum.

The appeal should be dismissed with costs.

The judgment of Rand, Kellock and Locke, JJ. was delivered by:—

KELLOCK J.:—Under the will in question, the testator, by para. 5, directed his trustee to pay to the credit of an "income account" the annual net revenue from a trust fund until all his children should have attained the age of

(1) (1928) 40 C.L.R. 506. (2) (1850) 1 Sim. (N.S.) 92 at 103, 104.
(3) (1945) 26. Tax. C. 472.

twenty-five years, directing that these monies should be under the sole "control" of his wife

> to be used by her to maintain a home for herself and my children, for the maintenance of my wife and my children, for the proper education of my children, and otherwise for the benefit of my wife and my children as my wife in her sole discretion may from time to time determine.

The testator further provided that any monies to the credit of the account "not required by my wife for the purposes aforesaid" should be returned to capital. In the event of the death of his wife before all the children should have attained the specified age, he directed, similarly, that the guardian whom he had appointed for his children should have control of the monies to the credit of the account

> to the extent required to provide for the maintenance, education and benefit of my children as the said guardian in her sole discretion may from time to time determine *in the same manner as my wife if living.*

By para. 7 he further provided that from and after the time when "all" his children should have attained twenty-five, his wife was to be paid one half of the net income of the trust fund for life, and each of the children one quarter during their respective lives, with the further provision that in the event of the net income being less than $10,000 in any year, the deficiency should be made up out of capital. The trustee was also given a discretion to make further payments out of capital should even this sum be insufficient to provide for the proper maintenance of the wife and children. From and after the death of the wife, all of the income was to be paid to the children equally.

By para. 9, it is provided that upon the death of either of the children without issue, the income "which would have gone" to the deceased child if living, should, during the lifetime of the testator's wife and the surviving child, be paid to the surviving child, with the proviso that

> In the event of the death of my son without issue but leaving a wife surviving, the share of the income which would have gone to him if living shall be paid * * * to his wife until her death or until she remarries, whichever shall first occur.

Para. 10 provides that upon the death of his daughter leaving issue, then until the death of the testator's wife and son, "the share of the income which my daughter would have received if living" should, until all the issue should have attained twenty-five years, be paid to his

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widow if living, or if not, to his son, to be used for the maintenance and education of the issue of the daughter until all should have attained the age of twenty-five, and should thereafter during the same period be paid to the issue.

Similarly, it is provided by para. 11 that upon the death of his son leaving issue, then until the death of the testator's wife and daughter, the share of the income "which my son would have received if living" should, until the issue attained twenty-five years, be paid to his son's widow for the maintenance of herself and the issue and the education of the issue until all shall have attained twenty-five years, and thereafter during the lifetime of his daughter and the testator's widow, be paid to the wife and issue of his son, with the proviso that in the event of the death or remarriage of his son's widow, then "her interest in the said income" should cease, and the share "which should have gone to her" shall go to the issue. The will contains an ultimate trust, upon the death of the testator's children and wife, for the benefit of his grandchildren who attain twenty-one years.

It seems plain on the scheme of this will, that, for example, should the son marry and die before attaining age twenty-five, his widow and children, if any, would stand in his stead with respect to the income. It does not appear that it was the intention of the testator that all benefit in respect of income to the widow of the son and the son's issue should depend upon the son himself having attained the specified age. It is to be observed that the term of existence of the "income account" in para. 5, as well as the coming into operation of the provision with respect to payment of specific shares of income to the wife and each of the children, depends upon ALL the testator's children reaching the age of twenty-five years, an event which would, in the case put, never happen.

The testator left surviving two children in fact, a son and a daughter, neither of whom has as yet attained the age of twenty-five years. In the existing circumstances, the provisions of para. 5 are the operative provisions, and although the income is under the sole control of the wife, the income is not, in my view, hers absolutely, but is impressed with the obligation, to use no other word, that it

be devoted to the objects provided for in that paragraph. I think, therefore, it cannot be said that the entire income is to be regarded as that of the widow for purposes of *The Income Tax Act*.

While the provisions of this will are not the same as those in question in the will under consideration in *Singer* v. *Singer* (1), it is to be observed that even on the terms of that will, it was held that while the mother had a discretion, she was subject to an obligation. The court approved of the judgment of the Chief Justice of Ontario in the Appellate Division (2), Meredith C.J.O., at 611, said:

> Apart from authority, I should have no doubt as to what the testator meant, or as to what the language he has used to express his wish imports, and that is, that his wife should be entitled during her widowhood to receive the income, subject to an obligation on her part to maintain the children out of it, but leaving to her discretion the manner in and extent to which provisions should be made for any child, a discretion not subject to control or interference by the court so long as it should be exercised in good faith * * *

The learned Chief Justice thus viewed the decision of the Court of Appeal in *Allen* v. *Furnes* (3).

In Allen's case, the gift was to a father for life "for the support and maintenance of himself and children." The defendant had been appointed receiver of the interest of the father, the plaintiff, and although there was no trust constituted in favour of the children, the court would not permit the receiver appointed at the instance of creditors to take the whole, but allocated three-quarters of the income for the support of the children.

In *Re Booth* (4), a similar result was arrived at where the mother had become bankrupt and her trustee in bankruptcy claimed the whole of the income. North J. directed an inquiry as to the amount which should be allocated to the children. Although he proceeded on the basis of trust, the result does not differ in a case of this character whether the case be one of trust or "obligation."

Where, as in the case at bar, income is placed under the control of a wife and mother for the benefit of herself and children, she being under obligation so to apply it, it would appear to be a contradiction in terms to say that

(1) (1916) 52 Can. S.C.R. 447.
(2) 33 O.L.R. 602 at 610 ff.
(3) (1893) 20 A.R. 34.
(4) (1894) 2 Ch. 282.

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her interest is absolute, and yet that, while her discretion will not be interfered with so long as it is being exercised bona fide, the court will interfere where she is not acting properly in the application of the income, or where creditors intervene for the purpose of seizing it. The fact that the court will thus intervene indicates that the obligation in favour of the children fastens upon the *res* itself.

In *Re Coleman* (1), a testator gave his residue to trustees, directing them to apply the income

> towards the maintenance, education and advancement of my children in such manner as they shall deem most expedient.

until the youngest should attain twenty-one, with a gift over to the children as his wife should appoint, and in default of appointment, then equally to the children then living.

One of the children had assigned his interest to the plaintiff, and it was held that the latter was entitled to such

> moneys or property, if any, as may be paid or delivered, or appropriated for payment or delivery

by the trustees to the assignor. I think equally, in the present case, that the wife, being obligated to apply the income needed for the benefit not only of herself but also for the children, although her discretion is absolute, as was that of the trustees in the case just cited, has an interest limited to that which she appropriates for herself, and the children become entitled to the remainder in the proportions she from time to time determines.

The appellant in the returns filed claimed on the basis of an equal apportionment of the income as between herself and the children. The total amount in question is $3,797.26 and this is in respect of the period from the date of the death of the testator on the 19th of July, 1944, to the end of that year. Although the Minister is always in a position, under s. 41 of the statute, to obtain additional information from the taxpayer, no request was made, and the agreed statement of facts contains a statement that the appellant estimates the minimum annual expense of maintaining the children was $5,000. For the period under

(1) (1898) 39 Ch. 443.

review this is approximately $2,500. When the maintenance of the appellant herself is taken into consideration, the total maintenance for the three approximates the amount of income here in question. This tends to support the basis of allocation upon which the income tax returns were made.

I do not think the failure of the appellant to keep an exact account, in the circumstances here present, affects the matter. It is obvious that the expense of maintaining the two children as well as the widow herself was substantial. The family was living as a unit in the home maintained for them, as the testator directed, and a very substantial part of the account would consist of items apportionable only by dividing into three parts. Special expenditures for the benefit of any one of the objects of the gift of income would, of course, stand on a different footing, but the appellant had other income of her own, and if there were such special expenditures, she was entitled to use her own income for the purpose if she saw fit. Accordingly, I think the appellant has sufficiently met the onus resting upon her.

I would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Porter, Allen & MacKimmie.*

Solicitor for the respondent: *H. W. Riley.*

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*Feb. 12, 13, 14, 18, 19.
*May 12.

THE VANCOUVER GENERAL HOSPITAL (DEFENDANT) ..... APPELLANT;

AND

ELIZABETH MILDRED FRASER, executrix of the estate of GORDON ARTHUR FRASER, Deceased (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Master and servant—Hospitals—Liability of hospital for negligence of interne—Patient discharged with broken neck—Interne incompetent to read X-rays and failed to consult radiologist—Whether discharge was the cause of the death of the patient.

The respondent's husband, following an automobile accident, was admitted at night into the emergency ward of the appellant hospital. There, he was examined by the internes on duty and X-rays were taken. The films were not submitted to a radiologist who was on call, but the internes, although not competent to read them, proceeded to do so and advised the family physician that they had found nothing abnormal, with the result that the patient was discharged from the hospital with a dislocated fracture of the neck. The following day, he was re-admitted to the hospital by his own physician after the X-ray films had been examined by a radiologist, but died a few days later.

The jury rendered a general verdict against the appellant and this was affirmed in the Court of Appeal for British Columbia.

Held (Locke J. dissenting), that the appeal should be dismissed and the action maintained.

Held: The hospital undertook to treat the patient and was responsible for the negligence of its internes; and there was evidence on which the jury might properly find that the death of the patient resulted from his discharge from the hospital due to the interne's negligence either in not reading the X-ray films correctly or in not calling a radiologist.

Per Locke J. (dissenting): The hospital undertook to give the patient both nursing and medical attention, and the negligence of the interne would render the hospital liable for any resulting damage; there was however no evidence from which the jury might properly draw the inference that the ileus, which caused the death, resulted from his failure to properly diagnose the nature of the original injury or from anything done by or on behalf of Fraser in reliance upon his advise. (*Ryder* v. *Wombwell* (1868) L.R. 4 Ex. 32 referred to).

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming a judgment rendered pursuant to the general verdict given by the jury in favour of the plaintiff-respondent in an action for damages.

*PRESENT: Kerwin, Rand, Kellock, Cartwright and Fauteux JJ.

(1) [1951] 4 D.L.R. 736; 3 W.W.R. (N.S.) 337.

Alfred Bull Q.C. and E. A. Burnett for the appellant. The responsibility for the discharge of the patient was assumed by the deceased's own doctor as appears in the evidence. But if it could be said that there was evidence on which the jury could find that that responsibility was passed back to the interne and that he accepted such responsibility, the following submissions are made: (*a*) the responsibility was still that of the patient's physician but if he delegated it to someone else that was merely his method of discharging his responsibility; (*b*) if the interne accepted the responsibility to use his own judgment on the instructions of the physician, such action would not be within the course of the interne's employment so as to make the hospital responsible for his actions; (*c*) *The Sisters of St. Joseph* v. *Fleming* (1), *C.P.R.* v. *Lockhart* (2), *Plumb* v. *Cobden Flour Mills Co.* (3), *Bugge* v. *Brown* (4), *Dallas* v. *Home Oil Distributors* (5) and *Goh Choon Seng* v. *Lee Kim Soo* (6); (*d*) if the patient's own physician was not called by the respondent as a witness, the inference is that his evidence would not have been in favour of the respondent.

The discharge from the hospital was not the cause of the death. To show that it was is an extremely heavy burden and if closely examined would appear incapable of proof. The respondent had to show by a preponderance of evidence that the deceased would not have died had he not been discharged. The respondent's expert witness failed completely to connect the discharge with the death, and the witnesses for the appellant did not attribute the death to that cause.

There is no evidence of any negligence on the part of the appellant. The case is put on the basis of the decision in *Vancouver General Hospital* v. *McDaniel* (7), because this case is one of vicarious responsibility and not one of direct attack on the system of the hospital.

The negligence alleged i.e. that the hospital discharged the patient when the interne ought to have known that he had suffered a dislocated fracture of the neck is not

(1) [1938] S.C.R. 172.
(2) [1942] A.C. 591.
(3) [1914] A.C. 62.
(4) (1919) 26 Can. S.C.R. 110.
(5) [1938] S.C.R. 252.
(6) [1925] A.C. 550.
(7) [1934] 4 D.L.R. 593.

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negligence in law. It is submitted that the interne made a careful examination of the X-ray films and consulted with the other interne on the reading. He did not perceive that there was a dislocated fracture because he did not have the expert knowledge necessary properly to read the film. If he did not have such expert knowledge he could not be negligent in his reading. *Abel* v. *Cooke and Lloydminster and District Hospital Board* (1), *Rich* v. *Pierpont* (2) and *Seare* v. *Prentice* (3).

There is no dispute that the interne was an employee of the appellant and if negligent that the hospital would be liable.

Paul D. Murphy for the respondent. There was evidence to support the jury's finding that the appellant was negligent in discharging the deceased and that the employees of the hospital knew or ought to have known that the deceased at the time of the discharge had a dislocated fracture of the neck: the patient's complaints and the observed and observable symptoms of his condition, the failure of the interne to call the radiologist, etc. The charge of the trial judge has not been challenged on the issue of negligence and there was evidence upon which the jury could find that the appellant was negligent; *McConnel* v. *McLean* (4).

There was evidence to support the jury's finding that the deceased was discharged by employees of the appellant and not by his own physician. It is common ground that the physical discharge was by the hospital. That established a prima facie case against the hospital. The onus was then on the appellant to prove that the patient's physician discharged him. No doctor can have a patient in his care without seeing and diagnosing him and only the interne saw him. Therefore, Dr. Blair was not his doctor in this case. Dr. Blair could rely on the information given by the interne who was fully competent as a duly qualified practitioner and servant of the hospital. If Dr. Blair told the interne: If you think he can be discharged, go ahead. Then it becomes the discharge by the hospital.

There was evidence to support the jury's finding that the

(1) [1938] 1 W.W.R. 49.
(2) (1862) 3 F. & F. 305.
(3) 103 E.R. 376.
(4) [1937] S.C.R. 341.

deceased's discharge caused his death. There was direct evidence of nerve injury or cord pressure arising out of his discharge. There was also evidence from which this could be inferred by the jury. There was also evidence that the discharge caused other fractures and dislocation i.e. additional injury contributing to nerve injury or cord pressure.

In the particular facts of this case the appellant is legally liable for the negligence of its internes: *Evans* v. *Liverpool Corp.* (1), *Hillyer* v. *St. Bartholomew's Hospital* (2) and *Sisters of St. Joseph* v. *Fleming* (3).

The facts were put to the jury, no attack was made on the charge to the jury and the jury could reasonably come to the conclusion to which they arrived.

KERWIN J.:—There can be no question but that the appellant hospital undertook to treat Fraser. The latter was entitled to expect that the hospital would have someone in attendance who could correctly read the X-ray film or who would call in assistance for that purpose, as was provided for by the constitution of the hospital. The appellant's system is not attacked as provision was made therein for an interne, if he considered it necessary or advisable, to call in a radiologist. Before this Court the appellant advanced no claim that if Dr. Heffelfinger were at fault it would not be responsible for the results of his negligence.

I agree with the conclusions of my brothers Rand and Kellock that, upon a charge that has not been objected to, it was open to the jury to find (*a*) that Dr. Heffelfinger was negligent either in not reading the X-ray film correctly or in not calling in a radiologist; (*b*) that the appellant through Dr. Heffelfinger negligently discharged Fraser; (*c*) that such negligence caused Fraser's death.

The appeal should be dismissed with costs.

RAND J.:—The respondent is the widow of a ship's officer who died in the Vancouver General Hospital in the following circumstances. Shortly after 11:00 o'clock on the night of March 8, 1949, following an automobile accident, the deceased was brought by ambulance to the emergency ward of the hospital. There were lacerations on his forehead,

(1) [1906] 1 K.B. 160. (2) [1909] 2 K.B. 293.
(3) [1938] S.C.R. 172.

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and he complained of pain and stiffness in his neck. At the time the ward was in the charge of Dr. Davies, serving as an interne. At midnight, Dr. Heffelfinger, also an interne came on duty. Before he arrived, Dr. Davies had communicated with Dr. Blair whose name had been given by the injured man's wife as the family doctor, and had ordered an X-ray to be taken of the injured neck. Later a general examination, including movements of the head and a neurological test, was carried out by Dr. Heffelfinger

The X-ray plates were received shortly afterwards, and Dr. Heffelfinger, with Dr. Davies who had remained in the ward, examined them. Dr. Heffelfinger then telephoned Dr. Blair, with a result that can best be indicated by the entry in Dr. Heffelfinger's record: "Dr. Blair aware, and agreed to discharge and to see about eleven next a.m.", meaning the discharge of the patient, who was to see Dr. Blair the next morning.

Dr. Heffelfinger thereupon instructed the patient to return home. At this time stiffness of the neck prevented a flexion reaching closer than one inch from the chest: the patient was in pain; and as he left the hospital, approaching 3:00 o'clock a.m. to enter a taxi, he was holding his head in his hands, somewhat bent forward. He was 31 years of age, over six feet in height, and had to stoop to enter and leave the taxicab; and the route home passed over a number of railway tracks.

During the remaining hours of the night he was restless and about 9:00 a.m. Dr. Rennie was called, who reached the home around 2:00 o'clock in the afternoon. Later in the evening, after receiving, apparently, a report on the X-ray plates, Dr. Rennie ordered the patient back into the hospital which, approximately 24 hours after his discharge from the emergency ward, he reached shortly after 1:00 a.m., March 10.

He was then suffering from pain in the back of the neck, his neck was held rigid, and his face was flushed, and he was at once placed on a fracture board. Morphine was administered at 1:30 and at 2:00 he was asleep. At 5:00 a.m. there was less pain in his neck but pain in midback was becoming troublesome. At 10:00 a.m. he was more comfortable but extremely thirsty.

On the re-admission, there was abdominal distension evidencing in fact the early stages of a condition described as an adynamic ileus; and as this is one of the vital facts in the case, it must be made intelligible. The intestinal tract is controlled by two sets of nerves, the sympathetic and the parasympathetic. The latter furnish the stimulus of contraction and the former the reactive correlative of dilation or relaxation. At points in the tract there are valves that control the passage of matter along it, one of which is at approximately the junction of the small and large intestines. When the muscles of the former are contracted, this valve tends to open, and when they relax it tends to close. These nerves, as they proceed from the brain, pass the area of the injury laterally within the spinal cortex, emerging somewhat farther down. When they are damaged or irritated, their functioning may be disrupted. In that case, the intestinal muscles remain relaxed and the valve closed, and in the course of time putrefaction sets up in the matter retained. This produces gas, distension occurs, and the contents become forced back into the stomach and up through the esophagus; some may enter the lungs through the respiratory passages, and some be expelled as vomit. In short, a virtual reversal of the intestinal process may result with serious effects on other functions.

The X-ray plates actually revealed a fracture dislocation of the axis or second cervical or neck vertebra. The fracture was vertical and slightly behind the center line of the canal. There was a complete separation and a forward dislocation, involving the atlas and the skull, of one-third of a centimeter, on the right side of the arch or ring of the vertebra through which the cord passes; and on the left side there was a fracture commencing in the arch and running into the body of the vertebra, which is the front portion. It has not been made clear whether the latter originated or splintered on the inside or outside of the arch; Dr. Fahrni, an orthopaedic specialist, called in by Dr. Rennie, spoke of the loose portion on the right side as moving on a hinge, and that would seem to imply a split on the inside. As disclosed by the autopsy, a forward displacement of the axis on the third vertebra could be

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elicited by moving the head, which might mean a movement of the entire axis. Dr. Fahrni spoke of the vertebra as being "unstable." There was hemorrhage where the ligaments of the neck had been torn on the right side; and the brain tissue and the upper segments of the cord were found to be watery with oedema.

At 12:30 p.m. Dr. Fahrni made his first visit. He did not then consider it safe to put the patient through the motions of another X-ray picture. In addition to what the X-ray plates indicated, and the abdominal distension, there was an absence of borborygami, the normal gurgling sound from the intestines, with the abdomen tympanitic to percussion. What the situation demanded was obvious, to restore the intestines to their normal functioning, and to remove any possible complication by eliminating the dislocation in the axis. The patient's body was thereupon placed in extension, that is, so that the head, by its own weight, would tend to fall back: later, at 6:00 p.m., traction was applied, which means that extra weight was added to the downward drag of the head itself. The usual neurological reaction tests for evidences of nerve disturbance were made, but none found.

As a similar test had shown a similar result in the emergency ward, this is taken by Mr. Bull as demonstrating that there had not, up to the time of the re-admission, been any nerve injury resulting from the fracture. But this view takes no account of the significance of distension and the other conditions present upon re-admission. It disregards also the fact that from 1:15 a.m. until 12:30 p.m. when the test by Dr. Fahrni was made, the patient had lain on the fracture board; and from the medical evidence it was open to the jury to infer that in that time, through the automatic reaction of the muscles, the dislocation might have been reduced sufficient to mitigate pain and nerve irritation provoked between the discharge and the re-admission. That there was such an irritation is deduced by the respondent from the fact of the ileus; Dr. Kempt draws that conclusion: and Dr. Naden, an orthopaedic specialist, agreed that the conditions on re-admission could be evidence of nerve injury or irritation notwithstanding there appeared to have been no physically demonstrable neurological change.

But Mr. Murphy is not confined to nerve injury trauma as the instigating factor of the ileus. Admittedly the causal agencies in that derangement are obscure. Dr. Fahrni was emphatic that here was a case, from the beginning, for the utmost care in treatment and the immediate immobilization of the injured area. The fact that on one occasion after the dislocation had been eliminated, the patient had got up and walked across the room involved so much risk of displacement that Dr. Fahrni had an X-ray taken as the patient lay in bed, indicates the importance he attached to eliminating any possible effect on the ileus of the dislocation. He agreed that the shock of such an accident would undoubtedly disturb the autonomous nerve systems, including those controlling intestinal action; and that its onset could have been hastened by the 24 hours' neglect. He hesitated significantly in speaking of the watery or oedematic condition of the cord, the "degeneration" mentioned in the death certificate: it indicated pathological change which he thought more likely to be a circulatory change than an injury, if ante mortem; and the "moot point" was whether it was post or ante mortem.

Neither Dr. Fahrni nor Dr. Naden presented any theory of the cause of the ileus. Dr. Fahrni admitted frankly that he had none. Dr. Naden speculated somewhat between a range from the patient's lying on his back on the fracture board to any degree of pathological change or involvement of the nerves, including nerve irritation, of which the ileus itself could be evidence. He played with the idea of dehydration of the patient's body on the footing of his alcoholic breath. This, in a proper case, would produce an imbalance in the equilibrium of vital processes; but in the situation here his suggestion could properly be treated by the jury as quite beyond any relevancy to the task before them. In relation to the posture on the bed, what he apparently meant, although he did not trace the sequences, is that in the case of such a man, well built and physically vigorous, to arouse notions of injury and to place him under a regimen of such constraint might in some way set up functional nerve irritability. But the ileus was in its first stages before such a posture or the fracture board had appeared.

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On the other hand, the medical evidence is convincing that the case was one that from the beginning called for the strictest care until the condition had been fully diagnosed. The stiff neck—the broken neck, with the skull itself displaced—and the pain, were danger signals of unmistakable nature and called for only one mode of treatment. Dr. Naden at one point gave it as a considered judgment that if at that moment the patient had been told to go home and forget that he had been in an accident, he "would have been alive today"; but this was followed by the admission that in all likelihood he would have followed the same course of treatment as Dr. Fahrni, and by such other concessions and qualifications as, in the light of the stark facts, most likely nullified his evidence in its entirety.

It was agreed that in the absence of a destructive lesion to the cord, a broken vertebra is not in these days, as formerly, looked upon as a grave injury, and the normal prognosis is recovery. There may, of course, be cases in which the fracture and even dislocation may be such as to call for no treatment whatever; the bone, in such cases, adapts itself to the new position and may have either no or slight effects thereafter. But even where great care and competent treatment are called for, recovery is normally to be expected.

The jury must then have looked for some circumstances out of the ordinary of such a character as could properly be taken to be the significant factor in the situation before them. What must be kept in mind is that finding the cause is for the jurors and not the experts. These specialists are to assist the jury, not to direct them and much less to determine the fact to be found. And that finding is to be gathered by the jury from all of the circumstances, including the opinions of the professional men, but weighing them in the total complex of the controversy.

Viewing that complex as a whole, then, how can it be said that the jury could not here adjudge the unique circumstance that this man was subjected to a deprivation of initial vital care and treatment for 24 hours to be the essential and operative factor in bringing about what followed? No other factor has been seriously suggested. Fatal consequences in injuries of this kind, as the evidence indicates, have too frequently been traced to just such initial

failures; and that they could find that this delinquency most probably led to the onset of the ileus in an aggravated degree that steadily deepened until death in five days, is, I think, undoubted. The alternatives, that this man was of a type peculiarly susceptible to ileus or that death would inevitably have ensued the accident, have not in the evidence the support of a syllable.

But there are two remaining grounds. Mr. Bull argues, first, that there was no negligence on the part of the interne, Dr. Heffelfinger, and secondly, that the discharge of the patient was by his own doctor and not by the hospital. These really merge into one question: was there any negligence on the part of the hospital which caused or contributed to the day's absence from the hospital? and that I now examine.

At the threshold of the enquiry stands this question: what did the hospital undertake toward the deceased when he entered the emergency ward for treatment? As can at once be seen, various matters enter into that determination. Mr. Bull introduces the regulation of the hospital dealing with the procedure in that ward; it is contained in the Hospital Manual, and is as follows:—

> Any member of the house staff called to the emergency department must respond promptly. It is imperative that every emergency case be examined immediately and given such first aid treatment as is necessary on admission for making him as safe and comfortable as possible. After this, get in touch with the patient's physician and act under his orders. Specific instructions are posted in the emergency department. Report forms are to be completed in each case.

This was supplemented by the evidence of Dr. Seymour, the assistant medical director. Interneship is a preliminary hospital experience for young doctors, but whether voluntary or required does not appear. In this case, Dr. Heffelfinger was under a contract which had run for approximately nine months, and during that time he held a temporary license to practice medicine within the confines of the hospital.

That primary undertaking, symbolized in the scope of real or apparent authority of the interne, is to be gathered from all the circumstances of the entrance of the patient into the hospital, of what is sought by him and the nature of what is done to and for him. There is first the fact that he enters a hospital to which sick or injured persons

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resort for treatment; the patient would see both a doctor and a nurse; a preliminary examination is made of him, in which all the usual questions of a physician are put to him; there is an enquiry as to the family physician, who is spoken to on the telephone: there is the order for the X-ray, the interpretation of it, and the report made to the physician: all the ritual and paraphernalia of medical service. From all this it is clear that although the hospital indicates the interposition of the family physician, the interne is to be more than a mere untutored communicant between him and the patient. By the terms of the regulation, he is to "examine immediately and get in touch with the physician and act thereafter under his orders;" but for that examination and report he must use the undertaken degree of skill, and that cannot be less than the ordinary skill of a junior doctor in appreciation of the indications and symptoms of injury before him, as well as an appreciation of his own limitations and of the necessity for caution in anything he does.

Dr. Heffelfinger's evidence is all we have on his report. He says: "I only gave him my findings and let him decide what to do with it—I described my findings in examination —and the X-ray findings, and asked him what he wanted to do about it, and the outcome of it was that he asked me to discharge him and come around in the morning"; and, speaking of the work of an interne generally, "also for the reason to report the results of my examination as well . . . . it is part of the routine under circumstances such as that to look at the films and report them to the attending doctor." He claims to have warned Dr. Blair that he had had only a limited experience with X-ray plate reading; but he had come to the opinion that there was no fracture; and that he may have expressed that opinion, and also that it would be safe to allow the patient to leave, could be drawn from his evidence.

Now, was that opinion one that ought to have been given here by Dr. Heffelfinger without such qualifications as would have nullified it in the ears of Dr. Blair? The indications on the plates were perfectly clear to him at the trial; would the jury be warranted in concluding that holding such an opinion he would be unlikely to convey a true picture of the patient's condition, including that

evidence of it which was described to the jury by his wife? The stark facts, the danger signs, that should have demanded verification to any doctor, interne or not, were the rigid neck and the pain. In the presence of these, to be able to minimize the injury as he did on the departure from the hospital, when the victim of it was suffering from a displaced skull, would justify the inference that his report to Dr. Blair must have been a pallid or deprecatory description of the clinical facts; and even though there may have been sufficient as it was to arouse the suspicions of Dr. Blair, that would not excuse its inadequacy or its falsity in fact.

Dr. Heffelfinger went beyond the mere communication of Dr. Blair's advice or instructions to the patient. On the wife's evidence, he actively reasured both the deceased and her, notwithstanding her hesitant acceptance of it, that there was nothing seriously wrong and no ground for anxiety. He was, of course, acting in good faith, but he failed, not, it may be conceded, in reading the plate incorrectly, but in not being more acutely sensitive to the grave symptoms that stood out before him and in not exercising caution against his inexperience, in not seeking verification. That misreading, concurred in apparently by Dr. Davies, and, on the communication, by Dr. Blair, created in him a settled opinion of the worst possible error. In these reassurances he was not exhibiting the skill and care which the hospital undertook would be exercised in the ward; and that insufficiency, regardless of whether or not he was acting on behalf of Dr. Blair, was the agency that gave rise to the fatal event that followed. On those assurances, the husband and the wife placed reliance and acted. The jury had before it evidence from which it could conclude that his duty as the representative of the hospital toward the patient was not, in the circumstances, performed by allowing the injured man to leave in the condition in which he was: and for that the hospital must answer.

I would therefore dismiss the appeal with costs.

KELLOCK J.:—Contrary to the appellant's contention, there was evidence, in my opinion, upon which the jury were entitled to find that the hospital did undertake to treat the deceased and negligently discharged him in what was actually a serious condition.

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The deceased was admitted at 11:10 p.m. of March 8, and shortly after, his wife, upon being notified and asked the name of the family doctor, gave the name of Dr. Blair. Dr. Davies, the interne in charge of the emergency ward at the time, had already ordered an X-ray to find out whether or not there was any fracture of the cervical vertebrae when Dr. Heffelfinger came on duty, about midnight, and the patient had been X-rayed. Shortly thereafter, he and Dr. Davies examined the films, concluded that there was "no gross abnormality," and telephoned that information to Dr. Blair. According to the report prepared by Dr. Heffelfinger, Dr. Blair "agreed" to the discharge of the patient. Dr. Blair had previously been spoken to on the telephone by Dr. Davies, but as neither was called it is not known what passed in this conversation.

Dr. Heffelfinger at first took the position in evidence that he was not qualified to read X-ray films. This he subsequently modified by saying that neither he nor Dr. Davies was qualified to give an "expert" opinion. There was on call at the hospital at all times, however, a radiologist who could have given such expert opinion had either Dr. Heffelfinger or Dr. Davies thought it necessary, and I think it was quite open to the jury to find that the two internes undertook to read and felt quite competent to read the particular films. Dr. Heffelfinger testified:

> Q. Why did you look at them at all, Doctor?
>
> A. It is part of the *routine* to, under circumstances such as that, to look at the films and report them to the attending doctor.
>
> Q. Then you wish the jury to believe that you were qualified to read X-ray films?
>
> A. In a sense, yes.
>
> Q. Qualify it all you want. What kind of sense? We want to understand this, please.
>
> A. Under the circumstances, I was qualified to read the films, yes, as an interne, but I was not qualified to give an expert opinion on the films.

I think there was quite sufficient evidence for the jury to find that what occurred was in accord with that which the hospital well understood was its undertaking to the public, namely to examine the deceased, including examination by X-rays as a matter of routine, to read the films, and to report the findings to the deceased's physician. I do not think the evidence precluded the jury from finding that the

situation was other than one in which the deceased's physician was in charge of the whole procedure and was accepting sole responsibility for what occurred.

I think it was open to the jury to conclude that if X-rays of the particular area of the spinal cord here in question are difficult to read and require a person with more training than either of them had, the internes were negligent in failing to use the means at hand, namely, to call the radiologist to obtain a proper reading. The whole purpose of the X-rays was to ascertain whether or not the deceased had sustained a fracture. In fact he had, and Dr. Heffelfinger, on his examination for discovery admitted it was obvious from the X-ray films that such was the case. In my opinion, therefore, there was ample evidence upon which the jury could find negligence on the part of the appellant in connection with the discharge of the deceased from the emergency ward.

Coming to the question as to whether or not the respondent sufficiently established that the negligence was the cause of death, it is to be borne in mind that

> Conclusions of fact embodied in the verdict of the jury cannot be subjected to the same degree of re-examination (as in the case of appeals from a judge sitting alone) for the course of reasoning by which the verdict has been reached is not disclosed, and consequently, the verdict of the jury on fact must stand if there is any evidence to support it and if the conclusion is one at which a reasonable jury when properly directed, might reasonably arrive.

Watt v. *Thomas* (1), per Viscount Simon.

It is common ground that the deceased had no involvement of his nervous system at the time of his discharge from the emergency ward in the early hours of March 9. Further, all the medical witnesses agree that an injury such as that here in question need not be serious provided early treatment is received. It is true that Dr. Naden gave it as his opinion that the deceased might well have been alive today had he received no treatment, but he also said that had he been attending the case he probably would have followed the procedure which was in fact followed. The jury on this point, as on all others, were entitled to discriminate as between witnesses and as between different parts of the evidence of the same witness.

(1) [1947] 1 All E.R. 582 at 584.

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The certificate of death, the contents of which, we were given to understand, constitute by statute *prima facie* evidence, discloses the cause of death as "Bronchopneumonia, paralytic ileus. Fracture dislocation of axis and atlas. Contributory: Softening and edema (degeneration) of medulla and cervical cord." According to the autopsist, the lungs were edematous and were typical of bronchopneumonia. These conditions he described as "terminal," that is, resulting from the paralytic ileus. He also found edema of the medulla and the upper segments of the spinal cord as well as a softening in the cord as a result of the edema. He testified:

Q. Now, so far as the time element is concerned in these injuries, is it correct that you say the condition, I think you said it, the conditions were caused by the fracture of the axis, the fracture dislocation of the axis?

A. That is correct, or an injury to the neck, which resulted in the fracture dislocation.

This answer was understood by all counsel concerned as a statement that the edema both of the lungs and of the cord were "terminal" in the same sense, that is, as resulting from the ileus. Dr. Kemp, called for the respondent, testified in chief as follows:

Q. Assuming . . . he dies of a paralytic ileus which, as Dr. Harmon says, caused at least two terminal conditions, bronchopneumonia—I have forgotten the other—

A. Edema of the lung.

Q. Thank you, doctor. Edema of the lung, and *softening of the cord and edema of the cord.*

Counsel for the appellant proceeded on the same footing.

Before dealing further with the respondent's evidence, it will be convenient to refer to evidence adduced by the appellant. Dr. Fahrni, who was called to attend the deceased on his re-entry to the hospital, but who did not see him until approximately 12:30 p.m. of March 10, made a neurological examination similar to that conducted by Dr. Heffelfinger when the patient was in the emergency ward. Dr. Fahrni, after stating that this examination indicated "no sign of any neurological involvement," then gave the following answers:

Q. When you say that, do you mean not only the spinal cord but the nervous system? Generally speaking, the nervous system?

A. Yes.

Q. And when you say the nervous system, do you mean including the central nervous system—not only the central nervous system but the sympathetic and *parasympathetic* nervous system?

A. *That is a difficult question to answer,* in that anyone who has had any injury has nearly always obvious upsets in their automatic nerve system.

It is clear, I think, on the evidence, that when the deceased returned to the hospital in the early morning hours of March 10, his abdominal condition indicated that the ileus had already set in. Dr. Fahrni says that the "first symptom" he observed of the ileus was distension of the abdomen, and Dr. Naden, who was called on behalf of the appellant, testified that when the deceased got back to the hospital, it was his understanding that the condition then existed. That this was accepted at the trial appears, I think, from the following cross-examination of Dr. Kemp by counsel for the appellant:

Q. Speak up.

A. It was read to me in evidence that the man on re-entering hospital had abdominal distention, and what is known as meterism, or gas, which correctly means a swelling which would indicate an early ileus.

Q. *What you say, of course, appears in the medical chart. There was some distention of his abdomen.*

A. Yes, sir.

The medical chart referred to is the "history sheet" which discloses the condition referred to, with respect to which, in the course of his cross-examination of Dr. Fahrni, counsel for the respondent stated, without correction from any quarter,

That history sheet is obviously made up when Mr. Fraser comes back.

The case was expressly put to the jury on this footing by the learned trial judge in his charge, and there was no objection on this point by counsel for the appellant. I think, therefore, it is too late for the appellant to take any other position.

With respect to the activities of the deceased subsequent to his discharge from the emergency ward and prior to his re-entry to the hospital, Dr. Fahrni testified that these could bring about a speeding up of the onset of shock, and further,

Q. Yes?

A. The other thing is that the cervical spine was obviously unstable, and *it could have gone on* with further displacement and put pressure on the spinal cord.

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In answer to the question as to whether or not there was any evidence of that happening, the witness said there was none. However, Dr. Naden testified:

Q. There were no neurological signs of any kind or description whatsoever?

A. Not when he was discharged from the hospital or at any other time.

Q. Except the bowel distention.

A. That's not a neurological sign.

Q. It might be a sign of neurological injury, or nerve injury?

A. Yes, I think one would have to say that that is a possibility, but once again in this patient, and it is this patient we are speaking of, in this patient as far as it has been *physically* possible to demonstrate there was no evidence of neurological change.

He subsequently said with respect to the bowel distention:

There is no evidence that this was caused by nerve injury. It is evidence of nerve irritation, but the evidence could be from nerve irritation by traction on the sympathetic plexus and lower dorsal and upper lumbar region, which is the reason you get a paralytic ileus in abdominal—post-operative abdominal conditions from traction of the sympathetic plexus which is not—which one cannot call injury apart from traction and not injury in the interpretation I make of your question.

There had been, of course, no traction by external means to which the deceased had been subjected prior to his re-entry into the hospital, and no evidence at all of any other traction. Without explanation, and the witness gave none, this reference to traction was quite irrelevant. Dr. Naden also said:

Q. Well now, doctor, what I want to know is—and what I want the jury to know—is this, can, in your opinion, a paralytic ileus be brought about by reason of an injury (*a*) to the spinal cord; (*b*) by an injury to the sympathetic nervous system?

A. It can be. It can be.

Dr. Fahrni expressed the view that the type of fracture from which the deceased suffered was not one which tended to close the canal of the spine as the head is carried forward, but rather which opened the canal the further the head was taken forward,

and unless the head is taken extremely far forward, there would be no pressure on the cord at all.

Dr. Fahrni also said that when he was called into the case and met the deceased's doctor, Dr. Rennie, at the hospital, he was shown the X-rays which had already been

taken. When he testified, therefore, that there would be no pressure on the cord of the deceased unless the head was moved "extremely far forward," he was aware of the nature of the fracture and the dislocation, and with that knowledge he had already testified that the cervical spine of the deceased was "obviously unstable" and "it could have gone on with further displacement and put pressure on the spinal cord."

Dr. Fahrni also said that, according to the X-ray, the dislocation "went one third of a centimetre," which, however, was not the maximum extent of the dislocation; it probably went "a little bit further," at the time of the accident, and "could be pushed forward again by forward flexion of the neck," which was one of the dangers to be avoided. So much so was this the case that when Dr. Fahrni took charge of the deceased, he did not consider it "safe" to put the latter through the motions of having X-rays taken to see whether, as a result of the deceased's activities, any increase in the displacement had occurred. He said that whether or not a greater dislocation had occurred could have been ascertained exactly by taking an X-ray picture, and that on his re-admission he would want to know whether any change either in the dislocation or the extent of the fracture had occurred "for one reason only," and that was "to ascertain whether there had been any pressure on the cord."

Q. That is very important, isn't it?

A. Yes.

He further testified:

Q. There wasn't anything particular about his condition, was there, that prevented you from taking an X-ray?

A. No, except that I didn't want him moved.

Q. Why didn't you want him moved?

A. I wouldn't want anyone moved in a condition of that nature, unless there was a particular indication for it.

Q. You mean, doctor, that you wouldn't want him to indulge in any activity at all? Is that what you mean?

A. Yes.

* * *

Q. Yes, but you could have got the portable machine in?

A. The movements are not in moving his bed along the hall there, but in actually taking the film and placing the cassettes behind his head and so forth.

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Q. You mean any moving of his body at all? That was what you wanted to avoid, moving his body at all?

A. Moving his neck.

Q. All right, moving his neck at all?

A. Yes.

Q. You wanted to avoid that?

A. Yes.

I think it was quite open to the jury to infer from this evidence that if Dr. Fahrni, with his knowledge of the patient, including his history and the nature of the fracture dislocation from which he suffered as disclosed by the X-rays, knew there was a very real danger of the cord being subjected to pressure by movements of the head, even in the course of taking X-rays which he would assume would be done with the greatest care by servants of the hospital under his direction, there was much more likelihood that pressure had been put on the cord by the uncontrolled movements of the patient while he had been absent from the hospital.

The language which Dr. Fahrni had used in the early part of this evidence was, as already mentioned, that he did not consider it "safe" to take X-rays. Subsequently he went on to say that one reason he did not want the deceased to indulge in any activity was that he was in pain. The connection between pain and being "safe" was not explained and is not obvious unless the witness meant that pain caused by uncontrolled activity on the part of the patient could itself bring about an upset in the automatic nervous system. The witness, however, did not say this. A further reason he gave was that he wanted to reduce the fracture and keep it reduced. Thus the patient would have a better neck than if left the way it was. He then said he had "no other reasons" for not wanting the patient to indulge in activities. This was, however, immediately followed by the following evidence:

Q. Well, isn't there another reason for reducing the dislocation, so that no pressure will be caused on the cord?

A. That is all included in my qualification.

Q. All right, doctor, I am just trying to take the lid off, if I may. That is one reason for reducing a dislocation, to prevent injury of the cord, or pressure on the cord, isn't it?

A. In the way your question came to me, no. You asked me—we had him lying on his back in bed. Once he is there, no possible damage to the cord can take place.

Q. I know that, yes, all right; and you want to reduce the dislocation and reduce it so no damage can occur to the cord, is that correct?

A. Yes, in a way.

Q. What do you mean, in a way?

A. I would say to diminish the danger of damage to the cord.

Q. All right, thank you, to eliminate damage or danger of damage to the cord.

A. Yes.

Q. Now, we have that. That is one reason for reducing dislocation, correct?

A. Yes.

Q. In other words, it is highly important, and that is one reason for your immobilization, isn't it?

A. What?

Q. One reason for immobilizing is so that the dislocation won't become any worse, or the bones won't move?

A. Yes.

Q. So that there won't be any damage to the cord?

A. To diminish the danger of damage to the cord.

The witness continued:

Q. Now, if you want to increase that danger, you tell him to get up and go home, don't you? If you deliberately wanted to increase the danger of damage to the cord, you would tell him to get up and go home?

A. Yes.

Q. And, of course, you know that was done in this case?

A. Yes.

Q. So that that was a highly dangerous thing, at least?

A. Yes, I will admit it was a dangerous thing to do.

Q. A very dangerous thing to do, doctor, wasn't it?

A. Yes.

Q. Because it might have caused injury to the cord?

A. Yes, it might have.

Q. And, in fact, he did have injury to the cord at death?

A. You are asking me?

Q. I am asking you.

A. I don't know.

Dr. Fahrni also said with respect to the cause of the ileus that he could not say "that the fracture dislocation of his axis did not cause it."

Dr. Kemp, called on behalf of the respondent, said that the treatment generally accepted was extension, the purpose being two-fold: first, to prevent flexion of the neck and spine to avoid damage to the cord; second, to allow the fractured bones to heal. The danger to be guarded against above all things was flexion. He testified that in his opinion the activity of the deceased after discharge from the emergency ward "must have" caused pressure upon the cord.

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Mr. Bull for the appellant found a good deal, and properly so, upon the admission of this witness that, when testifying in chief, he had not known of Dr. Fahrni's neurological examination of the deceased. I think the fair reading of this witness's evidence is, however, that notwithstanding the results of that examination, Dr. Kemp considered that the abdominal distention in evidence some hours earlier on the patient's re-admission to the hospital was itself evidence of nerve injury or nerve irritation.

Q. And you had no information when you gave your answer to Mr. Murphy's hypothetical question what the result of that examination was?

A. Except I believe it was read there was a meterism and distention in the man's abdomen.

Q. Speak up.

A. It was read to me in evidence that the man on re-entering the hospital had abdominal distention, and what is known as meterism, or gas, which correctly means a swelling which would indicate an early ileus.

Q. What you say, of course, appears in the medical chart. There was some distention of his abdomen.

A. Yes, sir.

Q. I think it was the first day he got back to the hospital. I am not referring to that at all. Just leave that out. I am referring to the neurological examination which Dr. Fahrni would make when he was called in on the case.

A. I have no knowledge of Dr. Fahrni's examination.

Q. And you had no knowledge of the result of that, if he made one, when you gave that answer yesterday?

A. No, unless it was a part of what was read.

Q. And that is, of course, very important?

A. Oh, yes, definitely.

Q. Dr. Fahrni would know, I presume, when he attended the man on his re-entry in the hospital, whether there was any apparent nerve damage?

A. Not necessarily. Dr. Fahrni is an orthopedic specialist. They are not known for their knowledge of the nervous system.

The witness was further cross-examined with respect to the effect of the activities through which the deceased went while out of the hospital, and he said:

Q. Even being home. What would those activities result in, scientifically?

A. Scientifically they could result in a further increase of the dislocation, eventually leading up to pressure on the cord.

Q. You don't suggest they did that.

A. They must have.

Q. What you say is they could do that.

A. They could do that and they probably did.

This witness would not agree with the evidence that the maximum dislocation had occurred at the moment of impact.

In my opinion, on the whole of the evidence, the relevant parts of which I have endeavoured to review, I do not think it can be said that there was no evidence upon which the jury could have reached the finding they did. I would therefore dismiss the appeal with costs.

LOCKE J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), dismissing the appeal of the Vancouver General Hospital from the judgment of Coady, J. following the verdict of a jury.

The respondent is the widow and the personal representative of the late Gordon Arthur Fraser and in that capacity brought the action on behalf of herself, her infant son and the mother of the deceased.

In so far as they are relevant to the issue of negligence, the facts are as follows: shortly after 11 o'clock on the evening of March 8, 1949, Fraser, who had been injured in an automobile accident, was admitted into the emergency ward of the Vancouver General Hospital for treatment. The Vancouver Hospital contains some 1,200 beds and is equipped with all the usual accessories of a first class hospital, including an X-ray department. The emergency ward consists of 7 beds for the reception of accident cases and is staffed with nurses, orderlies and internes and, at the time of Fraser's admission, Dr. Davies was the interne on duty. The emergency accident report shows that Fraser was suffering on admission from a ragged laceration to his right forehead and pain and stiffness in the posterior portion of the neck. Dr. Davies, who was not called as a witness at the trial, signed a requisition for an X-ray some time prior to midnight, this stating that the patient might be taken to the X-ray department on a stretcher, that the part to be radiographed was "the neck, the cervical vertebrae" and in the space provided on the form for "Information desired" there appeared the following: "? fracture." According to the respondent, one of the nurses telephoned to her shortly after 11 o'clock, informing her of the accident

(1) [1951] 4 D.L.R. 736; 3 W.W.R. (N.S.) 337.

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and asking who was their family doctor, in response to which she gave the name of Dr. Harold Blair. In the space reserved for the name of the patient's doctor on the X-ray requisition form, the name J. H. Blair appears. At midnight Dr. R. M. Heffelfinger, an interne, a graduate of the Manitoba Medical College, who held a temporary licence from the College of Physicians and Surgeons of British Columbia entitling him to practise medicine, surgery and midwifery within the confines of the Vancouver General Hospital, came on duty, apparently to relieve Dr. Davies.

Mrs. Fraser arrived at 11.40 p.m. before the X-rays were taken and found her husband in bed complaining that his neck was very stiff and sore. According to her, she asked Dr. Heffelfinger:

> if there was going to be a doctor who was in charge

saying that it was supposed to be Dr. Blair, who had been phoned by Dr. Heffelfinger, and asked if Blair was coming to the hospital and was told that he was not coming until he (Heffelfinger):—

> had taken the X-ray and given him a report of the X-ray plates.

Thereafter she says that Dr. Heffelfinger sutured the cut on her husband's forehead and she then apparently waited in the ante room while her husband was taken to the X-ray department. After a wait of some 45 minutes Mrs. Fraser said that she was told that her husband could go home. She thereupon went to the ward where he was in bed and gives the following account of what then took place:

> Dr. Heffelfinger . . . . stood at the foot of the bed and I on the right side of the bed and my husband, Mr. Fraser, said to Dr. Heffelfinger that his neck was very stiff and he couldn't move it and it was extremely sore and he said, "There must be something wrong with my neck," which (sic) Dr. Heffelfinger in turn assured him it was merely strained ligaments, muscular or glandular trouble, at the time.

While her husband was being dressed by the nurse she said that she felt that he should not be leaving the hospital and went and talked to Dr. Heffelfinger again, saying:

> Dr. Heffelfinger, are you sure that there is no more serious injury than what you have stated in your conversation at Gordon's bedside?

and had been assured that there was not. She had telephoned for a taxicab to take them home and while they were waiting for this to come she says that Dr. Heffelfinger

came and said to her husband that he was to go down to Dr. Blair's office at 11 o'clock that morning, to which her husband had replied that if he was no better first thing in the morning Dr. Blair or some other doctor was coming to see him.

According to Dr. Heffelfinger, when he came on duty he conducted a neurological examination of Fraser to ascertain if there was any evidence of injury to the nervous system and found none. He was asked by Fraser if Dr. Blair had been notified and he said that this had been done. Fraser then asked if Dr. Blair was coming down, to which he replied that he did not know whether he was or not. Apparently, it was Dr. Davies who had telephoned to Dr. Blair and there is no evidence as to what took place between them. There appears, however, on the emergency accident report, which was signed by Dr. Heffelfinger, a notation that the family physician was notified at 12.05 a.m. this apparently being before the X-rays were taken. Following the taking of the X-rays, Dr. Heffelfinger says that he examined the prints together with Dr. Davies. After this he telephoned to Dr. Blair describing the patient's condition, the results of the examination, and:

> the results of the X-ray as interpreted by the other interne and myself.

and told Dr. Blair that the patient was most insistent about going home and asked him (Blair) what he wanted to do and was told to discharge the patient and have him see him at the office "the following morning." In chief, asked whether he was qualified to read X-ray plates, he said he was not, that his only experience in that field was the usual teaching received in a medical school and instructions received in the hospital as an interne up to that time but that he had not taken any post graduate or special training in radiology. Asked as to whether he had told this to Dr. Blair, he said: "I informed him to that effect." Cross-examined, he said that internes were permitted to order X-rays when required and read them and give a report "after first contacting the attending doctor." As neither Dr. Davies nor Dr. Blair gave evidence, whether the latter asked for the X-ray was not disclosed. Dr. Heffelfinger said that their examination of the X-rays disclosed no gross

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abnormality. He said that he had been requested by Dr. Blair to examine the films, and again:

> We were requested by him to look at the films and to report to him our findings.

The latter statement apparently referred to Dr. Davies and himself and as, so far as the evidence shows, Dr. Heffelfinger had only spoken once to Dr. Blair, the request last referred to was presumably made to Dr. Davies. When he was asked again if what he had told Dr. Blair was that he and Dr. Davies could find nothing grossly abnormal and confirmed this, he again said that he had told Dr. Blair that he (Heffelfinger) "had not very much experience in reading X-ray films." While the doctor could not remember whether or not he had assured Mrs. Fraser that her husband's condition was not serious or that the injury might be a strained ligament or some glandular strain which caused his neck to be stiff, he denied that he had advised Dr. Blair that, in his opinion, Fraser could be discharged. In concluding the cross-examination Dr. Heffelfinger was asked if he had said in his examination for discovery that he had not expressed to Dr. Blair any opinion regarding discharge of the patient but had only given the latter his findings and let him decide what to do, and that after describing his findings on his examination and the X-ray findings he had:

> asked him what he wanted to do about it, and the outcome of it was that he asked me to discharge him and come around in the morning.

he confirmed having done so.

Dr. R. A. Seymour, the Assistant Medical Superintendent of the hospital, gave evidence as to the hospital rules regarding the emergency department, one of which provided that:

> Any member of the house staff called to the emergency department must respond promptly. It is imperative that every emergency case be examined immediately and given such first-aid treatment as is necessary on admission for making him as safe and comfortable as possible. After this, get in touch with the patient's physician and act under his orders. Specific instructions are posted in the emergency department. Report forms are to be completed in each case.

It was apparently in accordance with this rule that Dr. Davies and Dr. Heffelfinger telephoned to Dr. Blair and obtained his instructions and that Dr. Heffelfinger made the emergency accident report. The Vancouver General

Hospital has a large X-ray department and, while there were only technicians on duty at night, there was a radiologist who was always on call and for whose opinion Dr. Blair might have asked. Unfortunately in the result this was not done. It was made clear by Dr. Seymour that the internes were permitted to order X-rays to be taken and, if requested, to report what they disclosed to the patient's doctor.

It is now common ground that the X-ray films disclosed a fracture dislocation of the second cervical (axis) vertebra and that this was not detected by Dr. Heffelfinger. There was also evidence which, if believed, would indicate that it was a dangerous thing to send Fraser home in a taxicab in this condition. The allegations of negligence are that the defendant, its servants or agents so negligently and unskilfully diagnosed or treated Fraser that he thereafter died. It is contended that the activities carried on by Fraser in reliance upon Dr. Heffelfinger's advice in the interval between his leaving the hospital to go home and the time of the discovery of the nature of his injury resulted in his death.

At the conclusion of the trial and following a most careful charge by the learned trial judge the following questions dealing with the matter of the alleged negligence of Dr. Heffelfinger were submitted to the jury:

(1) Were the internes the servants or agents of Dr. Blair in discharging the deceased?

(2) Were the internes, if your answer to (1) is "no", were the internes the employees of the defendant in discharging the deceased?

(3) Were the internes negligent in discharging the deceased?

(4) If your answer to Question (3) is "yes", did that negligence cause the deceased's death?

(5) If your answer to Question 4 is "yes", what damages do you find were suffered by:

(*a*) Mrs. Fraser Sr.;
(*b*) Mrs. Fraser Jr.;
(*c*) Brock Fraser?

The jury did not answer any of the questions but returned a general verdict in favour of the respondent and assessed damages.

Since a general verdict was given, it must be taken that all the issues of fact properly before the jury are determined in favour of the respondent. The negligence found is that

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of Dr. Heffelfinger and the first question to be determined is whether there was any sufficient evidence of negligence upon his part and, if there was, whether in the circumstances disclosed by the evidence the appellant is liable if damage resulted.

It was shown that under an agreement in writing made between Dr. Heffelfinger and the Vancouver General Hospital dated June 1, 1948, he agreed to act as junior interne, in accordance with the rules existing or which might be issued from time to time, and agreed not to practise medicine in any of its forms or branches outside the Vancouver General Hospital for the period that the contract was in force. In consideration of his services he was to be paid $25 per month and it was provided that the agreement might be cancelled by the hospital without notice, in consequence of neglect of duty, misconduct or continued failure to observe the hospital regulations. The temporary licence granted to him by the College of Physicians and Surgeons above referred to had been granted on May 31, 1948. The evidence is not clear as to the previous experience of Dr. Heffelfinger, though it appears to me a fair inference from the evidence that he had but recently graduated in medicine. That he was engaged as an interne would probably convey to medical men that this was so, but there is nothing in the evidence to indicate that this knowledge was shared either by Fraser or the respondent. It is apparently common ground that the appellant operates a public hospital at the city of Vancouver to which injured persons such as Fraser, *inter alia,* might obtain admittance, presumably on the footing that they are to pay for services rendered. As to this and as to whether the appellant corporation is by statute or otherwise required to receive all sick persons presenting themselves for admission, no reference was made either in the evidence or in the arguments addressed to us.

At the root of the matter lies the question as to the duty owed by the appellant to Fraser in the circumstances disclosed by the evidence. In the absence of any direct evidence as to what took place upon his admission, there is sufficient evidence from what took place thereafter that when admitted he was taken in charge by Dr. Davies and the nurses in the emergency ward and such steps taken by

them immediately as they considered necessary in view of his condition. That Dr. Davies did examine Fraser is apparent since it was he who signed the requisition for the X-ray, the form indicating that he suspected or wished to be informed with certainty as to whether there was a fracture of any of the cervical vertebrae. Upon Dr. Heffelfinger's arrival he undertook what appears to have been a most thorough and careful neurological examination of the patient. It is thus made plain that the hospital undertook to give Fraser both nursing and medical attention. The duty of the hospital in these circumstances was to exercise reasonable care in the treatment given to the patient, this involving, to the extent that such treatment consisted of medical treatment by the doctors, that they should exhibit reasonable skill. It was unfortunately the fact that the X-ray films which were taken disclosed a fracture of the second cervical vertebrae and that Dr. Heffelfinger, who on his own statement had little skill or experience in reading such films, failed to detect it. There was a skilled radiologist on call at night to whom Dr. Heffelfinger might have referred the matter and the jury may well have considered that it was a negligent act, in view of his own lack of experience in such matters, not to refer the matter to this man. For the hospital it is said that the responsibility was not that of Dr. Heffelfinger since, by the rules which governed his conduct, he was required to get in touch with the patient's own doctor and to act on his instructions and that this was done. The only evidence as to what took place between Dr. Heffelfinger and Dr. Blair is that of the former. The evidence concerning this conversation may well have been regarded by the jury as not entirely satisfactory. While the doctor said that he had advised Dr. Blair of his limited experience, they may have considered that the evidence as to the extent of this disclosure was not clear and that if Dr. Blair had been aware that, as stated by Dr. Heffelfinger in evidence, he was not qualified to express an opinion as to what the films disclosed the latter would not have agreed to the patient being discharged. I think further that, in arriving at a conclusion as to who had taken part in the decision to discharge Fraser, they may have attached importance to the emergency accident report in which Dr. Heffelfinger had said that

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Dr. Blair had "agreed" to discharge rather than he had directed the discharge. The language of this entry, plus the fact that (since it must be assumed that the jury believed the evidence of Mrs. Fraser) Dr. Heffelfinger did not merely convey to them Dr. Blair's instructions but, in answer to inquiries of both Fraser and his wife, the latter of whom was apparently reluctant to have her husband leave the hospital, he assured them that the injuries to his neck were not serious, lends some support to the view that he took an active part in the decision to discharge the patient and in his discharge. Assuming, as I do, that Dr. Heffelfinger was a recent graduate in medicine, that his experience was thus limited and that he was not competent to read the X-ray films, had he informed Fraser and his wife of these facts and, after full disclosure to Dr. Blair, simply conveyed to them the doctor's advice and instructions and acted upon them, the situation would, in my opinion, have been different. The jury may well have considered that there had not been full disclosure made to Dr. Blair of the lack of experience of Dr. Heffelfinger and that assuming to advise Fraser that he could safely leave the emergency ward and go to his home, without having obtained the opinion of a radiologist as to whether there was a fracture of the vertebra, was a failure on the part of Dr. Heffelfinger to exercise that reasonable degree of care and skill and treatment, which it was the duty of the appellant to afford to Fraser in the circumstances disclosed.

Facts were disclosed by the evidence from which the jury might properly draw the inference of negligence on the part of Dr. Heffelfinger. The nature of the obligation which the hospital assumed towards Fraser must be inferred from the circumstances disclosed by the evidence and here the inference may properly be drawn that it was to afford both nursing and medical attention. The decision in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1), does not, in my opinion, touch the present matter and the views expressed by Kennedy L.J. must be considered in the light of the comments made upon them in this Court by Davis J. in delivering the judgment of the majority in *Sisters of St. Joseph* v. *Fleming* (2), and of Lord Greene M.R. in

(1) [1909] 2 K.B. 820. (2) [1936] S.C.R. 173, 190.

Gold v. *Essex County Council* (1). Dr. Heffelfinger was an employee of the appellant and if there was negligence on his part in the present matter it was, in my opinion, in the course of his employment and if damage resulted the appellant is liable (*Cassidy* v. *Ministry of Health* (2), Denning L.J.).

There remains the question as to whether there was evidence from which a jury might properly draw the inference that what was done by Fraser, in reliance upon Dr. Heffelfinger's advice, caused or contributed to his death which occurred on March 14th.

Fraser had been brought to the hospital in an ambulance but left in a taxicab to go home. He was a big powerful man, 6 ft. 3 inches in height, and entering and getting out of the taxicab no doubt required him to stoop. There was evidence from which the jury might conclude that there were places in the street which would be traversed on his way home which were rough and would give the passengers a shaking-up. It was necessary for him to walk up some fifteen steps to enter the door of his home and on entering he undressed himself and lay down in bed, was given a hot drink and his head propped up on pillows. He had left the hospital at about 3 o'clock in the morning of March 9 and at 9 o'clock that morning his wife, at his request, telephoned Dr. C. S. Rennie and on his advice a hot water bottle was placed at the back of Fraser's neck. Dr. Rennie arrived at Fraser's home at about 2 o'clock, staying nearly an hour. According to Mrs. Fraser, he examined her husband but the nature of this examination is not disclosed in the evidence and Dr. Rennie was not called as a witness at the trial. When he left he apparently obtained a report on the X-ray films that had been taken during the previous night and returned shortly before eleven o'clock that evening with the plates or films taken from them and informed the respondent, and presumably her husband, that they disclosed a fracture of the second cervical vertebra and advised that Fraser return to the hospital. The hospital reports put in evidence by the plaintiff indicate that he entered the private ward pavilion at 1.15 a.m. on March 10,

(1) [1942] 2 K.B. 293.

(2) [1951] 1 T.L.R. 539 at 548.

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the attending physician being shown as Dr. C. S. Rennie and the nature of his injury being stated as fracture-dislocation cervical spine.

It is common ground that the cause of Fraser's death was an ileus, a paralysis of the small intestine, and resulting complications, and it is the respondent's case that the activities carried on by him between 3 o'clock on the morning of March 10 and either the time when Dr. Rennie discovered the nature of the injury or the time of Fraser's re-admission to the hospital were responsible for the development of this condition.

In view of the medical evidence that a paralysis of the small intestine may result from a number of causes, the burden resting upon the respondent upon this issue was a difficult one. While it was stated in argument before us that her case was that the condition was brought about by an injury to the nervous system resulting from Fraser's activities during this period, I do not think the respondent should be restricted to this. If there were in fact no injury to the autonomic nervous system but there was other evidence connecting Fraser's actions, in reliance upon Dr. Heffelfinger's advice, with its development, the respondent's claim should be sustained.

As has been stated, Dr. Heffelfinger gave Fraser a thorough neurological examination shortly after midnight on March 9. Dr. J. R. Naden, a highly qualified orthopaedic surgeon who was called as a witness for the appellant, referred to this as "the examination that was so minutely carried out by Dr. Heffelfinger" and the respondent adopts the same position and contends that this established that the shock of the accident and the fracture of the axis vertebra had caused no injury to the nervous system. That the forward dislocation of the axis resulted in a displacement of 3/16th of an inch was disclosed by the X-ray examination and, according to Dr. Harmon who conducted the autopsy on March 15th, there could be elicited a forward displacement of the second vertebra on the third.

It was the contention of the respondent that pressure thus brought to bear upon the spinal cord at the site of the fracture had caused an injury to the nervous system controlling the functioning of the small intestine and this was the opinion expressed by Dr. W. N. Kemp. According to

him, Fraser should not have been permitted to move about or to leave the emergency ward; he considered that he should have been put to bed and extension applied for the purpose of reducing the fracture, saying that the important thing in such cases was to prevent flexion of the neck and upper spine "thus preventing further damage or any damage to the cord." Dr. Kemp said that an ileus resulted from some interruption in the function of the parasympathetic nervous system and that in the majority of the cases which he had heard of or seen they had been functional, there having been "some imbalance in the function of the parasympathetic system without any anatomical destruction of the nerves." While an ileus, functional in origin, was, in his opinion, curable, one caused by injury to the nerves in the cervical region was not "because spinal nerves like nerves in the brain once they are destroyed never recover." Answering a hypothetical question propounded by counsel for the respondent, which assumed that the examination of the patient at the emergency ward had been very carefully and thoroughly done and showed no sign of nerve injury and that thereafter the injured person had followed the course which had in fact been pursued by Fraser between the time of his leaving the emergency ward and his re-entry into the hospital and which asked his opinion as to the cause of death, Dr. Kemp said that it was almost a certainty that at some stage of the various activities enumerated:

> the pressure of the dislocation would be such that the softening which is reported in the cord and the edema, indicating as they do destruction of the nerve tissue, assuming all these to be correct . . . . I would say there is a very direct connection between the resulting paralytic ileus and all these various activities subsequent to leaving the hospital.

In answer to a further question he said that, in his opinion, the paralytic ileus:

> was directly due to injury suffered by the nerve filaments, probably largely parasympathetic, located in the cord at the cervical area.

and that:

> it would be reasonable to assume that the symptoms, not being present when he was discharged from the hospital, it must have occurred subsequent to his departure from the hospital.

The latter answer clearly shows that, according to the witness, if there had been any injury to the nerves or nervous system such as he described at the time Fraser was examined by Dr. Heffelfinger the examination would have disclosed it.

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The question propounded to Dr. Kemp was incomplete since a most relevant fact, of which the doctor was unaware, was omitted. At some time during the morning of March 10, presumably after Fraser had been readmitted to the hospital, Dr. Rennie on his behalf retained the services of Dr. W. H. Fahrni, an orthopaedic surgeon who had carried out a thorough neurological examination of Fraser that day and found "no sign of any neurological involvement" and who said that while he examined him thereafter, at least once a day, there was never any evidence of any nerve injury. The following passage from the cross-examination of Dr. Kemp deals with this aspect of the case:

Q. Now, when he came back to the hospital on the 10th and was attended by Dr. Rennie and Dr. Fahrni, the ordinary routine thing for a specialist like Dr. Fahrni, to do, is to again check his nervous system? A. I think so, especially with a neck injury, with this history.

Q. And you had no information when you gave your answer to Mr. Murphy's hypothetical question what the result of that examination was? A. Except I believe it was read there was a meterism and distension in the man's abdomen.

Q. Speak up. A. It was read to me in evidence that the man on re-entering the hospital had abdominal distension, and what is known as meterism, or gas, which correctly means a swelling which would indicate an early ileus.

Q. What you say of course appears in the medical chart. There was some distension of his abdomen. A. Yes, sir.

Q. I think it was the first day he got back to the hospital. I am not referring to that at all. Just leave that out. I am referring to the neurological examination which Dr. Fahrni would make when he was called in on the case. A. I have no knowledge of Dr. Fahrni's examination.

Q. And you had no knowledge of the result of that, if he made one, when you gave that answer yesterday? A. No, unless it was a part of what was read.

Q. And that is, of course, very important? A. Oh, yes, definitely.

and again, after reference was made to the fact that Dr. Fahrni was an orthopaedic specialist and Dr. Kemp having said that "they are not known for their knowledge of the nervous system", the following appears:

Q. They have the knowledge of how to make a neurological examination? A. Apparently. It is just about the equivalent of what a general practitioner has.

Q. You agree that Dr. Heffelfinger who was then an interne made the proper one? A. According to this record.

Q. And you would at least give an experienced orthopaedic surgeon credit for having a similar knowledge? A. Oh yes, at least.

Q. And you agree then that the conclusion which Dr. Fahrni would draw from the examination when he was attending would be highly important? A. Oh, definitely.

Later, having been asked in the course of cross-examination about Fraser's activities, he said that:

> Scientifically they could result in a further increase of the dislocation, eventually leading to pressure on the cord.

and when asked if the activities had done that, Dr. Kemp said that they must have. Dr. Kemp was not re-examined, the respondent's case being closed at the termination of this cross-examination. What he would have answered to an hypothetical question, in which the facts upon which his opinion was to be based included the all important one that no trace of injury to the nervous system could be found on March 10, when Dr. Fahrni examined Fraser, is unknown.

There was no other evidence given on behalf of the respondent directed to sustain the contention that the development of the ileus was attributable to Fraser's activities during the period mentioned. It was part of the assumed statement of facts contained in the hypothetical question answered by Dr. Kemp that the ileus had already commenced to develop when Fraser was readmitted to the hospital in the early morning of March 10. The respondent had sought to establish this fact by introducing into the evidence as part of her case the nurse's notes and the history sheet prepared by the employees of the hospital. The nurse's notes consist of entries apparently made at the time to record the course of the illness and show the time of admission as being 1.15 a.m. on March 10, at which time the patient was suffering from a pain in the back of the neck extending to the level of the shoulders. Dr. Rennie is shown to have visited Fraser at 1.30 a.m. and again at 10 a.m. At 12.30 p.m. an entry shows that extension was applied to the neck by Dr. Fahrni and that at this time Fraser was complaining of pain in his back and hips. There is no entry in the nurse's notes of March 10 of there being any distension of the abdomen which, according to medical evidence, might indicate the commencement of an ileus, the first entry of this being at 2 a.m. on March 11. No nurse was called to give evidence as to this. The hospital record further included a history sheet, apparently prepared by Dr. W. G. Walker. This document is not dated nor the time of day when it was made known. Since, however, the first entry says that the patient was involved in a traffic accident "today", it may perhaps be inferred

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that Dr. Walker compiled this document on the day that Fraser was readmitted to the hospital. The sheet contains an entry to the effect that the abdomen was very extended. Dr. Walker, who could have cleared up the matter, was not called. Dr. Fahrni, however, who apparently first saw the patient at 12.30 p.m. on March 10, as indicated in the nurse's notes says that there was some distension at that time and that he regarded this as a symptom of an ileus. There is thus no evidence of distension at the time, some eleven hours earlier, when Fraser entered the hospital. Indeed, the absence of any mention of the fact in the nurse's notes is some evidence, however slight, that the contrary was the case.

The question as to what had brought about the paralysis of the small intestine was not one which, in the circumstances of this case, could be dealt with by a jury without the assistance of medical opinion. In my view, the opinion of Dr. Kemp based upon an incomplete, and in one part inaccurate, statement of the facts was valueless. On this aspect of the case, the respondent's action must fail unless sufficient support can be found in other evidence. The evidence for the appellant on this issue was that of Dr. Fahrni and of Dr. J. R. Naden, both practising in Vancouver and specializing in orthopaedic surgery. Their evidence made it apparent that the condition of ileus might be produced in a variety of manners and that at times it is impossible to diagnose the cause. Dr. Fahrni gave no evidence as to what information, if any, he obtained from Dr. Rennie as to Fraser's symptoms at 2 o'clock on March 9 when the latter had examined him. He had met Dr. Rennie at the hospital and had seen the X-ray plates taken on the requisition of Dr. Davies and had Fraser immobilized on his back in bed, in the usual manner adopted in treating an injury of the nature disclosed, and applied head traction to reduce the fracture. It was important, in his opinion, to ascertain whether the plaintiff had suffered any damage to the spinal cord and he thereupon conducted the neurological examination already referred to. According to him, there are a great many causes for an ileus: some may occur for no obvious reason but may, as he expressed it, develop spontaneously, though this is rare. The condition, he said, may be produced by a direct irritation of the nerves to the

bowels, which would be obvious on examination, and that any severe injury may bring on an ileus or any very severe psychic upset. Further he said that the condition was one which was very poorly understood and that:

> As yet it is not known the exact mechanism of the onset of an ileus, except that the nerves to the bowel are obviously interrupted, but there are many times when they are definitely not interrupted when an ileus does arise.

and that simply lying in an unaccustomed position on one's back might cause an ileus. While saying in cross-examination that in the case of a fracture such as this it was a very dangerous thing to send Fraser home from the emergency ward, as has been done, because it might have resulted in injury to the spinal cord, he could find no evidence of any such injury or that driving to his home from the hospital had caused any harm. Asked if his reason for wishing to reduce the fracture was to prevent pressure on the spinal cord, he said that there was no such pressure on the cord or evidence of injury to the cord. Then asked as to what had caused the ileus, he said he did not know. Later, in his cross-examination, he was asked if he could suggest some contributory factors which might have produced the condition and after he had said that he could not say that the fracture dislocation of the axis did not cause it, the cross-examiner abandoned the subject and it was not thereafter revived.

Dr. J. R. Naden, the chief of the orthopaedic section of the Vancouver General Hospital since 1936, who had been in court and heard both Dr. Fahrni's and Dr. Heffelfinger's description of the neurological examinations that they had made, was of the view that they showed that there was no evidence of injury to the spinal cord or to the nervous system in any way, and further that Dr. Harmon's evidence as to his finding at the autopsy did not disclose any damage to the spinal cord. Dr. Naden said that an ileus might develop from a number of causes, that he had seen the condition develop in patients who had been put to bed suffering merely from a pain in the back, that the most common cause was an infection such as peritonitis, that the condition developed also at times from a stomach operation and that the "mechanism of paralytic ileus is not completely known." The condition, he said, could be

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brought about by an injury to the spinal cord or to the autonomic nervous system but the existence of such injury could be demonstrated by a neurological examination such as that conducted by Dr. Fahrni, who had found no evidence of injury to the spinal cord or the sympathetic nervous system or the parasympathetic nervous system in relation to the spinal cord. Dr. Naden agreed with Dr. Fahrni that the evidence given by the autopsist did not disclose any injury to the spinal cord. He further was of the opinion that Fraser's activities after leaving the emergency ward had no connection with the development of the ileus.

No rebuttal evidence was tendered by the respondent and thus the evidence of Drs. Fahrni and Naden as to the variety of causes which might produce an ileus is unchallenged. The question as to whether there was any evidence of injury to the nervous system at the time Dr. Rennie took charge and at the time of Fraser's re-entry into the hospital, which might have produced the condition, was of the most vital importance to the respondent's case. It is true that apparently Dr. Fahrni's first neurological examination of Fraser was some eleven hours after his readmission to the hospital. This makes available to the respondent the argument that his findings do not, of necessity, establish that there was not some evidence of injury or disturbance of the nervous system which might bring about the paralysis apparent at 1.15 that morning and which was not evident at 12.30 p.m. As to this, Fraser's own physician, Dr. Rennie, and Dr. Walker, if in fact he examined Fraser shortly after his admission, might have given some evidence but neither were called. Dr. Fahrni was Fraser's doctor, so that whatever was known to him was available to the respondent, including the fact that at 12.30 p.m. on March 10 no evidence of any nervous injury was detected by him and, if the respondent proposed to contend that his condition was different several hours earlier, I think the onus of establishing that fact lay upon her.

No evidence was given as to the exact manner in which Fraser sustained the injuries that brought him to the emergency ward of the hospital, other than that he had been involved in an automobile accident. The medical evidence shows that such a fracture of the second cervical

vertebra might be caused in a motor accident by the vehicle in which a person was travelling being brought to a sudden and violent stop. While Dr. Rennie was consulted six hours after Fraser left the hospital and examined him five hours later and might thus be charged with the responsibility for his treatment thereafter, it is not unfair to the appellant to deal with this aspect of the case upon the basis that if the ileus resulted, as the respondent contends, from Fraser's activities between 3 a.m. on the morning of March 9 and 1.15 a.m. on the following morning, the cause was the negligence complained of. Dealing with the matter on this footing, there was, in my opinion, no evidence from which the jury might properly draw the inference that the ileus resulted from anything done by or on behalf of Fraser, in reliance upon Dr. Heffelfinger's advice. Dr. Kemp's theory as to the cause of the development of the ileus was based upon a misconception of the facts and in the belief that the shaking-up which Fraser would receive in driving home in the taxicab, the forward flexion of his cervical spine in getting into and out of the taxicab and his movements after he arrived home and while there until he re-entered the hospital, had caused an injury to his nervous system and that such injury had not existed when he left the emergency ward. That any such injury would have been disclosed by the examination conducted by Dr. Fahrni follows, of necessity, from Dr. Kemp's evidence and was the considered opinion of both Dr. Fahrni and Dr. Naden, and there is no other evidence on the matter. Other than that these activities would, in his opinion, bring about an injury to the nerves or nervous system, Dr. Kemp did not hazard any opinion as to what might have caused the ileus. On the other hand, Dr. Fahrni, who was Fraser's own doctor, and Dr. Naden were of the opinion that what was done by Fraser in the period mentioned had nothing to do with the development of the condition. The case is thus left in this position that the undisputed evidence is that the ileus might have been developed from a variety of causes, including the injury sustained at the time of the accident, the shock Fraser then suffered, or from some other unknown cause. That it was caused by an injury to the nervous system during the period in question is disproved by the evidence.

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That damage resulted from what the jury evidently considered to have been a negligent act on the part of Dr. Heffelfinger was a fact which the respondent was required to prove. This does not mean, to adopt the language of Earl Loreburn, L.C. in *Richard Evans and Company* v. *Astley* (1), that she must "demonstrate her case" and, if the more probable conclusion is that for which she contends and there is anything pointing to it, there was evidence for the jury to act upon. I do not think this statement was intended to differ with what had been said by Willes, J. in *Ryder* v. *Wombwell* (2), where, delivering the judgment of a court which included Byles, Blackburn, Montague Smith and Lush, JJ., he quoted with approval what was said by Williams, J. in *Toomey* v. *London and Brighton Railway Company* (3):

> It is not enough to say that there was some evidence . . . . A scintilla of evidence . . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence.

In the present matter the jury might, if they saw fit, reject the opinions of Dr. Fahrni and of Dr. Naden, that what occurred during the interval in question had nothing to do with the development of the ileus, and it is to be assumed that they did so. There was, in my opinion, a complete absence of any other evidence from which they might reasonably and properly draw a conclusion as to whether the cause was something done in reliance upon Dr. Heffelfinger's advice, or in consequence of his failure to diagnose the true nature of the injury, or that it was the physical injury sustained in the collision or the resulting shock or some other reason unknown. If it were to be said that from the fact that they rendered a general verdict it is to be taken that the jury found, in the face of all the evidence, that some injury to the nervous system did result during the interval in question, such a verdict would, in my opinion, be perverse and should be set aside.

I would allow this appeal and direct that judgment be entered dismissing the action. The appellant is entitled to its costs throughout if they are demanded.

(1) [1911] A.C. 674 at 678. (2) (1868) L.R. 4 Ex. 32 at 39.
(3) (1857) 2 C.B. (N.S.) 150.

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CARTWRIGHT J.:—I agree with the conclusion of my brothers Rand and Kellock that there was evidence in this case on which the jury might properly find that there was negligence on the part of the appellant in connection with the discharge of the deceased from the emergency ward and that such negligence caused the death of the deceased and I would accordingly dismiss the appeal with costs.

FAUTEUX J.:—I agree with my brothers Rand and Kellock that the appeal should be dismissed.

There was before the jury material on which they could, acting judicially, find that the death of Gordon Arthur Fraser resulted from an unwarranted discharge of this patient from the hospital consequential (*a*) to a negligence of Dr. H. to read in the X-ray plates—or, if unqualified in the matter, to call for the assistance of the hospital's available expert to do so—the fracture of the axis which, admittedly suspected by him, was indicated in the X-ray films, and (*b*) to a failure on his part to adequately inform the family physician as to the real situation with respect to the condition of the patient as well as with respect to his capacity to appreciate it, a failure which, in the result, lead the family physician to "agree" to the discharge.

Appeal dismissed with costs.

Solicitor for the appellant: *E. A. Burnett.*

Solicitor for the respondent: *Paul D. Murphy.*

1951
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*Feb. 5

THE KING ..... APPELLANT;

AND

THE ASSESSORS OF THE TOWN OF SUNNY BRAE ..... } RESPONDENT.

Ex Parte Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur.

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

Assessment—Taxes—Religious Congregation operating laundry and dry cleaning business in competition with other firms in like business—The Rate and Taxes Act, R.S.N.B., 1927, c. 190, s. 4(1) (d) and (g)—Whether appellant's buildings, and equipment exempt under clauses (d) and/or (g)—Meaning of word "charitable" as used in clause (g).

The Rates and Taxes Act, R.S.N.B. 1927, c. 190, exempts from taxation s. 4(1):

"(*d*) Every building of a religious organization used exclusively . . . for the religious, philanthropic or educational work of such organization, with its site and ground surrounding the same upon which no other building is erected, but this exemption shall not include real estate in respect of which rent is received by such organization; also the personal property and income of such organization, used exclusively for religious, philanthropic or educational purposes;

(*g*) The property of any literary or charitable institution."

The appellant is a religious society devoted exclusively to the furtherance of the education of girls generally and in particular to the education and reformation of wayward girls, and the education and care of female orphan children. Its members have taken the vows of poverty and receive no wages and any revenue is expended exclusively for the furtherance of the purposes of the Society. Girls are received regardless of their race or creed or ability to pay. The appellant owns real estate on which is erected a main building which provides accommodation for the inmates and includes a school and a public laundry and dry cleaning plant where the girls are taught habits of industry and fitted to earn a living. The plant is in public competition with commercial laundries. There is also on the property a two-family brick dwelling occupied by two male employees and their families. The men are employed as truck drivers. The appellant was incorporated in 1945 by a special act of the N.B. Legislature for the purpose of carrying out its objects as set out above and was authorized to purchase land and erect buildings for such purposes and as incidental thereto for the maintenance of the institution, to carry on the business of a steam and general laundry.

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock, Estey, Locke and Cartwright JJ.

The respondent assessed the laundry equipment, two motor trucks used in the business and the brick dwelling. The appellant claims exemption under s. 4(1) clauses (*d*) and (*g*).

Held: (Rinfret C.J., Kerwin and Cartwright JJ. dissenting).

1. In construing s. 4(1), clause (*g*) must be regarded as a general clause and clause (*d*) as a particular clause and to avoid repugnancy or inconsistency (*d*) must be taken to be an exception to (*g*).
2. The appellant is not a "charitable society or institution" within the meaning of clause (*g*); *Cocks* v. *Manners* L.R. 12 Eq. 574; *In re White* [1893] 2 Ch. 41; but a society of mixed objects, some charitable and some not, and must find exemption, if any, under clause (*d*).
3. The use referred to in (*d*) is the actual use to which the property is put and not the object to which the profits from the business carried on may be devoted.

Per Estey J. The equipment used in the conduct of the business serves not only the appellant organization, but the public generally. It therefore cannot be said to be "used exclusively for religious, philanthropic or educational purposes."

Per: Rinfret C.J., Kerwin and Cartwright JJ., dissenting—Whether the word "charitable" as used in clause (*g*) is to be construed in its legal sense or in its natural and ordinary meaning, the appellant is a "charitable society or institution," notwithstanding its operation of the laundry and dry-cleaning plant, within the meaning of those words as used in clause (*g*). *Birtwistle Trust* v. *Minister of National Revenue* [1938] Ex. C.R. 95 at 101; affirmed by [1940] A.C. 138; In *re Douglas—Obert* v. *Barrow* 35 Ch. D 472 at 479 and 487. In the contemplation of the Legislature as expressed in the statute of incorporation the operation of the laundry business is merely incidental to the charitable purposes of the appellant and the maintenance thereof. This is not the case of an institution carrying on a commercial business and incidentally performing sundry charitable works or paying over its profits to others for charitable purposes, but of a society or institution of which all the primary purposes are purely charitable which is actively engaged on charitable works and as an incidental means of providing some of the money which is required for the prosecution of such charitable works carries on a business under its statutory powers. It is a charitable society or institution within the meaning of those words as used in clause (*g*) and it follows that all its property is exempt from taxation.

APPEAL from a decision of the Supreme Court of New Brunswick, Appeal Division, Richards C.J. and Harrison J. (Hughes J. dissenting) (1) dismissing an application by way of Certiorari by the appellant calling upon the respondent to show cause why an assessment upon the appellants' property in the Town of Sunny Brae should not be quashed.

John Carvell for the appellant. If there is no evidence that rent is *received* for the brick dwelling house, then the finding that it is must be erroneous. The only evidence

(1) (1951) 28 M.P.R. 380; 3 D.L.R. 394.

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regarding the receipt of rent by the Society for any of its property appears in the affidavits of the Town Clerk and the Chairman of the Board of Assessors; these affidavits merely depose the fact that rent is paid for the dwelling "or included in the salary or wages paid" the employees who occupy it. Since the saving of expense by paying employees by supplying them a dwelling is not the *receipt* of rent, this alternative deposition is not evidence that rent is *received*. Therefore the finding that rent is received is erroneous and this building should be exempt from taxation.

The laundry and dry-cleaning equipment, and property used in conjunction therewith, which is the property of the Society, is exempt from taxation if it is used exclusively for religious, philanthropic or educational purposes. *The Rates and Taxes Act*, s. 4(1) (*d*), which is made applicable by s. 75 of *The Towns Incorporation Act*. The finding that this property is not so used is erroneous. The property of the Society is used exclusively for religious, philanthropic or educational purposes since these are the only purposes of the Society. *In re House of the Good Shepherd of Omaha, House of the Good Shepherd of Omaha* v. *Board of Equalization of Douglas County* (1). Where the incorporating statute of the Society provides that it may carry on the business of a general laundry etc. as "incidental to", meaning *part of* its philanthropic and educational purposes, it follows that the laundry and dry-cleaning equipment and property used in conjunction therewith is exempt from taxation.

All the property of the Society is exempt, regardless of its use, if it is the property of a charitable society. *The Rates and Taxes Act* s. 4(1) (*g*), which is made applicable by s. 75 of *The Town Incorporation Act*. It is wrong at law to rule that a religious society cannot claim exemption as a charitable society—The Legislature has provided an exemption; the meaning of the words used is clear and should be given effect to. The ordinary sense of the words used leads to no absurdity, inconsistency with the rest of the instrument, or manifest injustice and does not require modification by the Judiciary. *Re Linton & Sinclair Co.*

(1) [1925] 203 No. West R. 632.

Ltd. (1); *Pemsels'* case (2). Charitable societies and religious societies do not necessarily belong to the same genus. The word "religious" may describe a society which is not a charitable society. *Cocks* v. *Manners* (3) *In re Delaney* (4). Obviously in this case where the Legislature dealt with the property of religious societies and charitable societies in separate exemptions it considered them to be distinct—As gathered from the words used, the intention of the Legislature should be construed to be the subsidization of charitable societies carrying on business. *Halifax* v. *Sisters of Charity* (5). The ruling of the Court of Appeal can only be the result of adding a clause to the Statute, "Provided that the property of a religious society shall not be deemed to be the property of a charitable society"; this is manifestly in error. Maxwell on the Interpretation of Statutes, 9 Ed. p. 14-18.

The appellant is a charitable society since its object is the advancement of education, except in so far as this is tempered with the purpose of relieving poverty and advancing religion. All of these purposes are recognized by the law as charitable, according to the standard set by Lord Macnaghton in *Pemsels'* case, and since it does its work with philanthropic principles, not for the purpose of making a profit. *Re the Township of King and the Marylake Industrial School and Farm Settlement Association* (6). Therefore all the property of the appellant is exempt from taxation.

J. A. Creaghan K.C. for the respondent. Taxation is an act of Sovereignty to be performed as far as conscientiously can be with justice and equity to all and exemptions, no matter how meritorious, are of grace and must be construed strictly. In *Ruthenian Catholic Mission* v. *Mundare School District* (7), Iddington J. at p. 625 said: "An exemption from taxation should never be carried further than what is beyond doubt the clearly expressed intention of the legislature * * * *"

It is a general rule that while a taxing Act is to be construed strictly in favour of the taxpayer, a statute under which an exemption is claimed from a burden imposed

(1) [1937] 1 D.L.R. 137.
(2) [1891] A.C. 534.
(3) (1871) L.R. 12 Eq. 574.
(4) [1902] 2 Ch. 642.
(5) (1904) 40 N.S.R. 481.
(6) [1939] 1 D.L.R. 263.
(7) [1924] S.C.R. 625.

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upon the community at large is also to be narrowly construed against the claim for exemption. To claim exemption under s. 4(1) (*d*) the property must be used exclusively for religious, philanthropic or educational purposes. *Les Commissionaires etc. St. Gabriel* v. *Les Soeurs de la Congregation de Notre Dame de Montréal* (1); Evangelical *Lutheran Synod* v. *Edmonton* (2); *L'Association Catholique etc.* v. *Chicoutimi* (3); *C.N.R.* v. *Capreol* (4).

Section 4(1) (*d*) expressly excludes real estate in respect of which rent is received.

The appellant does not come within the provisions of s. 4(1) (*g*). Richards C.J. "There is no question as to the nature and purposes of the Society in question. It clearly comes within s. 4(1) (*d*) as a religious, philanthropic and educational institution rather than under s. 4(1) (*g*) as merely a literary or charitable society." (5) Harrison J. "The society is, as stated by the Mother Superior, a religious organization, that is to say its purposes are conducive to the advancement of religion." (5). *In re White* (6); *Re Ward* v. *Ward* (7).

"As a religious organization the exemption of the property of this Society is governed by s. 4(1) (*d*). No doubt all religious organizations are classified as charitable under the legal definition of charity, but this class of charitable organization is specifically dealt with in the exemption clauses of *The Rates and Taxes Act,* and therefore this religious organization cannot claim exemption under the general description of charitable society found in clause 4(1) (*g*)."

It is submitted these findings are correct. The same property could not be included in both clauses as the exemptions are different. Hughes J. in his dissenting judgment was at variance with the rules of construction he adopted in *R.* v. *Mullin* (8) and the cases cited by him at p. 308. It is submitted the interpretation there given was the proper one. See also *Pemsel's case* (9) per Lord Halsbury at 551: "The fact however, remains, that in various statutes the word charitable is distinguished by the Legislature from 'public', 'educational', 'religious', and in no

(1) (1886) 12 S.C.R. 45 at 54.
(2) [1934] S.C.R. 280 at 284.
(3) [1940] S.C.R. 511.
(4) [1925] S.C.R. 499 at 502.
(5) 28 M.P.R. 380.
(6) [1893] 2 Ch. 41.
(7) [1941] Ch. 308.
(8) (1946) 19 M.P.R. 298.
(9) [1891] A.C. 531.

one instance that I have been able to find, do the words run 'or other charitable purpose', which one would think would be the natural mode of the meaning now insisted on." In *Adamson* v. *Melbourne & Metropolitan Board of Works* (1) Anglin C.J. in delivering judgment gave a restricted interpretation of the words "charitable institutions."

The judgment of the Chief Justice, Kerwin and Cartwright, JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Supreme Court of New Brunswick, Appeal Division, discharging a rule nisi to quash the assessment made by the assessors of the Town of Sunny Brae against certain property of the appellant.

The appellant was incorporated by special act of the Province of New Brunswick being c. 94 of the Statutes of 1945.

The preamble to this Act reads as follows:—

WHEREAS the Religious Ladies established at Moncton and known as Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur, whose members aim at devoting themselves to the care and reformation of female penitents and the providing of a home for orphan children, have by their petition prayed that the institution may be incorporated in order that they may better accomplish the objects for which it was formed;

Section 1 incorporates three sisters who are named "and all members of 'Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur' and other religious forming the Council of the said Community their associates and successors" under the name of the appellant "with all the general powers and privileges incident to corporations."

Sections 2 and 3 read as follows:—

2. The Corporation shall have power to conduct, control and maintain an educational institution for the support, care and reformation of female penitents and for the care and education of girls generally; an hospital and dispensary for the sick; an asylum for orphan children and a home for the aged and infirm and such other persons who may desire to reside in any establishment of the Corporation according to the rules and by-laws of the Corporation.

3. The Corporation shall have perpetual succession, a common seal and may sue and be sued; may purchase, receive or otherwise acquire lands or buildings in the Province of New Brunswick, may erect on such

(1) (1929) 98 L.J. (P.C.) 20.

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land acquired, as aforesaid, or any of them an educational institution, an hospital, an asylum, a home and any other necessary buildings and works and may use, convert, adapt and maintain all or any of such land, buildings and premises to and for the purposes aforesaid, and incidental thereto for the maintenance of the said institution, hospital, dispensary, asylum and home, may carry on the business of a steam and general laundry and of tailors and makers of dresses and wearing apparels of all kinds, with their usual and necessary adjuncts and generally may enjoy real and personal estate and may mortgage, lease, convey or sell or otherwise dispose of such real and personal estate for the furtherance of the objects of the Corporation.

There appears to be no dispute as to the relevant facts which are set out in affidavits made by the Superior of the appellant and the Town Clerk of the respondent respectively.

The following paragraphs from the affidavit of the Superior are relevant:—

That the said Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur is a Society devoted exclusively to the furtherance of the education of girls generally, and especially to the education and reformation of female penitents and the furtherance of the education and care of orphan female children.

That the said Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur is a religious Society whose members have taken vows of poverty and receive no wages for their services in teaching and caring for the said girls, and any revenue of the said Society has not been distributed as profits or dividends but is retained and expended exclusively for the furtherance of the purposes of the Society.

That the said object of furthering the general education of girls is realized by the provision of a general Christian education to 82 boarding pupils and orphans; and that 35 female penitents are surrounded with virtuous influence and taught the habits of industry, so that they may become useful members of society and fitted to earn a living.

That girls are accepted in our institution regardless of their race, religion, creed or any other consideration.

The following paragraphs from the affidavit of the Town Clerk are also relevant:—

That Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur, commonly known as the "Home of the Good Shepherd" is the owner of a large tract of land situate in the said Town of Sunny Brae, on which is constructed a large building in which it carries on a school for the education and reformation of girls, and a home for female orphan children. The said Home of the Good Shepherd carries on in the said building a very extensive public laundry and dry-cleaning business serving customers in the said Town of Sunny Brae, the City of Moncton, N.B., and generally throughout the surrounding districts. For the purpose of the said laundry and dry-cleaning business it owns and operates two motor trucks for picking up and delivering clothing and other articles

to be laundered and/or dry-cleaned for reward. It is a very keen competitor with other laundry and dry-cleaning establishments in the area served.

That in addition to the main building used for general purposes of the Home, and in part of which the said laundry and dry-cleaning business is carried on, the Home of the Good Shepherd is the owner of a new two family brick dwelling occupied by two male employees and for which rent is paid or included in the salary or wages paid such employees.

The respondent did not assess the lands or the main building of the appellant, but did assess "the laundry and dry-cleaning equipment" as personal property at the sum of $40,000, the trucks at $2,200 and the two-family dwelling house at $8,000, making a total assessment of $50,200. It is the legality of this assessment which is in issue, and the decision of the appeal turns upon the proper construction of section 4 of *The Rates and Taxes Act,* R.S.N.B. (1927) c. 190, which by section 75 of *The Towns Incorporation Act,* R.S.N.B. 1927, c. 179, is made applicable to assessments for town purposes.

Counsel for the appellant concedes that the relevant statutory provisions give the respondent authority to make the assessment in question unless the property assessed is exempt from taxation under the provisions of clauses (*d*) and (*g*) of 4(1) of *The Rates and Taxes Act* which read as follows:—

> 4. (1) The following property shall be exempt from taxation:—
>
> (*d*) Every building of a religious organization used exclusively as a place of worship, or used for the religious, philanthropic or educational work of such organization, with its site and ground surrounding the same upon which no other building is erected, but this exemption shall not include real estate in respect of which rent is received by such organization; also the personal property and income of such organization, used exclusively for religious, philanthropic or educational purposes;
>
> (*g*) The property of any literary or charitable society or institution.

Counsel for the appellant, while conceding the well settled rule that clear words are necessary to give immunity from liability to taxation imposed upon the community at large since every exemption throws an additional burden on the rest of the community, argues that the appellant is a charitable society or institution and that under clause (*g*), quoted above, all its property is exempt from taxation.

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Counsel for the respondent submits that the fact of the appellant carrying on the laundry and dry-cleaning business, mentioned above, prevents it being regarded as a charitable society or institution within the meaning of clause (*g*). Alternatively he submits that even if the appellant would *prima facie* fall within the wording of clause (*g*) it does not do so as it is a religious organization and religious organizations being specially dealt with in clause (*d*) must be deemed to be excluded from clause (*g*).

Neither counsel suggested that there is any statutory definition in New Brunswick of the words "charitable society or institution." In *Commissioner's for Special Purposes of Income Tax* v. *Pemsel* (1) at page 580, Lord Macnaghten says:—

> In construing Acts of Parliament, it is a general rule, not without authority in this House (*Stephenson* v. *Higginson* (2)), that words must be taken in their legal sense unless a contrary intention appears.
>
> * * *
>
> That according to the law of England a technical meaning is attached to the word "charity" and to the word "charitable" in such expressions as "charitable uses", "charitable trusts", or "charitable purposes", cannot, I think, be denied.

Whether the word "charitable" as used in clause (*g*) is to be construed in its legal sense or in its natural and ordinary meaning, it is, I think, beyond question that the appellant is a "charitable society or institution" unless its operation of the laundry and dry-cleaning plant has the effect of excluding it from such class.

A sufficient definition of a charitable institution is to be found in the judgment of Maclean J. in *Peter Birtwistle Trust* v. *Minister of National Revenue* (3).

> A charitable institution is, I think, an organization created for the promotion of some public object of a charitable nature, and functioning as such.

This judgment was reversed, Kerwin J. dissenting, in [1939] S.C.R. 125, and restored *sub nom Minister of National Revenue* v. *Trusts and Guarantee Co.* (4), but there is nothing said in any of the judgments to throw doubt on the accuracy of the definition quoted. A helpful discussion of what is a charitable institution is to be found in *In re*

(1) [1891] A.C. 531.
(2) 3 H.L.C. at p. 686.
(3) [1938] Ex. C.R. 95 at 101.
(4) [1940] A.C. 138.

Douglas. Obert v. *Barrow* (1) where Kay J. at first instance (at page 479) and Lindley L.J. in the Court of Appeal (at page 487) held that the *Home for Lost Dogs* was a charitable institution and neither Cotton L.J. nor Bowen L.J., the other members of the Court of Appeal, said anything to suggest the contrary.

I have reached the conclusion that notwithstanding the operation of the laundry and dry-cleaning business the appellant remains a charitable institution within clause (*g*). The Act of Incorporation and the material filed make it clear that the primary purposes and objects of the appellant are purely charitable. It will be observed that in s. 3 of such Act, after the enumeration of certain purposes, all charitable, it is provided that "incidental thereto for the maintenance of the said institution, hospital, dispensary, asylum and home" the appellant may carry on the business of a laundry. In the contemplation of the legislature as expressed in the Statute and in fact as shewn by the material filed, the operation of the laundry business, large though it be, is merely incidental to the charitable purposes of the appellant and for the maintenance thereof. This is not the case of an institution carrying on a commercial business and incidentally performing sundry charitable works or paying over its profits to be used by others for charitable purposes but rather that of a society or institution of which all the primary purposes are purely charitable which is actively engaged in carrying on charitable works and which as an incidental means of providing some of the money which is required for the prosecution of such charitable works carries on a business under statutory powers.

For the above reasons, I am of opinion that the appellant is a charitable society or institution within the meaning of those words as used in clause (*g*) and it follows that all its property is exempt from taxation for under this clause it is the character of the owner of property rather than the use to which such property is put that determines whether it is liable to assessment.

I have not over-looked the second argument of counsel for the respondent, that the appellant, being a religious organization, must find any exemption to which it is

(1) (1887) 35 Ch. D. 472.

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entitled in clause (*d*) and must be held to be excluded from the operation of clause (*g*). There is no doubt that the appellant is a religious organization but the construction contended for by counsel for the respondent would bring about the result that all the property of a society or institution whose objects were solely charitable would be exempt from taxation if such society were purely secular, or indeed if it were avowedly atheistic, but that a society with identical objects composed of members of a religious order would have only a limited exemption. It seems to me that clear and unambiguous words would be required to achieve such a result.

I can find nothing in the wording of the Statute and I know of no rule of construction which requires us to hold that the thirteen clauses contained in section 4(1) of *The Rates and Taxes Act* are necessarily mutually exclusive. There is no incompatibility between religion and charity but, in law, a society may be religious without being charitable, see for example *Cocks* v. *Manners* (1), or charitable without being religious, for example the *Home for Lost Dogs* referred to in *In re Douglas. Obert* v. *Barrow* (*supra*). If, as must often happen, a society is both a religious organization and a charitable institution I see no reason why it should not be entitled to the exemption afforded by clause (*g*) to a charitable institution. I find nothing in the record to indicate that any of the objects or purposes of the appellant society are religious without being charitable.

For the above reasons, I am of opinion that the appeal should be allowed, the rule *nisi* made absolute and the assessment quashed. The appellant is entitled to its costs in this court and in the Appeal Division of the Supreme Court of New Brunswick.

The judgment of Rand and Locke, JJ. was delivered by:

RAND J.:—The society or institution appealing to this Court is a body corporate by the name "Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur." The incorporation was by special act of the legislature of New Brunswick in 1945. The objects are, to conduct, control and maintain an educational institution for support,

(1) (1871) L.R. 12 Eq. 574.

care, and reformation of female penitents and for the care and education of girls generally; a hospital and dispensary for the sick; an asylum for orphan children and a home for the aged and infirm and such other persons as may desire to reside in an establishment of the society; and as incidental to these purposes and for the maintenance of the institution, power was given to carry on the businesses of a steam and general laundry and of tailors and makers of dresses and wearing apparel of all kinds, with their usual adjuncts.

The corporation has its seat near the city of Moncton and as part of its activities it conducts a general laundry business. Those engaged in the laundry include inmates as well as outside employees, and the business is in public competition with other laundries. Under *The Rates and Taxes Act* of the Province, it has been assessed on the building with its land occupied by two drivers of laundry trucks and the personal property, largely machinery, including the trucks, used in the business, in the sum of $52,200.

Exemption from taxation is claimed under paragraphs (*d*) and (*g*) of section 4 of the statute which are as follows:

> (*d*) Every building of a religious organization used exclusively as a place of worship, or used for the religious, philanthropic or educational work of such organization, with its site and ground surrounding the same upon which no other building is erected, but this exemption shall not include real estate in respect of which rent is received by such organization; also the personal property and income of such organization, used exclusively for religious, philanthropic or educational purposes;"
>
> (*g*) The property of any literary or charitable society or institution;

In the petition for certiorari and in the affidavit of Antoinette des Coteaux, the Superior, the organization is described as a religious society whose members have taken vows of poverty and receive no wages for their services in teaching and caring for the girls, and it is stated that the income is expended exclusively for the furtherance of the purposes of the society. About 60 per cent of those attending the general education classes pay a tuition fee of $20 a month, but the fee is said not to be a condition of admission to or continuance in the institution. Of the female penitents in what is known as the "School of Protection"

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only four pay the fee and eighteen are accommodated free, except for whatever revenue may be derived from their labour.

The question in controversy involves the characterization given to the corporation and its activities. A charity or charitable society is, I should say, one whose purposes are those described in the preamble to the statute 43 Eliz. c. 4 or purposes analogous to them. They can be classified generally, as for the advancement of religion, for the relief of poverty, for the promotion of education, and for other purposes bearing a public interest: and the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare.

A religious society may or may not be charitable. In *In re White* (1), it was held that a bequest "to a religious society", without more, meant, prima facie, for religious purposes and so charitable. In *Cocks* v. *Manners* (2), a religious institution consisting of a voluntary association of women whose purpose was "the working out of their own salvation by religious exercises and self-denial" was held not to be charitable. In *Townsend* v. *Carus* (3), in which a legacy was left on trust for the benefit of societies, subscriptions or purposes "having regard to the glory of God, in the spiritual welfare of his creatures", for which a scheme had to be devised, was construed by Wigram V-C. to be a gift for religious purposes and to be restricted to such purposes. In the course of dealing with the argument that ways of expending the property might be suggested which might be conducive to spiritual welfare, but which separately taken would not in themselves be charitable, he observed:—

> It appears to me sufficient to say that if, as I think the case is, the end proposed by the testatrix is charitable, no expenditure can be lawful which is not directly conducive to that end; and the end itself cannot lose its charitable character only because parts of the machinery admissible for its accomplishment are not in themselves abstractedly considered charitable. Writing, for example, is not grammar; but if grammar cannot be so well learned without first learning to write, that may be taught in a pure grammar school, as a step to the learning which is its proper object.

(1) (1893) 2 Ch. 41. (2) L.R. 12 Eq. 574.
(3) 67 E.R. 378.

Lindley L.J. in *In re White, supra,* paraphrases this language thus:—

> Having come to the conclusion that the object of the testator was charitable because it was religious, he says that no mode of carrying out his intention could be proper if that mode was not itself charitable.

This artificial signification, unless the context modifies it, is to be attributed to either "charitable" or "charity" when it appears in a statute: *Commissioners* v. *Pemsel* (1); and the former as used in paragraph (*g*) is to be so interpreted.

As long ago as 1675, in the case of *Webb* v. *Batchelet* (2), specifically holding them chargeable to repairs of highways, the Court declared parsons chargeable with all public duties; and that this is the settled view appears from Phillimore's Ecclesiastical Law, 2nd Ed., Vol. I, p. 477. Taxes, then, are the rule against all, and he who claims an exemption must show that he comes within the language delineating it. It must be shown, as Duff J., later Chief Justice, said, speaking for the Judicial Committee in *Montreal* v. *College of Sainte Marie* (3), "that the privilege invoked has unquestionably been created."

General tax legislation in New Brunswick began at the inception of the province. C. 42 of the consolidated statutes of 1836, providing for county rates, was enacted in 1786 and directs the assessors to "apportion the quota of the said sum or sums of money so to be levied upon the respective towns or parishes, to be paid by the several and respective inhabitants of the said towns or parishes as they in their discretion shall think just and reasonable." In 1875, in a re-cast of the Rates Act of 1853, exemptions pertinent to the question before us first appeared and they were in the form of paragraph (*g*). Previous to this, legislation applying to Saint John and Fredericton had provided for Church and other privileges but they were not uniform. Clause (*d*), on the other hand, was first enacted in 1924.

Mr. Carvell argues that the use of the property is within clause (*d*) by reason of the fact that the entire net income from the business is to be applied to purposes mentioned

(1) [1891] A.C. 531 at 580. (2) 89 E.R. 294.
(3) [1921] 1 A.C. 288 at 291.

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in the paragraph. But the uses contemplated are immediate and actual "religious, philanthropic or educational" activities, not those of ordinary business, whatever the ultimate destination of its revenues. Lands yielding rents have long been used as a form of charitable endowment, but they are excluded from the exemption, which implies, *a fortiori,* that business use is excluded.

Although the benefit to the truck drivers in the occupation of the two houses has not been reduced to a specific sum, it represents a business remuneration: and whether looked upon in the aspect of rent or the nature of the use, it is excluded from the paragraph.

The language of use for the personal property is at least as restrictive as that for the lands; if the word "exclusively" in the first clause is not to be carried forward to the use of all buildings and lands, it is more so; and the use of personal property for business purposes would likewise be excluded. The separate treatment of personal property and income from that of lands results from the fact that several features of the former had to be specially dealt with, and to have combined the language dealing with both of them would have produced an involved and cumbersome locution.

He then appeals to paragraph (*g*). The word "charitable" here connotes solely purposes, works and modes of action of the character described: a society that could, for instance, for all of its objects, receive charitable bequests with their peculiar privileges such as perpetual endowment. The illustration by Wigram V-C. quoted indicates that the carrying on of a business as part of a society's functions would rule it out of that category. Charity is essentially voluntary good works and voluntary donations the accepted means of obtaining the material resources necessary to them, both of which are incompatible with the means here.

If paragraph (*g*) is to be taken to include all societies and institutions having charity as the ultimate destination of their funds by whatever means raised, then clearly a religious society with solely charitable objects and powers would lie within it. At the same time it would be embraced within paragraph (*d*) since "religious, philanthropic and educational" works include all matters of charity and, as

well, some matters of benevolence beyond them. For such an organization, then, what could have been the purpose of introducing paragraph (*d*)? I should find it difficult to imagine any reasonable or practical purpose except to codify and clarify the position of religious societies, and to enlarge the scope of the exempting uses of their property. But whether to enlarge or restrain, the entire class is clearly intended to be withdrawn from (*g*).

If this is not so, a religious society with mixed charitable and business objects, or a non-religious organization, both having ultimate charitable purposes, would remain exempt as to all its property under (*g*), which would mean virtually that the further a society was from a true charity, the broader its exemption. Such an anomaly could not be attributed to the intention of the legislature. What (*g*) envisages are charitable and literary societies and institutions strictly so-called, with neither objects nor powers nor works outside of those descriptions. That the Companies Act should provide as it does in s. 17(2) (*f*) that

> The Company shall not carry on any business or trade for the profit of its members,

the last six words of which were added in 1944, adds nothing to the argument: whatever its effect may be, it is irrelevant to the meaning of the clause I am considering.

A similar exemption of "the property of a literary or scientific institution", in the Income Tax Act of 1842, language which seems to be the prototype of that of clause (*g*) here, was dealt with in *Manchester* v. *McAdam* (1), by the Court of Appeal and, on appeal, by the House of Lords (2). The city of Manchester had set aside certain buildings for a public library administered by a special Board; its purposes were unquestionably literary, and exemption was claimed for it as a "literary institution". The only doubt arose from the fact that it was maintained by rates. The Court of Appeal, Lindley and Rigby L.JJ., with Brett L.J. dissenting, held that it was not within the exemption because of its support by taxes, that what the statute designed was to encourage gifts of land to such institutions, supported in their activities likewise by other gifts or subscriptions, all for the ultimate benefit to the public. The House of Lords took another view; but Lord

(1) [1895] 1 Q.B. 673. (2) [1896] A.C. 500.

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Halsbury L.C., dissenting, speaks of the rate "distinguishing it from the voluntary character of a literary and scientific institution such as existed in 1842". In the opinion of the majority, an institution was to be conceived as an objective establishment for the purpose designated, which the library was, and its support by taxes was not a disqualifying factor. But the fact of such a difference of opinion hinging on such an element satisfies me that had the corporation, for instance, carried on a general printing business as auxiliary to its library administration, though with the net revenue devoted exclusively to the purposes of the library, its exemption could not have been seriously argued. The same principle was applied in *In re Badger,* (1) in which an incorporated body under the Literary and Scientific Institution Act, was held incapable of borrowing money for the purposes of a recreation adjunct.

What is here, then, is not a "charitable society or institution"; it is a society of mixed objects and works or activities, some of which are charitable and some not; and it is not such a society as the legislature had in mind when, in 1875, it first decided to provide so comprehensive an exemption as that of all the property of such owners.

We have today many huge foundations yielding revenues applied solely to charitable purposes; they may consist, as in one case, of a newspaper business; even if these foundations themselves carried on their charitable ministrations, to characterize them as charitable institutions merely because of the ultimate destination of the net revenues, would be to distort the meaning of familiar language; and to make that ultimate application the sole test of their charitable quality would introduce into the law conceptions that might have disruptive implications upon basic principles not only of taxation but of economic and constitutional relations generally. If that is to be done, it must be by the legislature. Concessions to taxation of income or property, as in the Income Tax Act of Great Britain, may expressly provide for meeting the modern development of mixed charitable and business objects as we have them here: but that was remote from what the legislature had in mind in 1875.

(1) [1905] 1 Ch. 568.

As the works and activities of the society, then, are not solely of a charitable nature, it is not within paragraph (*g*); but whether there originally or not, as a religious society, it must find exemption for its property in paragraph (*d*) which, for the reasons given, it cannot do. The appeal must, therefore, be dismissed with costs.

KELLOCK J.:—The error which the appellant alleges to exist in the decision of the Appellate Division is thus set out in its factum:

(*a*) The finding that rent is received for the brick dwelling house.

(*b*) The finding that the laundry and drycleaning equipment, and property used in conjunction therewith, is not used exclusively for the religious, philanthropic or educational work of the Society and is therefore not exempt from taxation.

(*c*) The ruling that exemption from taxation cannot be claimed in respect of the property of Les Dames Religieuses de Notre Dame de Charité du Bon Pasteur under section 4(1) (*g*) of the Rates and Taxes Act, and that the said property is not exempt from taxation thereunder.

I do not find it necessary to deal with the first contention.

The appellant's second contention, based on the provisions of s. 4 (1) (*d*) of the relevant statute, is that it is authorized by its incorporating statute to carry on the laundry and dry-cleaning business as "incidental" to its philanthropic and educational purposes, and therefore, as any profits received by the appellant from the carrying on of the business are devoted to its charitable purposes, the property used in carrying on such business is as much used for its philanthropic and educational purposes as its other property.

The appellant further contends that even if it fails in its second contention on the basis of use, it may have resort for exemption to the provisions of para. (*g*) as a "charitable society or institution," in which case mere ownership is sufficient.

The relevant portions of the statute are as follows:

4. (1) The following property shall be exempt from taxation:

(*d*) Every building of a religious organization used exclusively as a place of worship, or used for the religious, philanthropic or educational work of such organization, with its site and ground surrounding the same upon which no other building is erected, but this exemption shall not include real estate in respect of

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which rent is received by such organization; also the personal property and income of such organization, used exclusively for religious, philanthropic or educational purposes;

(*g*) The property of any literary or charitable society or institution.

With the contention that the use of the property real and personal here in question is brought within the terms of para. (*d*), I find it impossible to agree. That the business is being carried on as "incidental" to the charitable work of the appellant does not alter the fact that the use of the property is for business purposes, and it is immaterial that the appellant, after receipt of the profits from the business, devotes such profits to the support of its actual charitable work.

Coman v. *Governors of the Rotunda Hospital* (1), is in point. The hospital, unquestionably a charity in the strict sense, had certain rooms not used by it for hospital purposes but let out by it for hire for entertainments, concerts and cinema shows. By 5 and 6 Vict. c. 35, s. 60, duties under Schedule "A" of the statute were assessable upon the annual value of premises, but by s. 61 an exception from such duties was provided in the case of "any hospital * * * in respect of the public buildings, offices and premises belonging to such hospital" and upon "the rents and profits of lands, tenements, hereditaments and heritages belonging to such hospital * * * so far as the same are applied to charitable purposes." This statute was extended to Ireland by 16 and 17 Vict. c. 34, s. 3.

By the Valuation (Ireland) Act, 1852, s. 2, the valuing authority was directed "to distinguish all hereditaments and tenements, or portions of the same * * * used for charitable purposes * * * and all such hereditaments or tenements, or portions of the same, so distinguished, shall, so long as they continue to be * * * used for the purposes aforesaid, be deemed exempt from all assessment." Until 1915 the rooms in question had been scheduled as exempt in the Valuation List, and accordingly were not assessed for rating or Schedule "A" purposes. The Crown now sought to tax the profits arising from the hiring out of the rooms under Schedule "D", as being profits from a trade.

On behalf of the hospital it was contended that all profits derived from the lettings of the rooms were applied to the general support of the hospital and that the moneys

(1) [1921] 1 A.C. 1.

so received were rents and profits of tenements belonging to a hospital within s. 61, and that these moneys, so far as they were applied to charitable purposes, were exempt. They contended that they were a single statutory corporation constituting an indivisible charitable trust, and that they were not carrying on a trade or anything in the nature of a trade.

It is clear that, apart from the question as to carrying on a trade, the use of the premises by the respondents for purely hospital purposes would have entitled them to exemption from tax in respect of the annual value of the premises, but it was held that they were carrying on a trade and in so doing went beyond the bounds of the exemption to which they were entitled under Schedule "A". In the course of his judgment, the Earl of Birkenhead L.C. said at p. 14:

> When the facts set out in the case stated and the documents annexed to it are considered as a whole, it becomes plain that the respondents, with the laudable object of raising an income for the support of their charitable activities, have engaged in what can only be described as a business or a concern in the nature of a business, and thereby have earned annual profits which are outside the scope of Schedule A.

In that case and in later cases in the House of Lords, the decision of the Court of Session in *Religious Tract and Book Society* v. *Forbes* (1), was approved.

In the last mentioned case, the object of the plaintiff society, according to its constitution, was "by the circulation of religious tracts and books to diffuse a pure and religious literature among all classes of the community." The constitution went on to provide that "this object shall be carried out by the establishment of central and branch depositories and of auxiliary societies and by means of colportage and other agencies." The society operated two "depositories" or book stores, one at Edinburgh and the other at Belfast, and in addition, carried on the colportage agencies. The sales of all three were of the same goods at the same prices, there being only one stock out of which all its salesmen were supplied. The profits made by the stores were applied to the carrying on of the colportage, a purely charitable activity, which could not be carried on by itself at a profit but required the further aid of

(1) 3 T.C. 415.

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public subscriptions. The Lord President, later Lord Roberston, at p. 418 put the matter thus:

> * * * it may be conceded to the Appellants that the object of their Society is not that of making profit, but the diffusion of religious literature among all classes of the community. But incidental to that large and beneficial purpose they engage in trade * * * It appears that the colportage agency could not be carried on at a profit as a commercial undertaking, and is persevered in merely because the Society find that by appealing to the religious public they are able to obtain subscriptions which enable them to fill up the deficit. When we turn to the methods of the colportage, it appears that they are not commercial methods, that is to say, that the business carried on is not purely that of pushing the sale of their goods, but that on the contrary the duty of the salesman is to dwell over the purchase and make it the occasion of administering religious advice and counsel. Now, under these conditions it seems to me impossible to hold that this is a business, trade, or adventure, which is unfortunately resulting in loss. It is really a charitable mission in which the sale of the Scriptures is made the occasion for doing something more than merely effect the sale of books. And accordingly, while I completely assent to the view that the establishment and conduct of the shops and the establishment and conduct of the colportage all rest upon the same ultimate motive, yet at the same time the two operations seem to be essentially distinguished. The shops are simply book-seller's shops—the other is a combination of the sale of books with a missionary enterprise * * *

At p. 419 Lord Adam said:

> Now, I agree with your Lordship that if a party takes to selling books it does not matter to the Crown what his object is in doing so, whether it is to put profit into his own pocket, or, having made profit, to expend that in charity or donation.

In my opinion, it is too clear for argument that the "use" referred to in para. (d) of the statute in the case at bar, is the actual use to which the property is put, and not the object to which the profits from the business which may be carried on, on the property, after their receipt by the proprietor of the business, may be devoted. Accordingly, I think the judgment below is right in holding that the appellant in respect of the real and personal property here in question does not come within the exempting provisions of para. (d).

The further contention of the appellant that, although as a "religious organization" it is not entitled to exemption under para. (*d*), it may nonetheless claim exemption as a "charitable society or institution" under para. (*g*), requires examination. If sound, it would involve anomalous consequences.

For example, a religious organization, which is a charity in the strict sense, owning productive real property which it does not use but lets to tenants, while denied exemption therefor by the express terms of para. (*d*), would nevertheless, on the basis of this argument, be entitled to exemption in respect of the very same property under para. (*g*). Again, real or personal property, lying idle and not used, would be taxable on the basis of para. (*d*) but exempt under para. (*g*).

All religious organizations are not, of course, charitable organizations; *vide Cocks* v. *Manners* (1). The property of such organizations, therefore, to be entitled to exemption, would have to be brought within clause (*d*). I have no doubt that the great bulk of the religious organizations in the Province of New Brunswick at the time of the enactment for the first time of para. (*d*) in 1924, were charitable institutions within the strict sense of those words. It would seem to be a rather remarkable intention to be attributed to the legislature in the enactment of clause (*d*) that the great majority of religious organizations should be entitled to claim exemption for their real and personal property under the provisions of the new legislation if the use of such property brought it therein, and at the same time that their previously existing exemption to which they were already entitled on the mere basis of ownership should also be preserved to them. In my opinion, the construction of a statute which produces such anomalies is contrary to well settled canons of construction.

A statute is to be construed, if at all possible, "so that there may be no repugnancy or inconsistency between its portions or members;" *City of Victoria* v. *Bishop of Vancouver Island* (2), per Lord Atkinson, at p. 388. The principle applicable is, in my opinion, that stated at p. 176 of the 9th Edition of Maxwell, as follows:

> Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one.

(1) L.R. 12 Eq. 574.

(2) [1921] 2 A.C. 384.

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Among the authorities referred to in the judgment of Sir George Jessel M.R. in *Taylor* v. *Oldham* (1). At p. 410 the learned Master of the Rolls said:

* * * but I think in all these Acts of Parliament, the first thing you have to consider is, that where you have general provisions, whether contained in the same Act or in another Act of Parliament, and where you have special provisions as to a particular property in the ownership of one individual, you must read the special provisions as excepted out of the general.

The statute there under consideration was a private statute, but there is no difference in the application of the principle in the case of a public Act. Clause (*g*) of the section here in question is a general provision including all charitable institutions, and, in order to make the statute consistent with itself, clause (*d*) is to be regarded as an exception out of (*g*). The fact that (*d*) includes religious organizations not charitable, does not affect the principle to be applied.

In *C.N.R.* v. *Capreol* (2), the statute under construction was the Ontario Assessment Act, R.S.O. 1914, c. 195, by s. 5 of which all real property in Ontario was made liable to taxation "subject to the following exemptions:

2. Every place of worship and land used in connection therewith and every churchyard, cemetery or burying ground.

3. The buildings and grounds of and attached to or otherwise bona fide used in connection with and for the purposes of a university, high school, public or separate school, whether vested in a trustee or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, but not if otherwise occupied.

4. The buildings and grounds of, and attached to, or otherwise bona fide used in connection with and for the purposes of a seminary of learning maintained for philanthropic, religious, or educational purposes, the whole profits from which are devoted or applied to such purposes only, but such grounds and buildings shall be exempt only while actually used and occupied by such seminary.

5. Every city or town hall, and every court house, gaol, lock-up and public hospital receiving aid under The Hospitals and Charitable Institutions Act, with the land attached thereto but not land of a public hospital when occupied by any person as tenant or lessee.

9. Every industrial farm, house of industry, house of refuge, orphan asylum, and every boys' or girls' or infants' home or other charitable institution conducted on philanthropic principles and not for the purpose of profit or gain, and every house belonging to a company for the reformation of offenders, and the land belonging to or connected with the same; but not when occupied by a tenant or lessee.

(1) (1876) 4 Ch. D. 395. (2) [1925] S.C.R. 499.

10. The property of any children's aid society incorporated under the Children's Protection Act of Ontario, whether held in the name of the society or in the name of a trustee or otherwise, if used exclusively for the purposes of and in connection with the society.

12. The property of every public library and other public institution, literary or scientific, and of every agricultural or horticultural society or association, to the extent of the actual occupation of such property for the purposes of the institution or society.

13. The land of every company formed for the erection of exhibition buildings to the extent to which the council of the municipality in which such land is situate consents that it shall be exempt.

The question for decision was as to whether or not certain land owned by the railway and a building thereon containing numerous bedrooms, a reading room and other rooms and facilities for lodgings, entertainment and recreation, all operated by the Young Men's Christian Association under the terms of an agreement with the railway calling for payment of a nominal rent to the latter, was exempt under sub-s. 9 above. This was decided adversely to the appellant. In the course of delivering the judgment of the court, Anglin C.J.C. said at p. 502:

> The claim of the appellant was that the Railway Y.M.C.A. at Capreol is
>
> "a charitable institution conducted on philanthropic principles and not for the purpose of profit or gain,"
>
> and that it is, therefore, entitled to the exemption claimed
>
> But it seems obvious that every charitable institution so conducted does not fall within s.s. 9 of s. 5. Special exemptions of undertakings of a charitable nature conducted on philanthropic principles and not for the purposes of profit and gain are to be found in s.s. 2, 3, 4, 5, 10, 12 and 13. It seems reasonably certain, therefore, that the words
>
> "charitable institutions conducted on philanthropic principles and not for the purpose of profit or gain,"
>
> are not used in ss. 9 in their most comprehensive sense.

The learned Chief Justice went on to hold that the sense in which the words, "charitable institutions conducted on philanthropic principles and not for the purpose of profit or gain," were used in clause 9, was *ejusdem generis* with the other institutions mentioned in that clause, but it was "obvious" to the court that the general category of charitable institution mentioned in clause 9 did not include the particular charitable institutions described in the other sub-sections. The particular was to be considered as excepted out of the general provision.

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There is an additional reason, however, why, in my opinion, the appellant, as a religious organization, must find its exemption, if any, in the terms of para. (*d*) exclusively.

As already pointed out, the word "charitable," as used in para. (*g*), is not used in its popular but in its technical sense; *Chesterman* v. *Federal Commissioner of Taxation* (1), 128; *Adamson* v. *Melbourne* (2). A religious society may or may not be a charitable society in this sense, and upon any question arising, the court will inquire into the purposes of the society.

In *Morice* v. *Bishop of Durham* (3), Sir William Grant M.R. formulated the test as follows at p. 406:

> The question is, not, whether he (the testator) may not apply it upon purposes strictly charitable, but whether he is bound so to apply it? I am not aware of any case, in which the bequest has been held charitable, where the testator has not either used that word, to denote his general purpose, or specified some particular purpose, which this Court had determined to be charitable in its nature.

In the case at bar, the objects of the appellant are to conduct an educational institution for the support, care and reformation of female penitents, and for the care and education of girls generally; an hospital and dispensary for the sick; an asylum for orphan children, and a home for the aged and infirm and such other persons who may desire to reside in an establishment of the corporation according to its rules and by-laws; and "incidental" thereto, but nonetheless for the "*maintenance of the said institution*" it is given the power to carry on "the business of a steam and general laundry, and of tailors and makers of dresses and wearing apparels of all kinds with their usual and necessary adjuncts." According to the affidavit of the Town Clerk and Treasurer of the relator, the appellant does carry on in the building here in question

> a very extensive public laundry and drycleaning business serving customers in the said Town of Sunny Brae, the City of Moncton, New Brunswick, and generally throughout the surrounding districts. For the purpose of the said laundry and drycleaning business it owns and operates two motor trucks for picking up and delivering clothing and other articles to be laundered and/or drycleaned for reward. It is a very keen competitor with other laundry and drycleaning establishments in the area served.

(1) [1926] A.C. 128. (2) [1929] A.C. 142.
(3) (1804) 9 Ves. 399; 32 E.R. 947.

In *Brighton College* v. *Marriott* (1), Lord Blanesburgh said at p. 204:

> Whether in any particular case activities which may properly be described as charitable have become trading or commercial must always be a question of fact—one important consideration being whether these activities are being conducted with commercial considerations in view and on commercial principles: see *Religious Tract and Book Society of Scotland* v. *Forbes* (2).

There can be no doubt of the commercial nature of the appellant's laundry and drycleaning business, and a trust for the benefit of the appellant could not meet the test laid down by Sir William Grant.

In *Dunne* v. *Byrne* (3), in which a residuary bequest "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese," was held not to be a good charitable bequest but void, Lord Macnaghten, in delivering the judgment of the Privy Council, pointed out at p. 410 that it could hardly be disputed that a thing may be "conducive" and in particular circumstances "most conducive" to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the court attaches to the word, and indeed without being in itself in any sense religious. He went on to say:

> In the present case the learned Chief Justice suggests by way of example several modes in which the fund now in question might be employed so as to be conducive to the good of religion *though the mode of application in itself might have nothing of a religious character about it.*

What is thus referred to by Lord Macnaghten is to be found in the judgment of Griffith C.J. in 11 Commonwealth Law Reports, 637 at 645, as follows:

> Again, it seems to me that purposes may reasonably be called conducive to the good of religion although they have no such direct tendency. For instance, it might well be said that * * * *the establishment of a newspaper* conducted on religious or high moral principles * * * would be purposes conducive to the good of religion. Certainly the Archbishop might reasonably think so. I do not at present see my way to deny such a proposition. But I do not think that either purpose would be a charitable purpose.

(1) [1926] A.C. 192. (2) 3 T.C. 415.
(3) [1912] A.C. 407.

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In the case of the appellant, therefore, the carrying on of the laundry business is not a charitable purpose, and the appellant, regarded as an entirety, could not constitute the object of a valid charitable trust, and cannot, therefore, be said to be a charitable corporation.

Even a church, regarded as an entirety, inclusive of all its purposes, parochial as well as ecclesiastical, cannot constitute the object of a valid charitable trust; *Farley* v. Westminster Bank (1); *In re Jackson* (2). Where the testator does not indicate any larger purpose, a trust for the benefit of a church will be saved from invalidity by the presumption of law that the benefit is intended for ecclesiastical purposes only; *In re White* (3).

To apply the same presumption in the case of a trust for the benefit of a corporation such as the appellant would save a trust for its benefit from invalidity, but the presumption has no place under the taxing statute here in question, under which the appellant is to be taken as an entirety, and when so regarded, is not a charitable corporation.

The decision of Vice-Chancellor Wood in *Lechmere* v. *Curtler* (4), casts an interesting side-light upon the matter, which leads to the same result. In that case the testator had bequeathed a sum of money to the treasurer, for the time being, of an asylum thereafter to be instituted "for the humane and charitable purposes of that institution." An asylum was afterwards built under the compulsory provisions of an Act of Parliament. It was supported by compulsory rates, and was used entirely for the maintenance of pauper lunatics. At p. 648 the learned Vice-Chancellor said:

> Nobody questions that the maintenance of lunatics is humane and charitable, and a bequest of this nature might be useful in inducing the Justices to build an asylum. No doubt the legislature had humane and charitable purposes in view, but the building of this asylum was simply compulsory on the Justices. If I gave this £1,000 to this asylum, I should be merely relieving the rates to that extent, and I cannot say that this would be a humane and charitable application of the legacy within the meaning of the testator's will.

(1) [1939] A.C. 430.
(2) [1930] 2 Ch. 389.
(3) [1893] 2 Ch. 41.
(4) 24 L.J. Ch. 647.

In the case at bar, a trust for the benefit of the appellant corporation *simpliciter*, which it would be free to use, say, for the expansion of the laundry with the object of increasing profits, or to replace worn-out equipment, or to tide it over unprofitable periods, could not be said to be, in any sense, a charitable application of the proceeds of the trust. Accordingly, the appellant cannot be regarded as a "charitable society or institution" within the purview of the statute here in question.

I would dismiss the appeal with costs.

ESTEY, J.:—That the appellant, incorporated by an act of the Legislature of New Brunswick in 1945 (S. of N.B. 1945, c. 94), is a religious organization and, therefore, entitled to the exemptions from taxation within the meaning of s. 4(1) (*d*) of *The Rates and Taxes Act* (R.S.N.B. 1927, c. 190), is not disputed. The appellant, however, contests the imposition by the respondent of taxes upon the brick duplex dwelling, occupied by two of its laundry employees, and its personal property consisting of the laundry equipment and two trucks, by virtue of the exceptions contained in this subpara. (*d*). s. 4(1) (*d*) reads as follows:

> 4. (1) The following property shall be exempt from taxation:
>
> (*d*) Every building of a religious organization used exclusively as a place of worship, or used for the religious, philanthropic or educational work of such organization, with its site and ground surrounding the same upon which no other building is erected, but this exemption shall not include real estate in respect of which rent is received by such organization; also the personal property and income of such organization, used exclusively for religious, philanthropic or educational purposes;

The Appeal Division of the Supreme Court of New Brunswick, Mr. Justice Hughes dissenting, held that the respondent was right in taxing the brick duplex dwelling, as well as the personal property in the laundry and the two trucks.

The record discloses no controversy as to the facts. It sets out that the appellant

> is the owner of a large tract of land situate in the said Town of Sunny Brae, on which is constructed a large building in which it carries on a school for the education and reformation of girls, and a home for female orphan children. The said Home of the Good Shepherd carries on in the said building a very extensive public laundry and drycleaning business serving customers in the said Town of Sunny Brae, the City of Moncton,

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N.B., and generally throughout the surrounding districts. For the purpose of the said laundry and drycleaning business it owns and operates two motor trucks for picking up and delivering clothing and other articles to be laundered and/or drycleaned for reward. It is a very keen competitor with other laundry and drycleaning establishments in the area served.

3. That in addition to the main building used for general purposes of the Home, and in part of which the said laundry and drycleaning business is carried on, the Home of the Good Shepherd is the owner of a new two family brick dwelling occupied by two male employees and for which rent is paid or included in the salary or wages paid such employees.

No further particulars are given as to the wages of the two employees, but the hearing of this appeal proceeded upon the basis that they were hired and their wages paid partly in cash and partly in the permission of each to occupy exclusively one half of the brick duplex. In these circumstances, that the appellant was paid or received remuneration in the form of services for this brick duplex must be conceded. The essential question is whether this remuneration is included in the word "rent" as used in the exception in s. 4(1) (*d*). The word is not defined in *The Rates and Taxes Act*. In Halsbury's Laws of England it is stated:

> Rent—that is, rent-service—is the recompense paid by the lessee to the lessor for the exclusive possession of corporeal hereditaments. It need not consist of the payment of money. It may consist in the render of chattels, or the performance of services. 20 Hals., 2nd Ed., p. 158, para. 170.

See Woodfall's Law of Landlord & Tenant, 24th Ed., 303; Williams on Canadian Landlord & Tenant, 2nd Ed., 159.

> The word "rent" is itself a word of very wide import, not always correctly employed in ordinary current user, particularly in taxing provisions. Lord Wright in *Earl Fitzwilliam's Collieries Company* v. *Phillips*, [1943] A.C. 570 at 581.

In *Vyvyan* v. *Arthur* (1), Thomas Vyvyan, as owner in fee, leased certain premises requiring the payment of certain money "and also doing suit to the mill of the said Thomas, his heirs and assigns, called Tregamere mill, by grinding all such corn there as should grow in or upon the close thereby demised during the term." It was held that the covenant requiring the grinding of the corn was "in the nature of a rent," Bayley J. stating at p. 414:

> The lease contains a reddendum, and whatever services or suits are thereby reserved partake of the character of rent.

(1) (1823) 1 B. & C. 410.

The language adopted by the Legislature in subpara. (*d*) "this exemption shall not include real estate in respect of which rent is received by such organization" does not suggest that it was legislating with reference to rent in the strict sense. It is not the reservation of rent or any right to distrain therefor, which latter Lord Halsbury describes as "the mark of rent" (20 Hals., 2nd Ed., p. 158, para. 170), or, indeed, any of the attributes connected with the word when used in the strict sense. On the contrary, it rather appears that the Legislature adopted the word in the broader sense, as defined in Woodfall's Law of Landlord and Tenant, 24th Ed., p. 303: "Rent is a retribution or compensation for the lands demised." It is not, however, necessary to determine the exact meaning, more than to indicate that the language ought not to be construed in the restricted sense but that it is sufficiently comprehensive to include that which was received by the appellant organization as remuneration for the brick duplex dwelling.

In the absence of facts to the contrary, I think we should assume, because of the returns that must be made in respect of workment's compensation and unemployment insurance, that the total wages were known and, therefore, ascertained. In reality the employees paid for the use of these premises an amount "in the nature of a rent" or "in the character of rent." In these circumstances it would appear that the word "rent," as used in s. 4(1) (*d*), is sufficiently wide to cover this particular payment. See also *Tucker* v. *Morse* (1); *Edney* v. *Benham* (2).

The personal property taxed is used in the conduct of the laundry and dry-cleaning business. The fact that the net income from this business is applied for the purposes of the appellant's religious organization does not detract from the fact that the equipment here taxed is used in the conduct of a business which serves not only the appellant's organization, but the public generally. It, therefore, cannot be said that this personal property is "used exclusively for religious, philanthropic or educational purposes" within the meaning of subpara. (*d*) and it is, therefore, subject to be taxed by the respondent.

(1) (1830) 1 B. & Ad. 365. (2) (1845) 7 Q.B. 976; 115 E.R. 756.

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The appellant, however, claims that even if, under subpara. (*d*), the foregoing property is taxable, it is a charitable institution within the meaning of subpara. (*g*) and, therefore, that its entire property is exempt. Subpara. (*g*) reads as follows:

(*g*) The property of any literary or charitable society or institution;

Assuming, therefore, as the appellant contends, that it is both a religious organization and a charitable institution, the pertinent issue is, having regard to the provisions of the statute, may it be included and, therefore, entitled to have all of its property exempted under the provisions of subpara. (*g*)?

While the provision in subpara. (*g*) has been included in *The Rates and Taxes Act* since 1850 (S. of N.B. 1850, 13 Vict., c. 30, s. II, art. 17, subpara. (*d*) was not included until the act was consolidated and amended in 1924 (S. of N.B. 1924, 14 Geo. V, c. 3). The language adopted in the enactment of subpara. (*d*) read by itself discloses the Legislature intended that all religious organizations should be subject to the provisions of that subpara. Moreover, it would appear that when subparas. (*d*) and (*g*) are construed together according to the accepted rules of construction, which again the Legislature would intend, the result is that all religious organizations are subject only to the provisions of subpara. (*d*). Subpara. (*d*) is particular in that it applies only to religious organizations, while subpara. (*g*) is more general in character and includes all literary and charitable societies and institutions, which would include the majority of religious organizations as well as all other types of literary and charitable societies and institutions. It is a case, therefore, where the rule, as stated by Sir John Romilly, should be applied:

> The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. *Pretty* v. *Solly*, 53 E.R. 1032 at 1034.

In another case Sir John Romilly gives this example:

> For instance, if there is an authority in an act of parliament to a corporation to sell a particular piece of land, and there is then a general clause at the end that nothing in this act contained shall authorize the

corporation to sell any land, that would not control the particular enactment, but the particular enactment would take effect notwithstanding it was not clearly expressed and distinct, and the insertion of the exception in the general clause would be supplied. *De Winton* v. *The Mayor, etc. of Brecon,* (1859) 28 Law J. Rep. (N.S.) Chanc. 600 at 604.

It would, therefore, follow that subpara. (*d*), being particular, should apply to all religious organizations, charitable and non-charitable, and that subpara. (*g*), being general, should apply to all other charitable societies and institutions.

The same construction, in the circumstances of this case, finds support in the rule stated by Lord Macnaghten when, after pointing out that where there is no preamble to the statute there are "only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment," goes on to state, as one of these exceptions,

> that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed. *Vacher & Sons, Limited* v. *London Society of Compositors,* 1913 A.C. 107 at 118.

See also *Becke* v. *Smith* (1); *The Canadian Northern Railway Co.* v. *The King* (2).

That there is such an inconsistency or repugnancy between these subparas. (*d*) and (*g*) becomes clear when it is appreciated that religious organizations are, for the most part, charitable in character. All religious organizations, charitable and non-charitable, are included in subpara. (*d*) and are exempt from taxation except as provided in the two exceptions therein specified. If, however, those religious organizations which are charitable come also within subpara. (*g*), it follows they are not, under that subpara., subject to the exemptions in subpara. (*d*). If, therefore, the statute be so construed as to include these under subpara. (*g*), the purpose and intent of subpara. (*d*) is largely destroyed and the intention of the legislature, as expressed in subpara. (*d*), substantially defeated. The magnitude and importance of this inconsistency or repugnancy becomes more apaprent when it is appreciated that organizations for religious purposes are, for the most part,

(1) (1836) 2 M. & W. 191 at 195. (2) (1922) 64 Can. S.C.R. 264 at 270.

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charitable. Those which are charitable and non-charitable are discussed by Sir John Wickens, V.C.:

> A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word "charitable" is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable." *Cocks* v. *Manners*, 1871 L.R. 1 Eq. 574 at 585.

Lord Lindley describes a religious society non-charitable in character

> A society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility. *In re White*, (1893) 2 Ch. 41 at 51.

and, as stated by Lord Wrenbury,

> Religious purposes are charitable only if they tend directly or indirectly towards the instruction or the edification of the public. *Chesterman* v. *Federal Commissioner of Taxation*, 1926 A.C. 128 at 131.

A statutory provision that appears so complete and accurate to accomplish the purpose intended, when enacted, subsequently studied in the light of particular facts often appears to be quite different. It then becomes a problem of construction. The problem here presented has occurred so often that the foregoing rules have been dictated by experience as of assistance in determining, in such circumstances, the intention of parliaments and legislatures. Their application in this instance not only avoids the inconsistency or repugnancy already discussed, but also avoids a construction which limits and restricts the comprehensive and inclusive language of subpara. (*d*) in a manner that it cannot be said the Legislature ever intended.

It would, therefore, appear that the intention of the Legislature is given effect to by construing subparas. (*d*) and (*g*) in such a manner that religious organizations, though also charitable, as the appellant's is, are included only under subpara. (*d*).

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Leger & Carvell.*

Solicitors for the respondent: *Creaghan & Creaghan.*

INDUSTRIAL ACCEPTANCE CORPORATION LTD.

AND

THE T. EATON CO. LIMITED OF MONTREAL ..... APPELLANTS;

1951
*Oct. 25

1952
**Mar. 12, 13, 14, 17.
*Jun. 4

AND

ACHILLE LALONDE ..... RESPONDENT,

AND

ALBERT LAMARRE ..... TRUSTEE.

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

Bankruptcy—Assets not equalling 50 per cent of unsecured claims—Discretion to refuse discharge—Terms—After-acquired salary—Whether non-exempt portion vests in trustee—Whether distinction between salary earned in bankrupt business and elsewhere—Bankruptcy Act, R.S.C. 1927, c. 11, ss. 23(ii), 142, 143—Article 599 C.P.

The trial judge refused the respondent his discharge in bankruptcy on the grounds that the assets did not equal 50 per cent of the claims of the unsecured creditors; that the debtor had failed to pay to the trustee the seizable portion of his after-acquired salary; and the insufficiency of his answers as he gave his evidence. The Court of Appeal for Quebec reversed that judgment and granted him his absolute discharge on the main grounds that his debt position had developed from circumstances for which he could not be held responsible and that he did not have to account for salary earned elsewhere than in carrying on the business in which he went bankrupt.

Held, that the conduct of the bankrupt, while not sufficient to justify the absolute refusal, did justify his discharge only subject to the imposition of terms.

Parliament, in adopting the language of s. 23(ii) of the *Bankruptcy Act,* intended that only such portion of the salary of the debtor as was subject to seizure by legal process under the law of the respective provinces should vest in the trustee. The section discloses a clear intention that the bankrupt should retain those exemptions which the Legislature of the Province in which he resided provided for him. Apart from such exemptions, the section applies to all property subject to execution or seizure including wages or salary which could only be reached by garnishee or attachment procedure.

There is nothing in the Bankruptcy Act to support the making of any distinction between a salary earned by the debtor in carrying on the business which was the subject-matter of the bankruptcy and a salary earned elsewhere.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Fauteux JJ.
**REPORTER'S NOTE:—The appeal was first argued on October 25, 1951. By order of the Court, it was re-argued on March, 1952.

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The purpose and object of the *Bankruptcy Act* is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 of the *Act* plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court which had refused the respondent his discharge from bankruptcy.

John L. O'Brien Q.C. and *E. E. Saunders* for the appellant, Industrial Acceptance Corporation. This is a clear case of a judgment based on the facts and on the credibility of the witnesses and should not therefore have been reversed by the Court of Appeal. The trial judge could by virtue of s. 142(2) of the *Bankruptcy Act,* in his discretion, give various orders, including the refusal of the discharge, its suspension, or the attachment of conditions to the discharge. *In re Geller* (2).

The trial judge had no discretion but to refuse the discharge in view of the failure to deposit part of the salary earned subsequently to the bankruptcy. The Court of Appeal erred in finding that the respondent was not obliged to give to the trustee any of his after-acquired earnings if earned in a different occupation. (Ss. 23, 142, 191 of the *Act.*).

Under s. 142, it is mandatory for the Court to refuse the discharge in all cases where the bankrupt has committed a bankruptcy offence or any offence connected with his bankruptcy. As to the obligation to turn the seizable portion of the debtor's salary over to the trustee: *Clarkson* v. *Tod* (3), *In re Scherzer* (4) and *In re Baillargeon* (5).

Failure to deposit was a bankruptcy offence and contempt of Court, which made it mandatory on the Court to refuse the discharge. The trent of the authorities is that the deposit must be made even before an order of the Court is made.

(1) Q.R. [1951] K.B. 226.
(2) 20 C.B.R. 359.
(3) [1934] S.C.R. 230.
(4) 15 C.B.R. 194.
(5) 15 C.B.R. 77.

On the question as to whether, on the Court refusing the discharge on the ground that an offence against the *Act* has been committed, there should not have been a conviction of that offence by a competent Court, the words in s. 142(2) of the *Act* appear to be clear. They do not provide that the discharge is to be refused where the bankrupt has been convicted of an offence, but where he has committed an offence. *Electric Motor & Machinery* v. *Bank of Montreal* (1).

R. Gerard Sampson and *Cicely M. Sampson* for the appellant, The T. Eaton Company. This appellant adopted the argument of John L. O'Brien Q.C., but added that it was entitled to oppose the discharge of the respondent notwithstanding that its claim was of an alimentary nature for necessaries of life, and with respect to this appellant's claim, the application for discharge should have been refused and in any event costs should not have been awarded against this appellant. *In re Reynolds* (2) and *Vincent* v. *Daigneault* (3).

Redmond Quain Q.C. for the respondent. Strictly speaking, the case of *Jackson* v. *Tod* (*supra*) is only authority for the proposition that some part of the ordinary salary of the bankrupt earned before his discharge, in the same occupation as he was engaged in at the time of his bankruptcy, is divisible amongst his creditors.

The consequences of the bankrupt being guilty of an offence under the old *Act* are, of course, that he can never get a discharge—or so, at any rate, would seem to be the case. Even if the consequences do not go that far and the cases would seem to indicate that they do, it would be at variance with a practice prevailing in this country and elsewhere to find a person guilty of an offence without a full and thorough trial before a judge and a competent Court.

The power of the judge in dealing with an application for discharge is not a discretionary one for, amongst other reasons, the reason that he is obliged to consider the report of the trustee and the resolution of the inspectors and must

(1) Q.R. 52 K.B. 162. (2) 5 C.B.R. 69.
(3) Q.R. 70 S.C. 551.

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give them their due weight. If he was in the present case exercising a discretion, he did not exercise it in such a way as to preclude review.

The judgment was not one that should be upheld. The Court does not appear under s. 142(1) of the *Act* to be given the authority to refuse to give a conditional discharge. What it is empowered to do is to refuse to give an absolute discharge. It should be noted that under the new *Act*, the provision whereby the Court was bound to refuse the discharge has been omitted.

The judgment of the Court was delivered by

ESTEY, J.:—This is an appeal pursuant to leave granted under s. 174(2) of the *Bankruptcy Act* (R.S.C. 1927, c. 11) from a judgment of the Court of King's Bench, Appeal Side, of the Province of Quebec (1), reversing the judgment of the Superior Court and granting to the respondent, Achille Lalonde, his absolute discharge in bankruptcy.

Achille Lalonde, against whom the receiving order was made, entered into the business of selling automobiles and agricultural implements and operating a garage in the spring of 1947. Approximately two months later he formed Lalonde Motor Sales Limited, which took over the business and assumed the assets and liabilities thereof. Lalonde personally guaranteed the indebtedness of, as well as subsequent obligations incurred by, the company. This business, as operated first under his own name and then under that of Lalonde Motor Sales Limited, continued for about eleven months, when a receiving order was made against the company. A few days later T. A. Lalonde presented a petition in bankruptcy dated July 28, 1948, against his son, the respondent in this appeal. The respondent was judged a bankrupt on the third day of August, 1948, and on July 25, 1949, he requested an appointment for the hearing of his application for a discharge in bankruptcy.

The liabilities of Achille Lalonde, as guarantor, approximated $90,000, and his other obligations over $1,900, a total indebtedness of about $92,000. His assets realized $22,600, which permitted a payment to the creditors of about 12 cents on the dollar.

(1) Q.R. [1951] K.B. 226.

Mr. Justice Marquis, presiding in the Superior Court, had before him the trustee's report, the minutes of the inspectors' meeting at which that report was considered and the evidence of the respondent-debtor Achille Lalonde. The trustee's report, which under s. 148(8) is prima facie evidence of the statements therein contained, set out that the debtor's guarantee of the debts of Lalonde Motor Sales Limited was the cause of his bankruptcy; a dividend of about 12 per cent would be paid to the unsecured creditors; the conduct of the debtor, both before and after bankruptcy, had not been reprehensible; and that he had not committed an act of bankruptcy. The trustee, however, recommended that the discharge should be refused because

Que l'actif du débiteur n'était pas égal à cinquante pour cent de son passif non garanti.

Mr. Justice Marquis refused the discharge and based his decision largely upon grounds that may be grouped under three headings: that the assets did not equal 50 per cent of the claims of the unsecured creditors; that the debtor had failed to pay to the trustee the seizable, or non-exempt, portion of his salary; and the insufficiency of his answers as he gave his evidence.

The learned judges in appeal reversed his judgment, mainly upon a consideration of the first two of these bases. The relevant portions of s. 142 provide that the judge shall refuse or suspend the discharge, or impose a condition, if, as set out in s. 143(*a*), the "assets of the bankrupt . . . . are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities unless he satisfies the court" that this low valuation "has arisen from circumstances for which he cannot justly be held responsible."

Lalonde's personal bankruptcy was due to the failure of Lalonde Motor Sales Limited, a company which he had formed to take over his personal business, which he completely controlled and managed. Such a company has a separate legal existence, but when, as here, the bankruptcy of that company, which he alone had managed, was the cause of his own bankruptcy, it was quite proper that the learned judge should examine Lalonde's conduct of that business in order to determine whether, within the meaning of s. 143(*a*), his debt position had developed "from circumstances for which he cannot justly be held responsible."

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Lalonde estimated the company had done a million dollars' worth of business in eleven months and entertained the opinion that the future was bright. In fact, he says that after he was aware of the indebtedness of the company he tried to continue in the hope that the sales would realize a sufficient profit to permit it to carry on. He deposed that, while the company kept books, there was no record made of his personal drawings, as to the amount of which the only evidence was his own statement that he drew money as he needed it and

J'ai essayé de vivre comme les gens avec qui je transigeais.

He did not produce a balance sheet or any records of the company, but was content to state to the court that these were all in the hands of the trustee in bankruptcy of the company and to give evidence of figures based upon his estimates and recollections. Upon these figures the learned trial judge found a sum of $45,000 unaccounted for. The Appellate Court examined the figures and concluded that they had accounted for at least a part thereof. These figures, incomplete and, at most, but approximately accurate, with great respect, did not provide sufficient proof upon which to found a conclusion that the debtor had made a satisfactory explanation as to why his assets were less than 50 cents on the dollar.

The learned judges of the Court of King's Bench, after referring to the fact that the assets did not equal 50 per cent of the unsecured liabilities and to the provisions of s. 143(*a*), stated:

ATTENDU que par son témoignage nullement contredit, le failli établit que si la valeur de son actif n'égale pas cinquante cents par dollar de ses obligations non garanties, cela provient de circonstances dont il ne saurait raisonnablement être tenu responsable;

The debtor, in his pleadings, took the position that if the assets did not equal 50 cents on the dollar that was because que ladite liquidation n'a pas été faite avec les soins voulus.

At the hearing before the learned judge he withdrew that allegation.

At the hearing he did complain that the Kayser-Fraser Company Limited shipped to him too many automobiles. Here again he merely stated that the company shipped these automobiles without his ordering them, but did not indicate on what basis automobiles were properly shipped

to him. His evidence as to this allegation, as well as upon other items, was based upon recollection expressed in most general terms and entirely unsupported by any documents which, if they existed, were available, because, as he deposed, the records of the company were in the possession of the company's trustee. The evidence, however, of the number of automobiles on hand, having regard to the nature and volume of the business, did not support this contention. Moreover, he did not show to what extent that contributed to his bankruptcy which, in view of the company's financing methods, would appear to be important. The same remarks apply to his complaints with respect to the finance company, both in relation to his own and the company's business, and of the Turcotte Company.

The learned judges in the Appellate Court commented upon the fact that the sale of the Val d'Or property was, upon the evidence, in the best interests of the estate. It would rather appear that the learned judge of the first instance was not making a finding as to the merits of the sale. He did comment upon the fact that the purchase price of $20,200 was less than the municipal valuation of $27,500, but it was Lalonde's attitude, as he gave his evidence, his professed ignorance as to details thereof, and particularly that he did not know his brother-in-law had purchased it, that impressed the learned trial judge and undoubtedly influenced him, along with the other facts, in his estimation of Lalonde.

Throughout his evidence Lalonde's statements are so vague and general in character that a reading thereof justifies agreement with the learned judge, who had the added advantage of observing him as he gave his evidence, when he stated:

> CONSIDERANT que les déclarations du failli devant la Cour, lors de l'enquête sur la présente demande, n'ont pas été à notre point de vue suffisantes pour justifier sa demande;

The learned judge was evidently of the opinion that Lalonde, upon his own evidence, had not satisfied the onus placed upon him by s. 143(*a*) to establish that though the assets were less than 50 cents upon the dollar it was due to circumstances for which he could not justly be held responsible.

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The learned judge also commented upon Lalonde's failure to pay, as requested, the seizable portion of his salary to the trustee.

The learned judges in the Court of Appeal commented upon the debtor's failure to pay the salary as follows:

ATTENDU qu'il est vrai que le failli n'a déposé aucun produit de son salaire chez le syndic avant qu'une demande ne lui en ait été faite; que l'article 143 qui énumère les faits qui peuvent être un motif de refus de libération, ne fait nullement une obligation au failli de rendre compte du salaire qu'il gagne, hors les opérations du commerce qui sont la cause de sa faillite;

Lalonde, after becoming bankrupt, was employed by The Sherwin-Williams Co. of Canada Limited at a salary of $390 per month. On April 25, 1949, the trustee verbally and in writing requested Lalonde to deposit the seizable portion of his salary with him. The trustee based his request upon the view that all of the salary vested in him except that which was exempt under s. 23(ii), where the provincial laws with respect to exemptions are adopted. The exemptions provided to those in the Province of Quebec earning salaries or wages are provided for in Article 599(11) of the *Civil Code of Procedure.* There it is provided that one who is earning a salary in excess of $6.00 per day is entitled to two-thirds thereof by way of an exemption. Upon a date that the evidence does not fix accurately, but in the summer months, Lalonde left the employment of The Sherwin-Williams Co. of Canada Limited and accepted employment with his father at a salary of $50 per week. He was, therefore, earning more than $6.00 per day with both employers and, within the meaning of Article 599 of the *Civil Code of Procedure,* in the trustee's view, one-third of the salary, as earned, vested in him. Lalonde paid to the trustee $175, whereas he should have paid $1,800.

The attention of the learned judges was not directed to the decision *in Re Tod* (1), where this Court held that the salary of a debtor in bankruptcy, earned subsequently to his being adjudged bankrupt, vested in the trustee, subject to the court fixing an alimentary allowance.

S. 23 of the Canadian act is based upon s. 15 of the English Bankruptcy Act of 1869 (32 & 33 Vict., c. 71) and now contained in s. 38 of An Act to Consolidate the Law

(1) [1934] S.C.R. 230.

Relating to Bankruptcy (1914, 4 & 5 Geo. V, c. 59). There are, however, important differences. In particular, s. 38(2) of the English act reads:

38. The property of the bankrupt divisible amongst his creditors, ... shall not comprise the following particulars:—

(2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole:

The corresponding s. 23(ii) of the Canadian Act reads:

23. Les biens du débiteur, susceptibles d'être partagés entre ses créanciers . . . . ne doivent pas comprendre ce qui suit:

(ii) Les biens qui, au préjudice du débiteur, sont exempts d'exécution ou de saisie selon la procédure judiciaire, conformément aux lois de la province dans laquelle sont situés les biens ou dans laquelle est domicilié le débiteur.

S. 2(*f*) defines "property" as follows:

"biens" comprend les deniers, marchandises, choses en action, ...

Mr. Justice Smith, in writing the judgment of *In re Tod, supra*, stated at p. 241:

The English decisions referred to above seem to establish beyond any question that, by the language of the English Act, "all such property as . . . . may be acquired by or devolve on him before his discharge," the instalments of salary such as are in question here vest in and belong to the trustee as they fall due, subject to the alimentary provisions referred to.

This precise language is adopted in the Canadian Act and is not capable of any difference of meaning in Canada from its meaning in England.

It would appear that Parliament, in adopting the language of s. 23(ii) (particularly when compared with the language of s. 38(2) in the English act) intended that only such portion of the salary as was subject to seizure by legal process under the law of the respective provinces should vest in the trustee. Moreover, the omission of any such provision as that contained in s. 51(2) of the English act, under which, on the application of the trustee, an order might be made against a bankrupt in receipt of a salary to pay the whole or part thereof to the trustee, appears to support the foregoing view.

Neither the provisions of s. 23 nor of any other section of the act appear to support, with great respect, the distinction suggested by the learned judges in the Appellate

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Court between a salary earned in carrying on the business the subject matter of the bankruptcy and that earned elsewhere.

It follows the trustee was within his rights when he requested Lalonde to pay to him the seizable or non-exempt portion of his salary and it was the duty of the debtor to pay over such salary to him. The record discloses that in response to the trustee's request he did pay the sum of $175, but he made no explanation to the trustee of his failure to pay a further sum in excess of $1,600 and at the hearing he made no other suggestion than that it was due to illness, in respect of which neither its character nor duration was specified, nor, indeed, the time of its occurrence. The learned judge, however, did not consider whether his failure constituted an offence under s. 191(*b*) of the *Bankruptcy Act*. He was nevertheless justified, where, as here, no satisfactory explanation was made as to his failure, in taking into consideration his conduct in relation to his non-payment of the required portion of his salary in the exercise of his judicial discretion to refuse, suspend or direct the discharge, subject to a condition.

Mr. Quain, on behalf of Lalonde, contended that s. 23(ii) applied only to property subject to seizure under execution and that the phrase in s. 23(ii) "execution or seizure under legal process" did not apply to wages or salary which could only be reached by a garnishee or attachment procedure. His contention was that this is the effect of *Re Tod, supra.* The application in that case was made by the trustee asking the court to direct that a bankrupt, earning a salary of $10,000 a year, should pay all in excess of $100 per week to the trustee. The decision is based largely upon *Hamilton* v. *Caldwell* (1), with regard to which Mr. Justice Smith, writing the judgment of this Court *in Re Tod,* stated at p. 242:

> The decision is that it is competent to the court to make such an order and this decision is arrived at on the general principles of equity and not by virtue of any special provisions in the Scottish act.

Hamilton v. *Caldwell* was a decision of the House of Lords under the Scottish act in which, as in Canada, there is no section corresponding to s. 51(2) of the English act.

(1) (1919) 88 L.J. (N.S.) P.C. 173.

The Bankruptcy Court in *Re Tod, supra,* exercised its power to fix an alimentary allowance which, under the Canadian act, might be more than but not less than the exemption provided to the bankrupt by s. 23(ii). The relevant exemption law in Ontario was *The Wages Act* (R.S.O. 1927, c. 176). S. 7 thereof provided to the debtor an exemption of 70 per cent of his salary, with power in a court to reduce that percentage. The court in *Re Tod* acted within the scope of that enactment. The application considered (in *Re Tod, supra*) was quite different from that here under consideration and the language used must be read and construed in relation to the issues raised.

It would appear that when the Parliament of Canada saw fit to omit s. 51(2) of the English act and to entirely rewrite s. 23(ii), being the corresponding section in the Canadian act, it disclosed a clear intention that s. 23(ii) should retain to the bankrupt those exemptions which the Legislature of the province in which he resided provided for him. The language in s. 23(ii), as expressed in French:

et tous les biens qui peuvent être acquis par lui ou qui peuvent lui être dévolus avant sa libération;

and as in English:

and all property which may be acquired by or devolve on him before his discharge;

is sufficiently comprehensive to include a procedure by way of garnishment or attachment of salary or wages. In the Province of Quebec the exemptions where salary or wages are garnisheed or attached are fixed, as already stated, by Article 599(11) of the *Civil Code of Procedure.*

It is not submitted that the learned judge, in the exercise of his judicial discretion contemplated by s. 142, overlooked any fact. The learned judges in the Appellate Court did not agree with certain of his conclusions, as already discussed. Moreover, the learned judges appear, in addition to the items already considered, to have been influenced by the fact that the creditors had not adduced evidence in support of their respective allegations. No witnesses were called by the creditors, but they had a right to submit their contentions upon the evidence adduced before the learned judge. Upon the evidence before him the learned judge, in the exercise of his judicial discretion, concluded that Lalonde was not entitled to his discharge.

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A judgment rendered in the exercise of a judicial discretion under s. 142 ought not to be disturbed by an appellate court, unless the learned judge, in arriving at his conclusion, has omitted the consideration of or misconstrued some fact, or violated some principle of law. *In re Richards* (1); *In re Wood* (2); *In re Labrosse* (3); *In re Lobel* (4); *Re Smith* (5). A consideration of the whole of the evidence, with great respect, does not warrant a reversal of the judgment of the learned judge of the first instance.

Appellate courts, however, where they have concluded that the discretionary judgment of the judge of the first instance ought not to be disturbed, have repeatedly relieved against what has appeared to them to be an undue severity in the terms imposed. *Re Nicholas* (6); *Re Swabey* (7); *Re Thiessen* (8). The purpose and object of the *Bankruptcy Act* is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases. The conduct of the debtor in this case, while not sufficient, with great respect, to justify the absolute refusal, does justify his discharge only subject to the imposition of terms.

The usual practice would suggest a reference of this matter back to the judge of first instance. There are, however, here present reasons, including the fact that the assets are not large, which, in the interests of the debtor and the creditors, justify a present final disposition and the avoidance of the expense incident to further proceedings.

(1) (1893) 10 Mor. B.R. 136.
(2) (1915) Han. B.R. 53.
(3) 5 C.B.R. 600.
(4) [1929] 1 D.L.R. 986.
(5) [1947] 1 All E.R. 769.
(6) 7 Mor. B.R. 54.
(7) 76 T.L.R. 534.
(8) [1924] 1 D.L.R. 588.

The claim of the appellant, The T. Eaton Co. Limited, is for necessaries and, therefore, an alimentary debt as defined in s. 2(*b*). Section 147 provides:

> 147. An order of discharge shall not release the bankrupt or authorized assignor.
>
> * * *
>
> (*d*) from any debt or liability for necessaries of life, and the court may make such order for payment thereof as it deems just or expedient.

Under the terms of this provision we direct that the debtor make payment forthwith of the claim for the necessaries of life by The T. Eaton Co. Limited in the sum of $92.60.

We further direct that under the provisions of s. 142(2) (*d*) the debtor, as a condition of his discharge, shall consent to a judgment against him by the trustee for a part of the balance of the debts proved in these proceedings in the sum of $5,000 and that the said sum of $5,000 shall be paid: $1,500 on June 30, 1953; $1,500 on June 30, 1954; and $2,000 on June 30, 1955.

The Court appreciates the exhaustive presentation by counsel of their respective submissions and is particularly grateful to Mr. Quain, who undertook the presentation of the debtor's case at its request.

The appellants, Industrial Acceptance Corporation and T. Eaton Co. Ltd. of Montreal, will have their costs in this Court and in the Courts below, payable to them out of the estate. The respondent, Lalonde, will have costs in this Court only, payable out of the estate.

Solicitors for Industrial Acceptance Corporation: *O'Brien, Stewart, Hale & Nolan.*

Solicitor for The T. Eaton Co. Ltd. of Montreal: *R. Gerard Sampson.*

Solicitors for the respondent: *Quain, Bell & Gillies.*

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*Feb. 7, 8, 11, 12.
*May 12.

CANADIAN ATLAS DIESEL ENGINES CO. LTD. (DEFENDANT) .. } APPELLANT;

AND

McLEOD ENGINES LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Commercial—Agreement to supply engines to complete orders —Whether letters of request for engines were orders—Claim for rectification—"Orders"—Admissibility of oral evidence.

The appellant and the respondent were agents for the sale of Chrysler marine engines in British Columbia. On January 26, 1949, the respondent agreed to surrender its franchise and to sell its stock of engines and accessories to the appellant; it was also agreed that the appellant would supply the respondent "with the necessary Chrysler engines to complete the orders shown on the attached list". No such list was attached to the agreement. The parties met again the following day, and the respondent, after showing some of its import permits, wrote to the appellant: "As agreed in our meeting yesterday, we are listing below orders we have on hand . . ." This list was compiled from letters from fishing companies, dated in 1948, and setting out an estimate of the number of engines they would need for the 1949 season and expressing the hope that the respondent would be able to deliver them as and when required. The particulars of equipment and accessories were not set out in the letters. With these letters, the respondent was able to obtain the necessary import permits to bring the engines in from the United States.

After supplying some engines, the appellant refused any further delivery unless the respondent produced firm written orders obtained on or prior to January 26, 1949. In an action for breach of contract, the appellant pleaded, inter alia, that it had agreed to supply the engines to enable the respondent to fulfil only bona fide orders, and counterclaimed for rectification of the contract. The trial judge accepted the evidence of the respondent that there had been no discussion as to the type of orders, and accordingly there could be no rectification and found that the appellant had in no way been deceived by the respondent. This judgment was affirmed by a majority in the Court of Appeal for British Columbia.

Held (Rand and Cartwright JJ. dissenting), that since the letters were not orders within the meaning of that expression as used in the agreement no breach had been shown, and therefore the appeal should be allowed and the cross-appeal dismissed.

Per Estey J.: The evidence adduced supports the contention that a latent ambiguity was raised that justified the examination of the surrounding circumstances to determine the intent and meaning of the word "orders" as used in the contract. But this, however, did not permit the reception in evidence of declarations from representatives of the

*PRESENT: Kerwin, Rand, Estey, Locke and Cartwright JJ.

customers, setting forth their intention with respect to the meaning and purport of these letters. That intention, as in written instruments generally, must be determined by the court upon a construction of the language adopted by the parties to express their intention. The letters were estimates of customers' requirements and not orders for engines to be delivered in the future. If the respondent intended them as orders, it should have disclosed it, or made their contents known to the appellant in such manner that it would have understood respondent's meaning and intention.

Per Locke J.: The documents upon which the respondent must rely as constituting orders are the letters from certain customers prior to the agreement; and the word "orders" in the agreement cannot be construed as including these letters. The respondent's pleadings do not assert that by custom in the trade or otherwise the word "orders" should be construed otherwise than in accordance with its commonly accepted meaning, namely, a direction to make, provide or furnish anything at the responsibility of the person ordering. Oral evidence of those customers as to what they intended to convey by their letters was inadmissible; in the absence of any ambiguity in the language employed and in the state of the pleadings, the question of interpretation was for the trial judge. The letters were by their very terms simply estimates of the requirements of the companies during the coming season and not a direction or request to supply goods or an offer capable of acceptance.

Per Rand and Cartwright JJ. (dissenting): In view of the impossibility of rescission and the completely executed consideration, the only issues open would be fraud and warranty. The former has been disposed of by the vindication of the respondent; the latter must arise as a conclusion of intention to be drawn by the court from the letters, but there is nothing in them that would justify that. There was no reason to affirm when there was no question of what was in mind or of any undisclosed matter. The appellant was willing to supply those engines, and the technical difference between orders and what the letters involved was not of such a nature as would deprive the appellant of something of which it sought assurance. Furthermore, the word "orders" as used embraces the commercial commitments contained in the letters.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), Smith J.A. dissenting, affirming the judgment of the trial judge awarding the respondent damages for breach of contract.

Alfred Bull Q.C. for the appellant. The real issue is whether the respondent had on hand the orders which it stated it had; and whether these letters were orders or just letters non-enforceable as contracts. It was intended by both parties that the appellant would supply engines to the respondent to fulfil existing enforceable orders which the respondent had acquired or sales it had made prior to January 26, 1949.

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

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The evidence discloses that the documents which purportedly created the contract relationship between the respondent and the fishing companies were in reality only estimates of the possible future requirements of these companies. This material was supplied to the respondent upon his solicitation for the sole purpose of enabling the respondent to acquire stock against which the companies could order in the future.

There is no plea of any custom of the trade that was in the contemplation of the parties to the effect that orders would be taken to mean anything but the ordinary meaning of the word, viz., an unqualified offer to purchase.

The evidence as to the meaning of that word was not admissible since the word is not ambiguous.

If the parties were not ad idem, then there was no contract.

As to the cross-appeal, there was no evidence to support the claim on the accessories. There was no contemplation by the parties that the loss of profit was contemplated in the event of a breach of the contract. The second rule in Hadley v. Baxendale (1) is applicable to this case.

W. S. Owen Q.C. and *F. Bonnell* for the respondent. The letters of essentiality were in fact orders requiring the respondent to acquire the engines for future delivery. *Hammond* v. *Bussey* (2).

The appellant did not contemplate that the list should contain sufficient description to identify each individual engine. *Hillas & Co.* v. *Arcos Ltd.* (3), *Northern Ontario Power Co.* v. *Lake Shore Mines* (4) and *Cotter* v. *General Petroleums* (5).

The appellant's representatives were well aware of the import restrictions and that a considerable delay would elapse between the time the applications were filed and the permits granted, and that it would be impossible to specify the particulars of each engine required for future delivery. *Scammell and Nephew Ltd.* v. *Ouston* (6) and *Hillas* case (*supra*).

(1) 9 Exch. 341.
(2) (1887) L.R. 20 Q.B.D. 79.
(3) 147 L.T. 503.
(4) [1944] 2 D.L.R. 20.
(5) [1951] S.C.R. 138.
(6) [1941] A.C. 251.

The appellant is not entitled to rectification as the agreement accurately sets out the intention of the parties and the real agreement between them.

The appellant is not entitled to rescission of the agreement as no misrepresentation of any kind was at any time made by the respondent; and in any event the contract cannot be rescinded after the position of the parties has changed so that the former state of things cannot be restored.

As to the admissibility of the evidence, the case of *Birrell* v. *Dryer* (1) is relied on.

If the parties were not at idem, then there would be no contract but there is a finding by the trial judge that the appellant knew the system followed by the respondent. The appellant had opportunities to clear up the matter if he was not satisfied.

On the cross-appeal, the respondent relies on both rules in *Hadley* v. *Baxendale* (2).

KERWIN J.:—I agree with my brothers Estey and Locke. The appeal should be allowed and the action dismissed with costs throughout to the appellant. The cross-appeal should be dismissed with costs.

The dissenting judgment of Rand and Cartwright JJ. was delivered by

RAND J.:—This controversy is over the terms of an agreement involving the termination of an agency held by the respondents, McLeod Limited, for the sale, in Victoria, British Columbia, of marine engines manufactured by the Chrysler Corporation of the United States. The appellants, Atlas Company, held a like agency for Vancouver and as Chrysler seemed disposed to extend the district of Atlas to include that of McLeod, the latter, who had exercised the agency for about two years against Atlas' fourteen or more, decided to surrender on the best terms obtainable. The parties, including a representative of Chrysler met first in Seattle, later in Vancouver and finally in Victoria, and their agreement is to be deduced from letters to which reference will now be made.

(1) 9 A.C. 345. (2) 9 Exch. 341.

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The first communication is from Atlas to McLeod at Vancouver, on January 26, 1949, and the material portions are:—

Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck.

* * *

It is further agreed that Canadian Atlas Diesel Engine Co. will supply to McLeod Engines Limited the parts necessary to complete engines now being overhauled at Begg Brothers Limited. These parts to be supplied at cost.

It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet.

All merchandise purchased will be first-class condition and at actual cost.

The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

The second, from McLeod to Atlas, dated, at Victoria, on January 27, reads:—

As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, number of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

and is followed by an enumeration of ten fishing companies showing a total of 124 engines ordered and fifty delivered.

The last is dated January 31 at Victoria from Cunnings on behalf of Atlas to Alger, Sales Manager of Atlas, with a copy to McLeod:—

Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus $30 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

As is seen, the first letter speaks of "the orders" shown on the attached sheet"; the same word "orders" is used in the letter of January 27; and that of January 31 refers to "the list of sales now in our hands."

It appears that on April 16, 1948 regulations had been passed by the Dominion Government under c. 7 of the Statutes of Canada, 1948, dealing with exchange controls between Canada and the United States, imposing restrictions on the importation of goods from that country. To enable these engines to be brought into Canada, it was necessary to satisfy the department that there was a commercial need for them here. This led to the requirement of evidence of "essentiality" before import permits would be issued.

In accordance with this requirement, McLeod in the autumn of 1948 obtained letters from customers estimating their needs for the fishing season of 1949, and intimating that it would be expected and certainly desirable that the engines should be available for delivery when wanted. Decision on the applications was said to have taken up about two months and the certificates were received by McLeod either toward the end of the year or early in January, 1949.

A representative letter of "essentiality" is that from Canadian Fishing Companies Limited to McLeod dated October 7, 1948:—

> After a careful review of our probable engine requirements over the next several months, we estimate that we will need approximately twenty Chrysler Crown and Chrysler Ace Engines, with 2½ to 1 reduction gears.
>
> The above engines are to be used as power plants for commercial fishing vessels, used exclusively in the commercial fisheries of British Columbia.
>
> We sincerely trust that you will be able to make delivery of these engines when required. Thanking you,

As these letters were solicited by McLeod, they have a general uniform tenor and phraseology, but they were solicited in the regular course of McLeod's business and before any question of the cancellation of the agency arose.

The ground of Mr. Bull's argument is precise and narrow: these letters are not "orders" within the meaning of the word: the obligation is to supply engines only in fulfilment of genuine "orders"; and Atlas were justified in refusing to meet requests of McLeod for delivery. The question is whether that contention is valid.

It should first be made clear that there was no intention on the part of McLeod to misrepresent; they have been acquitted of acting otherwise than in good faith. They

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must then be taken as believing that what had been received from the companies established a relation embraced within the meaning of the word "orders" as used in the correspondence quoted.

The originals of the letters had been sent to Ottawa and kept there, and copies had not been retained. When consequently at the meeting in Victoria inquiries were made about them all that could be produced were the permits for importation, of which the following is a sample:

TO THE DEPARTMENT OF TRADE AND COMMERCE, EMERGENCY IMPORT CONTROL BRANCH

APPLICATION TO IMPORT CAPITAL GOODS

INSTRUCTIONS ON THE BACK MUST BE STRICTLY OBSERVED.

Applicant's Name—McLeod Engines Limited
Address—1221 Wharf St., Victoria, B.C.
Date—October 18, 1948.

The undersigned hereby makes application for a permit to import the goods, articles or commodities described hereunder, in respect of which the information furnished herein is certified to be true and correct.

No. of Pkgs.	Quantity	Description of Goods	Value in Canadian Dollars
15	15	Chrysler Crown Marine Engines.....	$10,500.00
15	15	Chrysler Ace Marine Engines.....	9,900.00
			$20,400.00

INSTRUCTIONS

To be observed in the Preparation and Completion of an Application for Permit to Import.

.....

3. Applications can be considered only when:—

.....

(b) this application is accompanied by a separate declaration of essentiality. This declaration must provide details as in (i) (ii) (iii) (iv) below and be signed by the end user of the goods or a senior member of his organization.

(i) why purchase cannot be deferred until the current foreign exchange situation is corrected; and

(ii) why the importation is absolutely essential, giving full reasons with supporting evidence; and

(iii) what steps have been taken to obtain the items from Canadian production sources; and

(iv) could the equipment be imported for temporary use and returned.

Atlas deny knowledge of the practice in obtaining permits as they had been granted a quota of importation against which, however, their imports would be charged unless they could procure an exemption by showing that an imported machine was to be used for essential purposes. This would be to furnish the same justification as for a permit to import.

The trial court held that the contract binds Atlas to supply the 74 engines specified in the list as stated in the letter of January 31, and I agree that it does so. On that footing, and assuming Mr. Bull's contention to be well founded, it can be said to have been made, on the part of McLeod, under a mistaken notion that the letters of essentiality were within the word "orders"; and on the part of Atlas to have been induced by the misrepresentation of McLeod as to their nature. In view of the impossibility of rescission and the completely executed consideration moving from McLeod, however, the only issues now open would be fraud and warranty. The former has been disposed of by the vindication of McLeod; the latter must arise as a conclusion of intention to be drawn by the Court from the letters, but I see nothing in them, read in the light of the circumstances, that would justify that. There was no reason to affirm when there was no question of what was in mind or of any undisclosed matter. Atlas was willing to supply 74 engines, and the technical difference between orders and what the letters involved was not of such a nature as would deprive Atlas of something of which it sought assurance.

That would be sufficient to dispose of the appeal; but as I have come to the conclusion that the word "orders" as used embraces the commercial commitments contained in the letters, I think it desirable to base myself on that ground as well as on the former.

Strictly speaking, an order, in law, is a proposal in the nature of an offer which invites, without more, some form of acceptance intended to lead to an obligation; that acceptance, according to the nature of the order, may be by promise or by some act as, say, the delivery of goods

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to a carrier. The letters of essentiality here do not go to that length; they do not of themselves alone contemplate an acceptance; but they are bona fide estimates of an approaching season's requirements by a customer to a seller which look to subsequent directions for shipment of the goods mentioned. They imply an assurance that such directions will be given, and exhibit that assurance as a representation to the department of government concerned. They did not, from that moment, in a legal sense, bind the companies, but neither would they had they been orders in the strict sense; before acceptance, an order can be revoked and an outstanding revocable order would admittedly satisfy the language used.

Could Atlas have believed that that considerable share of the business in such engines for the approaching season would have been specified otherwise than by such an estimate so far in advance, particularly when there had been placed before them and perused all of the importation permits but one which, as explained to them, was at the customs office? Proctor of Chrysler who inspected the permits with Cunnings of Atlas was familiar with the regulations and the necessity for the letters; in the whole of the negotiations, he played a leading part in relation to all terms of the contract, on behalf of Atlas as well as Chrysler, and his knowledge must be imputed to Atlas. That is particularly so in relation to the permits, since Cunnings, at the time, in the presence of Proctor, stated his lack of familiarity with the import procedure and the discussion of this feature proceeded on the basis of Proctor's acquaintance with it. In November, 1948, Proctor had visited McLeod in Vancouver and in the words of F. B. McLeod, "approved of the orders we had taken." Atlas, in co-operation with Chrysler, were in effect driving McLeod out of the market; with the list before them they were willing, so far as numbers went, that the requirements of McLeod's customers for the coming season be fulfilled by that company. It could not but have been seen that the latter had obtained some form of assurance from their customers covering the season's supply. A commercial obligation equal to a revocable order was represented: did

that in fact exist? Undoubtedly it did. In the ordinary course of business there would be no less dependability supporting the representation of the letters than an order; they were in effect commercial orders as distinguished from legal orders, behind both of which, until an obligation is created, stands the integrity of commercial commitments.

What, then, in all the circumstances did the understanding at Victoria on this feature come to? Atlas and Proctor were well acquainted with the business of the British Columbia coastal fisheries. They knew that the list which they received gave directly not the then outstanding orders but rather the total orders and the number up to that time filled; and they knew that the totals shown represented the season's requirements of the companies named. Atlas clearly meant to stop short of disrupting business relations established by McLeod. The permits satisfied them of the good faith of McLeod and of the existing commitments, and it was not until around the 20th of March following that any demand for evidence of original "orders" was called for.

For these reasons, I must reject Mr. Bull's contention. Commercial words, in any context, must take their meaning from the body of circumstances to which they are related and out of which they arise; and although the golden rule is that, subject to well known qualifications, the ordinary and grammatical meaning of language used is to be taken as intended, nevertheless in the use of such a term as that here in question, a sufficiency of significant surrounding facts may, by showing the perspective in which the matters were viewed and what matters of fact were actually in the minds of the parties, extend or modify its scope.

As Lord Wright, in *Hillas & Co. Ltd.* v. *Arcos Limited* (1), expressed it:—

> This (i.e., the true construction of a document) is a question of law on which evidence is not relevant, except to the extent clearly stated by Lord Dunedin in *Charrington and Co. Limited* v. *Wooder* (110 L.T. Rep. 548, at p. 511; (1914) A.C. 71, at p. 82), where the words "fair market price" were to be construed:
>
> > "Now, in order to construe a contract the court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were

(1) (1932) 147 L.T. 503 at 514.

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placed, in fact when they made it, or, as it is sometimes phrased, to be informed as to the surrounding circumstances. As Lord Davey says in the case of *Bank of New Zealand* v. *Simpson*, (82 L.T. Rep. 102, at p. 104; (1900) A.C. 182, at p. 188), quoting from a decision of Lord Blackburn's: "The general rule seems to be that all facts are admissible (to proof) which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used."

and Lord Tomlin at p. 511:—

Commercial documents prepared by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reason of their inartificial forms confront the lawyer with delicate problems.

The governing principles of construction recognized by the law are applicable to every document, and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document.

On the one hand the conveyance of real estate presenting an artificial form grown up through the centuries and embodying terms of art whose meanings and effect have long since been determined by the courts, and on the other hand the formless document, the product of the minds of men seeking to record a complex trade bargain intended to be carried out, both fall to be construed by the same legal principles, and the problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.

The contract must be construed as a whole: and an undue emphasis upon a word or a phrase may easily distort that balanced understanding which can be seen to have been the crystallized consensus. The expression "the list of sales now in our hands" indicates the generality of the notion of Cunnings and emphasizes the fact that these business men had in mind the substance of business relations, not the precision of language.

McLeod had been very successful as agents and as late as December Proctor had told them it looked as if they would be given the agency for the province. In that situation, with the knowledge of Proctor of the letters as "orders," Atlas cannot now be heard to say that the contract means such items only as may be "orders" as they understand the word. Their intention, in introducing this element of fairness into the proceedings, was to leave intact the body of business McLeod had actually negotiated for the season: and the word as used was intended to describe that.

On the cross-appeal I am unable to find in the record sufficient evidence to support the claim for damages for loss of profits on the prospective sales of accessories, as pleaded, and I am in agreement with the conclusion of the majority of the Court of Appeal on this branch of the matter also.

For these reasons the appeal and the cross-appeal must be dismissed with costs.

ESTEY, J.:—The issues in this appeal are largely determined by the construction of the word "orders" in the contract made between the parties hereto dated January 26, 1949. The respondent would, but the appellant would not, give to this word a construction sufficiently comprehensive to include the letters styled letters of essentiality obtained by the respondent from its customers. The learned trial judge and the majority of the Court of Appeal (1), Mr. Justice Sydney Smith dissenting, have found in the respondent's favour.

The relevant portions of the contract read as follows:

HOTEL VANCOUVER
Vancouver, B.C.
January 26th, 1949.

McLeod Engines Limited,
1221 Wharf Street,
Victoria, B.C.
Gentlemen:

Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck.

.....

It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet.

.....

The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

Yours very truly,
CANADIAN ATLAS DIESEL ENGINE CO. LTD.
per: "A. G. Cunnings"
A. G. Cunnings.

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

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This contract was written by representatives of both parties in Vancouver and the following day, at Victoria, the attached sheet was prepared and annexed thereto. The attached sheet reads:

1221 Wharf Street
Victoria, B.C.
January 27, 1949

Mr. A. G. Cunnings,
Canadian Atlas Diesel Co.,
1859 West Georgia Street,
VANCOUVER, B.C.

Dear Sir:

As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, number of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

Name	Orders		Delivered
B.C. Packers Ltd.	30		7
Nelson Bros. Fisheries	15		-
Canadian Fishing Co.	20	Customs	6
A.B.C.—North Pacific	30		25
A.B.C.—Phoenix	13		6
R. Cosulich Boat Wks.	4		2
Fred Radler	2		-
Pete Sather	1		-
Kyuquot Trollers	7		3
S. Hansen	2		1
Total	124		50

Yours very truly,
McLEOD ENGINES LTD.
President.

1-27-49
Rec'd copy
"A. G. Cunnings"
FBM/ea

The terms of this contract, other than that providing for the delivery of the engines as set out in the second of the above-quoted paragraphs, have been performed.

The parties hereto, prior to January 26, 1949, under contracts with the Chrysler Corporation of Detroit, Mich., sold marine engines and accessories in separately defined areas in British Columbia. These Chrysler engines had to be imported from the United States. Parliament, in 1948, enacted the *Emergency Exchange Conservation Act* (S. of C. 1948, c. 7) and under the provisions thereof the

Governor General in Council passed regulations and thereafter these engines could only be imported upon compliance therewith. This act and the regulations thereunder came into force on April 22, 1948.

The respondent, in order to comply with the foregoing regulations and have engines available as and when its customers might require them, interviewed and obtained from them, in the fall of 1948, letters that in these proceedings have been styled letters of essentiality. These letters it forwarded to Ottawa, together with such orders as it had on hand, in support of its application for importation permits, and when these were received it imported the engines. The original letters of essentiality were retained at Ottawa. They are similar in phraseology and, while copies of five were placed in evidence, that of October 7, 1948, from The Canadian Fishing Company Ltd., is typical:

Dear Sirs:

After a careful review of our probable engine requirements over the next several months, we estimate that we will need approximately twenty Chrysler Crown and Chrysler Ace Engines, with 2½ to 1 reduction gears.

The above engines are to be used as power plants for commercial fishing vessels, used exclusively in the commercial fisheries of British Columbia.

We sincerely trust that you will be able to make delivery of these engines when required. Thanking you,

The respondent's customers, in these letters, appear to do no more than to estimate their engine requirements in fishing operations, in order that they may assist the respondent in importing the engines and having them on hand as and when they might require them. The language contained in the letter from the British Columbia Packers Ltd. makes this particularly clear, as it states: "We hope this letter will assist you in being able to have engines available for our requirements." The respondent, however, contends that even if these letters be unambiguous upon their face that, having regard to the existence of the regulations, the knowledge thereof by the respective parties, the conversations at Victoria on January 27, the contents of the appellant's letter of instructions dated January 31 and the delivery of 14 engines upon the requisitions specified in that letter, a latent ambiguity is raised that justifies the examination of the surrounding circumstances to determine the intent and meaning of the word "orders" as used by

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the parties in this contract. The evidence adduced supports this contention. In *Frenkel* v. *MacAndrews & Co.* (1), where the court construed the word "route," Lord Warrington of Clyffe, at p. 567, said:

> It is well settled that if the surrounding circumstances raise a latent ambiguity in any of the expressions used, parol evidence may be resorted to for the purpose of ascertaining which of the meanings of an ambiguous expression was contemplated by the parties. . . .

See also *Charrington & Co., Limited* v. *Wooder* (2) and *Bank of New Zealand* v. *Simpson* (3).

This, however, does not permit the reception in evidence, as at the trial hereof, of declarations from representatives of the customers, setting forth their intention with respect to the meaning and purport of these letters. That intention, as in written instruments generally, must be determined by the court upon a construction of the language adopted by the parties to express their intention. *National Bank of Australasia, Limited* v. *J. Falkingham & Sons* (4).

The negotiations commenced in Seattle on January 24, 1949, between Proctor of the Chrysler Corporation, Cunnings of the appellant and McLeod and Bramston of the respondent. Proctor informed McLeod that his corporation was enlarging the area of the appellant's franchise in British Columbia. This, as realized by all parties, adversely affected the respondent's position as vendor of Chrysler engines. Certain alternatives were discussed, but no agreement was arrived at when, on the evening of the 25, the parties motored to Vancouver. There, the next day, an agreement was concluded and its terms embodied in the letter of January 26, 1949, to which the attached list was appended, at Victoria, on the following day.

The learned trial judge, wherever there was a conflict, accepted the evidence of McLeod and Bramston, as against that of the appellant's witnesses. He, however, did not have an opportunity to observe the demeanour of Proctor, whose evidence was taken upon commission in California.

Throughout the negotiations and in the contract both parties apparently used the word "orders" in the ordinary accepted sense of a request from customers for delivery of engines. McLeod made this clear when he stated in the

(1) [1929] A.C. 545.
(2) [1914] A.C. 71.
(3) [1900] A.C. 182.
(4) [1902] A.C. 585.

attached sheet: "we are listing below orders we have on hand." He also deposed to the same effect when he stated that he had the engines "sold" by virtue of these letters. McLeod does not dispute this. In fact he does not contend otherwise, his position being, throughout, that respondent accepted these letters as orders in that sense.

The respondent emphasized that the appellant was aware of the regulations and that it should be concluded therefrom that it was familiar with these letters of essentiality. Both parties hereto were well aware of and complied with the regulations, though under quite different provisions thereof. The respondent followed the practice of obtaining importation permits, while the appellant was granted a quota under these regulations. There is, however, no evidence to justify the conclusion that the appellant's officers and agents had any knowledge of either the existence or the contents of these letters of essentiality at the time of the execution of the contract, or, indeed, at any time prior to this litigation.

The evidence, however, clearly establishes that Cunnings was to inspect the orders and justifies the inference that he would do it at the time of or before the preparation of the list. McLeod himself deposed that because he did not have either the orders or particulars thereof at Vancouver he "couldn't give them adequate information . . . So it was decided to meet in Victoria the following day" in order that Cunnings and Proctor might "take a look at the stock they had bought, also to check our orders and make the attached list."

McLeod, as respondent's manager, had forwarded the letters of essentiality to Ottawa, where he knew they were retained and only the importation permits forwarded to respondent. He, therefore, in Vancouver, when it was arranged for the inspection of the orders next day in Victoria, knew they were not there and could not, therefore, be inspected. Indeed, so far as the evidence discloses, the importation permits in his possession did not evidence the existence of permission to import 74 engines. Moreover, McLeod did not disclose from what records in respondent's office at Victoria he prepared the list of orders. He merely stated that he had done so and that it was being typed when Proctor and Cunnings arrived at respondent's

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office. When finished, he presented it to them and he says that Bramston and Cunnings looked it over, as well as the importation permits which were on the desk, and Cunnings "signed it as having received it and being satisfied with it." This statement goes quite beyond what Cunnings subscribed to, as the list discloses, and is inadmissible to alter, vary or contradict the writing.

That some discussion must have taken place with regard to these orders at Victoria is evident from McLeod's admission that "we explained to them some of those orders had gone—practically all had gone to Ottawa to secure the permits." Moreover, Bramston, in giving his evidence as to what took place in Victoria, states that Cunnings "asked for a copy of the orders on hand" and goes on to explain that there was some discussion as to these orders which had gone to Ottawa and that Proctor and Cunnings were shown the importation permits. While Bramston says they did not ask for further information, he does not go so far as to say they accepted the importation permits in lieu of the orders. Bramston's evidence upon this point is consistent with his conduct before both Evans and Cunnings when he was refused delivery at first of five engines and later of one engine. When Evans refused the delivery of the five, Bramston, upon his own evidence, made no comment. He did, however, immediately consult with McLeod and forthwith wrote a letter enclosing the requisitions for the five engines and stating that appellant had, in the letter of January 26, agreed to deliver "Chrysler marine engines as schedule on attached list." When later, on March 16, Cunnings refused, he did not even press upon him that point of view. This further emphasizes the significance of the difference between the evidence of McLeod and Bramston as to the discussion at Victoria relative to the production of the orders.

The importation permits upon the desk authorized the importation of 47 engines. McLeod explained there was another permit at the Customs for 20 engines, of which four had already been delivered. Upon McLeod's own evidence they disclosed an authority to import only 63 engines. When it is remembered that these were all

business men, it seems difficult to conclude that Cunnings, who had insisted on seeing the orders for 74 engines, should accept such evidence as satisfactory proof of the existence of 74 orders. Moreover, upon the whole of this evidence, Cunnings was denied the inspection of the orders and under these circumstances a conclusion that he accepted an alternative that did not disclose the nature and character of the suggested orders ought to be drawn only where the evidence unequivocally supports that conclusion. Such evidence is not here present. The position might well have been otherwise had Cunnings been shown a copy of the orders, or had their contents been fully explained to him.

McLeod's appreciation of the difference between letters of essentiality and orders is evidenced by his statement

> In some cases we had an order as well, and it was also attached to the application along with that letter of essentiality.

and later

> In some cases we had an order along with the letters of essentiality, if so, we included it with the application, but it wasn't strictly necessary because if we didn't have the complete description of the engine they went through just the same.

If, in these circumstances, McLeod intended the estimated requirements made in the letters of essentiality to be accepted as orders within the meaning of the contract, he should have either exhibited one of the letters, a copy thereof, or made such explanation of their contents as would have enabled the appellant's representatives to understand the word "order" in the sense in which he desired it to be understood. McLeod's failure to do so has created the issue here raised and justifies the application of the rule stated by Blackburn J. in *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1):

> The language used by one party is to be construed in the sense in which it would be reasonably understood by the other.

Respondent submits that the appellant's letter of January 31, written by Cunnings after the contract was concluded, supports its view that the orders were not to be

(1) (1863) 3 B. & S. 917 at 929.

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produced, but that 74 engines were to be delivered in accordance with the terms thereof. This letter reads as follows:

A. G. Cunnings—Terminal Island
J. C. Alger—Vancouver January 31, 1949.
c.c. Mr. W. H. Stephenson—Oakland
Mr. E. Evans—Vancouver
Mr. Fred McLeod—McLeod Engines Limited, Victoria, B.C.

McLEOD ENGINES LIMITED

Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus $30 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

"A. G. Cunnings"
AGC:HS A. G. Cunnings

The respondent emphasizes not only that in this letter there is no suggestion of any obligation to disclose its orders, but that rather there is a positive assertion that the appellant will "supply engines . . . to make deliveries on the list of sales," as well as the direction that respondent "will issue purchase request with shipping instructions," which letter was followed by the delivery of 14 engines in accordance with the terms thereof. The appellant, on the other hand, submits that McLeod had led them to believe the engines were sold, and with this McLeod agrees, and, with that in mind, Cunnings used the word "sales" in his letter of instructions. This letter does not cover all of the points agreed upon regarding the delivery of these engines; e.g., it does not refer to the fact that these engines were to be paid for, as, in fact, they were, upon delivery. Moreover, Cunnings does not state in his evidence that the orders were to be shown along with, or at the time of, the requisition. It is further significant that throughout all the evidence it is never suggested that the respondent should surrender the orders to the appellant and, therefore, the purchase request with the shipping orders would be the only record upon which the appellant would make the delivery and from which it would make whatever record

it deemed necessary in relation thereto. It was the latter that was evidently uppermost in Cunnings' mind as he wrote this letter, and, having regard to all of these factors, it cannot be said that this letter necessarily supports the affirmative conclusion that the appellant accepted in Victoria the letters of essentiality as orders, or, as suggested at the hearing, as the appellant's obligation to deliver 74 engines to the respondent.

With respect to the 14 engines delivered, Evans, who received the requisition and delivered the orders, states that on two or three occasions he had asked Bramston to show him the orders; that Bramston had not done so and, in fact, had made no reply to his request. Bramston, who gave his evidence first, was not asked as to this conversation and was not recalled and questioned in regard thereto. However, on March 2 Evans did refuse to deliver to Bramston five engines. Bramston at that time made no protest to Evans, but immediately communicated with McLeod.

McLeod, as a result of Bramston's communication, did some long-distance telephoning, apparently with Proctor and perhaps others, and, as a result, Cunnings directed the five engines to be delivered and said that he would "be up in Vancouver." In respect to the whole 19 delivered, Cunnings deposed:

> I knew I was coming back up to Vancouver in the near future and I thought I would be able to get things straightened out when I returned here, and as I had made the arrangement originally I didn't want our Vancouver office personnel to get mixed up in it.

On March 16 Bramston presented a requisition and a cheque for a further engine. Cunnings was in Vancouver and personally refused the delivery of that engine. There is some discrepancy as to the exact language used. Bramston says Cunnings merely expressed regret that he could not provide the engine and that he himself made no comment, but withdrew immediately. Cunnings, on the other hand, states that he told Bramston he would give him the engine if he produced the order; that Bramston withdrew and he thought he would return, but he never did. Thereafter the matter was dealt with through the solicitors for the respective parties.

That 19 engines were delivered without the production of the orders is admitted. The respondent urges that this supports its contention that the orders were not to be

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produced. Appellant's position is that Cunnings permitted the delivery of the 19 engines in reliance upon McLeod's word that the orders would be submitted. When the orders were not submitted Cunnings apparently concluded that, as he himself had conducted negotiations, he would, when in Vancouver, personally insist on the production of the orders. This is consistent with the appellant's contention throughout that it would deliver the engines if orders therefor were produced by the respondent. There can be no question but that the parties agreed upon this on January 28 at Vancouver and the solicitors' letter written on behalf of the appellant to respondent on March 18, 1949, stated:

> Our clients take the position that they are only obliged to deliver to you under the special arrangement, subject to proper payment therefor, engines for which you can produce firm written orders dated January 26, 1949, or prior thereto.

Under these circumstances the delivery of the 19 engines does not assist in determining the issues here raised.

The evidence throughout does not support the respondent's contention. The letters, as phrased, were estimates of customers' requirements and not orders for engines to be delivered in the future. An examination of the surrounding circumstances supports that construction. The fact that McLeod construed these letters as orders does not resolve the matter. More important is that, if he intended them as such, having regard to their contents, he should have disclosed it, or made their contents known to the appellant in such a manner that it would have understood the respondent's meaning and intention.

The respondent's contention that a change was effected at Victoria, under which these orders were not to be produced, is in conflict with the endorsement made by Cunnings upon the list. If such a change had been effected it would have been of even greater or at least of equal importance to that of the acknowledgment of the receipt thereof and one would have expected that it would have been included in the endorsement. It is also in conflict with respondent's letter of March 2. This letter was written to appellant after Evans refused the delivery of the five engines to Bramston. The latter immediately com-

municated with McLeod and, as a consequence thereof, wrote the appellant enclosing the five requisitions and requesting delivery

> under terms of your letter of January 26, 1949, which specifies that your Company, Canadian Atlas Diesel Engines Ltd. shall deliver our company, McLeod Engines Limited, Chrysler Marine Engines as scheduled on attached list.

The respondent, therefore, as late as March 2, was relying upon the contract as made at Vancouver on January 26 under which McLeod had agreed the orders would be inspected.

Moreover, the evidence of McLeod and Bramston, quite apart from the endorsement made by Cunnings on the attached sheet and the letter of March 2, does not justify a conclusion that any such change was agreed upon. The subsequent letter of instructions and the delivery of the 19 engines is as consistent with the appellant's reliance upon the subsequent submission of the orders as with the contention of the respondent.

The evidence, as a whole, justifies the conclusion that the parties negotiated and concluded the contract at Vancouver under which the appellant would purchase the stock on hand and deliver to the respondent the engines for which it held orders. At that meeting the respondent was not in a position to give the particulars of the orders and it was agreed that they would be inspected the next day. This vital term of the contract has never been implemented by the respondent and nothing that took place at Victoria or thereafter justifies a conclusion that the appellant had accepted anything in lieu thereof.

The Court of Appeal varied the judgment of the learned trial judge by deleting an item in the damages. Respondent cross-appealed to this Court with respect to that item. In view of the conclusions arrived at, it is unnecessary to deal therewith.

The appeal is allowed, the cross-appeal dismissed and the action dismissed with costs throughout to the appellant.

LOCKE, J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) which, by a decision of the majority of its members, affirmed the judg-

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

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ment for damages awarded to the respondent at the trial. Sydney Smith, J.A. dissented and would have dismissed the action.

While it is sufficient, in my opinion, for the determination of the appeal to decide whether the documents referred to in the proceedings as "letters of essentiality" were orders within the meaning of that expression as used in the agreement evidenced by the letter written by the appellant to the respondent dated January 26, 1949, in view of the claim for the rectification of the agreement in the counterclaim and of the course of the trial, it is necessary to review the evidence as to the events leading up to the making of the agreement and as to what occurred immediately thereafter.

By an agreement dated July 19, 1948, made between the Chrysler Corporation and the respondent, the latter was granted the right to sell Chrysler Marine Engines, parts and accessories in the cities of Victoria and Prince Rupert. The term of this agreement was for one year but it was provided that either party might terminate it by written notice to be given in a defined manner. The appellant company, by agreements dated respectively April 9, 1947, and January 3, 1949, was granted similar rights in the Districts of Vancouver and Westminster. By the *Emergency Exchange Conservation Act* (c. 7, Statutes of Canada, 1948) restrictions were imposed upon the importation of certain goods into Canada, these including Diesel Engines of the type supplied by the Chrysler Corporation to both parties from the United States. Permits allowing the importation of such goods might be obtained on application to the Minister of Trade and Commerce in a manner thereafter prescribed by regulations made by the Governor in Council. In practice, under these regulations, prospective importers of goods from the United States were required to satisfy the Minister that the goods sought to be imported were required for some purpose approved by him. In the present matter the only market with which the parties were concerned was the sale of engines for use in the fishing industry, a purpose apparently regarded by the Minister as one for which importation should be permitted.

In the Fall of 1948 the respondent took steps to obtain such engines as it might expect to require for its business in British Columbia during the year following. On August

14, 1948, it obtained a letter from a company engaged in the fishing and fish packing industry, Nelson Brothers Fisheries Limited, reading as follows:—

After a careful study of Chrysler Engines which we will require for the 1949 season, we estimate that we will need ten (10) Chrysler Crowns and five (5) Chrysler Ace Engines with 2½ to 1 reduction.

We trust that you will be able to make delivery of these engines, as required, during the Spring of 1949.

By letter dated October 7, 1948, the Canadian Fishing Company Limited wrote to the respondent giving its estimate of the number of Chrysler engines it would require in the next several months as being approximately 20 Chrysler Crown and Chrysler Ace engines with 2½ to 1 reduction gears, saying that they were to be used as power plants for commercial fishing vessels used exclusively in the commercial fisheries of British Columbia, and concluding:—

We sincerely trust that you will be able to make delivery of these engines when required.

On October 8, 1948, British Columbia Packers Limited wrote to the respondent saying that its estimated requirements of Chrysler engines for the 1949 season were approximately 30 engines, of which 15 would be Chrysler Aces and 15 Chrysler Crowns with 2½ to 1 reduction gears, and concluding:—

We hope this letter will assist you in being able to have engines available for our requirements.

By letter dated October 13, 1948, the Anglo-British Columbia Packing Company Limited advised the respondent that during the course of the next six months it would require three Chrysler Crown engines with reductions and ten Chrysler Aces with reductions, that the engines would be used exclusively for their own fish boats and their fishermen's boats, concluding:—

Trusting you will be in a position to deliver these engines as required.

By letter dated October 21, 1948, Kyuquot Trollers Co-Operative Association informed the respondent that it had made a survey of its probable Chrysler marine engine requirements during the next few months and estimated that seven would be needed and, in addition to certifying that the engines would be used only to propel the commercial fishing boats of its fishermen, said:—

We trust you will be in a position to deliver these engines to us as needed during the present season.

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The letters from the British Columbia Packers Limited and Nelson Brothers Fisheries Limited were accepted as sufficient by the Emergency Import Control Branch of the Department of Trade and Commerce and permits to import 45 Chrysler engines for the purpose of resale to these companies were issued on December 2, 1948. Two other permits, each for one Chrysler marine engine, granted for resale to two commercial fishermen were issued on December 15 and December 20 respectively. The documents obtained from these prospective purchasers for the purpose of obtaining the permits were not produced at the trial.

On January 24, 1948, F. B. McLeod, president of the respondent company, met R. H. Proctor, the West Coast divisional manager for the Chrysler Marine and Industrial Engine Division of the Chrysler Corporation at Seattle, at the latter's request. Questions had arisen between the parties to this action as to their respective selling rights on the Pacific Coast and it had apparently been decided by the Chrysler Corporation that these differences should be composed. A. G. Cunnings, the manager of the Chrysler Marine and Industrial Engine Division of Atlas Imperial Diesel Engine Company, an American corporation of which the appellant is a subsidiary, took part in the discussions which were continued on the following day at a hotel in Vancouver. In the result, the respondent company agreed to surrender its Chrysler franchise and to sell its stock of Chrysler engines and accessories to the appellant on terms which were defined in a letter written by the appellant to the respondent, reading as follows:—

HOTEL VANCOUVER
Vancouver, B.C.
January 26, 1949.

McLeod Engines, Limited,
1221 Wharf Street,
Victoria, B.C.

Gentlemen:

Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck.

It is agreed that Canadian Atlas Diesel Engine Co. will pay wages of one parts man in Victoria, and one parts man in Vancouver, as from January 28, 1949, for taking inventory of stocks on hand.

It is further agreed that Canadian Atlas Diesel Engine Co. will supply to McLeod Engines Limited the parts necessary to complete engines now being overhauled at Begg Brothers Limited. These parts to be supplied at cost.

It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet.

All merchandise purchased will be first-class condition and at actual cost.

The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

Yours very truly,
CANADIAN ATLAS DIESEL ENGINE CO. LTD.
per: A. G. Cunnings.

When, according to McLeod, Cunnings asked for a list of the orders referred to, he told him that the records were in Victoria and said that if Proctor and Cunnings would come to Victoria on the following day, he (McLeod) would have the list ready. On January 27 the parties met again at the office of the respondent in Victoria. at which time McLeod says that the import permits for 47 engines were shown to Proctor and Cunnings. McLeod had dictated and presented to Cunnings a letter purporting to contain a list of the orders which his company had on hand and giving information as to the number of engines already delivered. This read as follows:—

1221 Wharf Street
Victoria, B.C.
January 27, 1949

Mr. A. G. Cunnings,
Canadian Atlas Diesel Co.,
1859 West Georgia Street,
VANCOUVER, B.C.

Dear Sir:

As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, numbers of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

Name	Orders		Delivered
B.C. Packers Ltd.	30		7
Nelson Bros. Fisheries	15		-
Canadian Fishing Co.	20	Customs	6
A.B.C.—North Pacific	30		25
A.B.C.—Phoenix	13		6
R. Cosulich Boat Wks.	4		2
Fred Radler	2		-
Pete Sather	1		-
Kyuquot Trollers	7		3
S. Hansen	2		1
Total	124		50

Yours very truly,
McLEOD ENGINES LTD.
President.

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The letter was clearly intended to take the place of the list of "orders shown on the attached sheet" mentiond in the fourth paragraph of the letter of January 26. McLeod says that at this time the respondent had 16 other import permits at the Customs House, presumably in Victoria. The original letters from the four packing companies and the Kyuquot Trollers Co-Operative Association, according to him, had been sent to Ottawa for the purpose of obtaining permits and apparently no copies were available. It is not suggested that their contents or the contents of whatever documents had been obtained to enable the respondent to obtain the other 16 permits were made known to Proctor or Cunnings. Nothing in the nature of written orders for any engines was produced to them.

The list given to Cunnings, as will be noted, contained no specifications of the engines for which the respondent had orders. It would be necessary, according to him, for the purpose of ordering an engine to have particulars as to whether engines with reduction gears were required, whether they were to have straight drives, right or left hand rotation, the size of the shaft required, and whether they were to have six or twelve volt ignition. The permits for the 47 engines, which McLeod says were produced at Victoria, merely specified that the engines imported were to be marine engines "with 2·56 to 1 reduction gears and 6 volt electrical systems." McLeod clearly knew, while Proctor and Cunnings did not, that the documents obtained from their customers and which, he said, had been sent to Ottawa, did not contain the necessary particulars.

If any evidence were needed (and I think it is not) to establish the fact, it is made clear in the cross-examination of McLeod that he intended by the letter of January 27 to represent to Proctor and Cunnings that the respondent had orders from the parties named for the number of engines stated or, as he also expressed it, that "we had those sold."

Following the discussion at Victoria, Cunnings, who lived in the United States, dictated a memorandum, a copy of which was sent to McLeod at Victoria. That document was in the following terms:—

A. G. Cunnings—Terminal Island
J. C. Alger—Vancouver January 31, 1949

c.c. Mr. W. H. Stephenson—Oakland,
Mr. E. Evans—Vancouver,
Mr. Fred McLeod—McLeod Engines Limited, Victoria, B.C.

McLEOD ENGINES LIMITED

Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus $30 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

(Sgd.) A. G. Cunnings.

Between the date of this memorandum and March 18, 1949, 19 of the 74 engines were delivered at the direction of the respondent to their customers. No written orders from the purchasers were produced in order to obtain these engines. On the latter date an officer of the respondent company requisitioned a Chrysler marine engine and was told by Cunnings that if he would bring in a purchase order given before January 27 the appellant would supply the engine, whereupon the officer (Bramston) left and did not return. Thereafter the matter was dealt with in correspondence by the solicitors for the respective parties and the action followed.

The point to be decided is the meaning to be assigned to the word "orders" in the letter of January 26, 1949. The issue is not affected, in my opinion, either by what took place at Victoria on January 27 or by the terms of the memorandum of January 31. The signature of Cunnings on the letter of January 27 was, as the document shows, merely an acknowledgment of the receipt of the letter. The document was admittedly given for the sole purpose of furnishing details of the orders mentioned in the letter given the day previous and, accepting McLeod's own

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version of the matter, nothing that took place at Victoria altered the position of the parties. The memorandum of January 31 was prepared for the purpose only of recording for the information of the appellant's officers in Vancouver and of W. H. Stephenson of Oakland (whose status is not given) particulars of the manner in which the undertaking given on January 26 was to be carried out. That in preparing this memorandum there was no intention to contract on the part of the appellant seems perfectly clear upon the evidence.

The documents upon which, the respondent must rely as constituting orders are the letters which it obtained from the Canadian Fishing Company Limited, British Columbia Packers Limited, Anglo-British Columbia Packing Company Limited and Kyuquot Trollers Co-Operative Association prior to January 26, 1949. The judgment delivered at the trial and that of Mr. Justice Robertson in the Court of Appeal (1) proceed on the footing that the word "orders" in the letter of January 26 should be construed as including these letters. With great respect, I am unable to agree with this conclusion. The pleadings of the respondent do not assert that by custom in the trade or otherwise the word "orders" should be construed otherwise than in accordance with its commonly accepted meaning. Oral evidence was admitted from various purchasing agents of the parties by whom these letters were written as to what was intended to be conveyed by them, some asserting that the intention was to obligate their employers and others to the contrary, that they were merely estimates. All of this evidence was, in my opinion, inadmissible: in the absence of any ambiguity in the language employed and in the state of the pleadings, the question of interpretation was for the trial judge. The word "order" is one which in different contexts may have a variety of meanings: in the business of buying and selling goods its commonly accepted meaning is, in my opinion, that assigned to it in the New Oxford Dictionary, namely, a direction to make, provide or furnish anything at the responsibility of the person ordering. The letters from Nelson Brothers Fisheries Limited, the Canadian Fishing Company Limited, the British Columbia Packers Limited and the Kyuquot

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

Trollers Co-Operative Association were by their very terms simply estimates of the requirements of marine engines of these various organizations during the coming season and included an expression of hope that the respondents would be in a position to deliver these engines when required. The language of the letter from the Anglo-British Columbia Packing Company Limited of October 13, 1948, varied in this respect that it contained the statement that the company would require 13 engines during the course of the next six months. None of these letters were acknowledged by the respondent. None of them contained a direction or request to supply goods or an offer capable of acceptance. The purpose of giving these documents to the respondent was to enable the latter to apply for import permits to the Department of Trade and Commerce and for that purpose alone. Both parties contemplated that when the engines were required, orders would be given, at which time of necessity the particulars of the required machine would be furnished. While, according to the letter of January 27, 1949, several of the engines for which the respondent claimed to have orders from the packing companies and the Kyuquot Trollers were said to have been theretofore delivered. The actual orders, pursuant to which they were delivered, were not produced. What was done, however, in the case of the British Columbia Packers Limited is made clear from two written orders from this company for the delivery of Chrysler engines which were sent to the respondent by their purchasing agents, Mills and Packers Limited, on January 25, and in the case of Nelson Brothers Fisheries Limited by their written order for one Chrysler engine date February 9, 1949, addressed to the respondent. Indeed McLeod, while being cross-examined, after referring to the letters from the four packing companies which, he said, had been sent to Ottawa to obtain import permits and being asked if that was all that he had said replied:—"In some cases we had an order as well and it was also attached to the application along with that letter of essentiality," the latter expression referring to letters of the nature obtained from the fishing companies.

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The learned trial judge attached importance to the fact that Cunnings signed the letter of January 27, 1949, written by the respondent, saying in part:—

> That was the time to stipulate for the production of confirmatory evidence of the orders. He signed without reservation or stipulation.

The document itself makes it clear that Cunnings' signature at the bottom of the letter in question was merely to acknowledge its receipt and I find nothing in the evidence to suggest that he signed for any other purpose. A further passage from the reasons for judgment states that the learned trial judge was completely satisfied that the present appellant knew perfectly well the practice which prevailed as between the fishing companies and importers and that "it substantially knew the nature of the documents which the plaintiff was treating as orders." As to this, McLeod had said that Proctor was aware of the procedure to be followed in obtaining import permits, and again that Proctor "had watched me for months obtaining these things (permits)." As to this, the *Emergency Exchange Conservation Act of 1948* had only been proclaimed in April of that year and there is no evidence of any practice which prevailed in regard to obtaining these permits as between the fishing companies and importers, or as to how they had been obtained by any importer other than the respondent. Proctor was an employee of the Chrysler Corporation and not, so far as the evidence shows, connected in any manner with the appellant, though he was familiar with its business dealings with his own employers, and even had Proctor been aware of the terms of the so-called letters of essentiality obtained from the fishing companies (and there is no evidence that he was so aware) it could not, in my opinion, affect the obligation of the appellant under the agreement of January 26.

The learned trial judge further accepted the evidence of McLeod and the respondent's other witnesses where they differed from those called on behalf of the appellant. The appellant had by its counterclaim asked for the rectification of the agreement on the ground that the letters did not express the terms agreed upon and that it was intended that the obligation of the appellant was simply "to fulfil bona fide and enforceable orders." Some evidence was given for the appellant that some such expressions had

been used in the course of the negotiations and this was rejected. Apart from the learned judge's finding, which was fatal to the claim for rectification, I am unable to appreciate the necessity for any such rectification. The word "orders" without more would import that they were orders given in good faith. Except as the question of credibility affected this issue, the decision of the matter did not depend upon the weight to be assigned to the evidence: the question was one of the construction of the language contained in a writing.

The parties to this transaction were experienced business men who after negotiations resulting in an agreement between them evidenced that agreement by the letter of January 26, 1949. Their intention is to be gathered from what I regard as the clear and unambiguous terms of that document. The obligation of the appellant was not to supply a defined number of engines but rather the engines required to complete the orders which the respondent claimed to have. The list given by the respondents to the appellant on January 27 did not contain, so far as the evidence shows, the names of any persons who had given orders for engines to the respondent. In my opinion, no breach of the agreement by the appellant has been shown.

I would allow this appeal with costs throughout and direct that the action be dismissed. The cross-appeal should be dismissed with costs.

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

Solicitors for the appellant: *Bull, Housser, Tupper, Ray, Guy & Merritt.*

Solicitors for the respondent: *Campney, Owen, Murphy & Owen.*

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*Mar. 6
*Jun. 16

LILLY McARTER (PLAINTIFF).....APPELLANT;

AND

A. E. HILL CO. LTD. (DEFENDANT) .....RESPONDENT.

AND

THE TOWN OF HARTNEY

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Highway—Non-repair—Trap-door installed in sidewalk covered with snow and not in reasonably good state of repair—Liability of owner of door when pedestrian slipped.

The appellant, while walking on the sidewalk in front of the respondent's premises, slipped on two iron trap-doors with studs on the top which the respondent had many years ago installed in—and flush with—the sidewalk. It had snowed for several hours before the accident and the snow had not been cleaned off the doors which were partially concealed. The trial judge found that the studs on the doors had been worn down during the years and that some had entirely disappeared, that the doors appeared to have sagged and were uneven and sloped, and that they were not in a reasonably good state of repair. The Court of Appeal reversed that judgment, and found that the studs were worn but that there was no evidence that the worn condition of the doors was the cause of the accident.

Held: The appeal should be allowed and the action maintained. There was evidence to justify the finding that the fall was caused by the slope of the doors. The appellant was entitled to find the sidewalk safe and convenient for travel. The respondent had placed the doors in the sidewalk, and by allowing them to sag and become uneven and sloped, had interfered with the rights of the public and impeded the way of the appellant as a traveller on the highway.

The contention of the respondent that it had no authority to repair the doors since they were part of the sidewalk fails since from time to time the doors were opened and used by the respondent.

Castor v. *Corporation of Uxbridge* (1876) 39 U.C.Q.B. 113 referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba, reversing the judgment of the trial judge and dismissing the action for damages suffered by the appellant when she slipped on the sidewalk.

L. St. G. Stubbs and Harry P. Beahen for the appellant. There was sufficient evidence to support the findings of fact of the trial judge and the judgment based thereon. There was insufficient evidence to support the findings of fact of the Court of Appeal.

The Court of Appeal did not show that there was demonstrable error in the trial court in law or in fact.

*PRESENT: Kerwin, Rand, Kellock, Estey and Cartwright JJ.

This was on public property but controlled by the respondent.

The case of *Hamilton* v. *Parish of St. George* (1) is not applicable, but the cases of *Hopkins* v. *Corp. of Owen Sound* (2) and *Rushton* v. *Galley* (3) are relied on.

F. M. Burbidge Q.C. for the respondent. The onus is on the appellant to establish that her fall was due to the worn condition of the studs. If the matter is left in doubt and a fortiori, if the proper inference from the evidence indicates that she slipped on the snow, then she failed to prove her case. *Burgess* v. *Southampton* (4). The appeal does not involve the reversal of the trial judge on a question of fact but on the proper inferences to be drawn from undisputed facts. Not only did she not make her case but there was no case to be made. There is no positive evidence as to where she fell and what caused her to fall.

The duty was to keep the sidewalk in a reasonable state of repair. And the sidewalk was in such a state. The action is based on nonfeasance and not misfeasance. *Crafter* v. *Metropolitan Ry. Co.* (5). The evidence establishes that the doors were in a reasonable state of repair and the cases of *Ewing v. Toronto* (6) and *Anderson* v. *Toronto* (7) are relied on.

The doors were in the sidewalk with the consent and approval of the town, and being part of the sidewalk, the duty to keep the sidewalk, including the doors, in repair was on the town. The case of *Ewing* v. *Hewitt* (8) is directly at point and is sufficient to dispose of the present case.

The cases of *Hamilton v. Parish of St. George* (1); *Vestry of St. Matthew* v. *School Board for London* (9); *Horridge* v. *Makinson* (10); *Callaway* v. *Newman Mercantile Co.* (11); and *Schoeni* v. *King* (12) are relied on.

The *Hopkins* case (*supra*) does not apply and the *Rushton* case (*supra*) is rather in respondent's favour.

(1) (1873) L.R. 9 Q.B. 42.
(2) (1896) 27 O.R. 43.
(3) (1910) 21 O.L.R. 135.
(4) [1933] O.R. 279.
(5) (1866) L.R. 1 C.P. 300.
(6) 29 O.R. 197.
(7) (1908) 15 O.L.R. 643.
(8) (1900) 27 O.A.R. 296.
(9) [1898] A.C. 190.
(10) (1915) 84 L.J.K.B. 1294.
(11) (1928) 12 S.W. (2nd) 491.
(12) [1944] O.R. 38.

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The judgment of Kerwin, Kellock, Estey and Cartwright, JJ. was delivered by:—

KERWIN J.:—This is an appeal by the plaintiff, Mrs. Lilly McArter, against the unanimous judgment of the Court of Appeal for Manitoba, which had reversed the judgment at the trial of Campbell J., awarding the appellant $3,038.58 against the respondent A. E. Hill Limited, the correct name of which company counsel agreed is A. E. Hill Company, Limited. Originally the Town of Hartney was also a defendant but the trial judge dismissed the action as against it on the ground that proper notice had not been given it under section 463 of the *Municipal Act,* and there was no appeal from that determination. After the decision of the Court of Appeal and the certification by its Registrar of the Case, stated and agreed on by the parties to the appeal to this Court, the plaintiff appellant applied for an order amending the Case. We remitted the Case to the Court of Appeal, and that Court made an order amending it by the substitution of one word for another in this direct examination of the appellant at the trial:—

> Q. You say you stepped, what happened? The door didn't get up and smack you in the face?
>
> A. It certainly didn't. I don't know whether I slipped, I presume I must have slipped because after you could see the mark where I had cleared the snow off the top of the snow.

The word "door" was substituted for the last word "snow". The significance of this amendment will become apparent later.

About 6 p.m. on December 4, 1948, the appellant was proceeding southerly on the cement sidewalk on Railway Street in Hartney, adjoining the west side of a store building owned and occupied by the respondent. About midway between the front and rear of this building, two iron trap-doors with studs on the top had been installed in—and flush with—the sidewalk, and were hinged on their outer edges to enable them to be opened. The trap-doors were about 8 feet in width, measured from the wall of the building, by 4 feet measured along the length of the sidewalk. The sidewalk from the wall of the building was 10 feet 8 inches wide, of which the trap-doors took up the first 8 feet, so that 32 inches of cement extended from

the westerly edge of the doors to the westerly edge of the sidewalk. These trap-doors had been installed by the respondent about 1902 and, therefore, prior to the incorporation of the town in 1904. The cement sidewalk had been constructed by the town about 1930. The doors and the elevator in the area beneath the level of the sidewalk were used by, and were under the control of the respondent.

Snow had fallen the night previous and during the day of December 4, including the afternoon, but it had ceased snowing at the time of the accident. I agree with the inference drawn by the trial judge that the snow had not been cleaned off the doors and that they were partially concealed by it. I also agree with him that the studs on the doors had been worn down during the years and that in fact on the westerly limits of the doors some had entirely disappeared. The witness Baxter testified that "there is a hollowed out part where the door is bent down" and some of the photographs show, as the trial judge states, that the doors "appear to have sagged and, as a consequence, were uneven and slightly sloped." His finding, therefore, that the trap-doors were not in "a reasonably good state of repair" was justified.

The appellant slipped and sustained injuries for which damages were claimed and awarded by the trial judge. On the second page of his reasons in the case, he found that while the appellant had testified generally that some of the studs were missing at the time, she had not given evidence showing the missing studs to have been contiguous to each other or that she had stepped on any point where the studs were missing. However, in the witness box she had pointed to a spot on a photograph, made an exhibit at the trial, as indicating where she had fallen and testified that it was "about a foot in from the edge of the door." Counsel for the appellant argued that this was sufficient to warrant the finding of the trial judge, on the third page of his reasons: "I find that some studs were missing from the doors and the plaintiff stepped upon that area and slipped and fell by reason of the absence of studs and the slope of the doors." While I am not satisfied that the appellant fell by reason of the absence of the studs, I do think that there was evidence to justify the finding

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that the fall was caused by the slope of the doors. As to Mr. Burbidge's contention that the statement of claim did not allege any such condition, I am of opinion that the allegation therein that the respondent was negligent "(a) in the construction and operation of the said trap-doors" covers the point.

Speaking for the Court of Appeal, Adamson, J.A., after referring to the finding of the trial judge on the third page remarked that while there was no doubt that the studs were worn, there was no evidence that the worn condition of the trap-doors was the cause of the accident. He then referred to the evidence of the appellant transcribed above. In view of the change made in the transcript of the evidence, the conclusion drawn by the Court of Appeal, that the snow had been packed on the sidewalk and that fresh loose snow lay on the packed snow, does not appear to be warranted. Adamson J.A. continued: "She does not say that the worn condition of the doors caused her to slip and there is no evidence on which to base such an inference." As indicated above, I am inclined to agree with this statement, if it referred only to the studs, but it takes no account of the condition caused by the slope of the doors and, therefore, on that question of fact, I agree with the trial judge and his judgment should be restored unless the respondent is able to show that it is not responsible in law.

Long ago it was laid down in 1 Hawkins's Pleas of the Crown, 700:—

> There is no doubt but that all injuries whatsoever to any highway, as by digging a ditch or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's people, are public nuisances at common law.

This extract and the old cases on the subject are referred to in the judgment of Chief Justice Harrison in *Castor* v. *Corporation of Uxbridge* (1). As he there points out, every obstruction which to a substantial degree renders unsafe or inconvenient the exercise of the right of the public to pass and repass on foot and with horses and carriages at their free will and pleasure over the highway is a violation of that right: per Erle C.J. in *Regina* v. *Train* (2). It was also pointed out in the Castor case that the plaintiff,

(1) (1876) 39 U.C.Q.B. 113 at 117. (2) (1862) 3 F. & F. 22 at 27.

if free from contributory negligence, would have the right to sue the company that had placed the poles on the highway thereby causing an unlawful obstacle. In the cases in England cited by the Chief Justice, the underlying principle is taken for granted and the same principle was followed in Ontario.

In *Hopkins* v. *Owen Sound and Trotter* (1), Ferguson J. held that a person who, with the knowledge of, and without objection by, a municipal corporation, constructs across a ditch between the sidewalk and crown of the highway an approach therefrom to enable vehicles to pass to and from his property, adjacent to the highway, is liable for injuries sustained, through want of repair of the approach, by a person using it to cross the highway. This decision was cited with approval by Riddell J. in a Divisional Court in *Rushton* v. *Galley* (2). In the present case the appellant was entitled to find the sidewalk safe and convenient for travel. The respondent had placed the doors in the sidewalk, and by allowing them to sag and become uneven and sloped, had interfered with the rights of the public and impeded the way of the appellant as a traveller on the highway.

In the statement of claim the appellant had pleaded that the respondent had constructed the areaway under the sidewalk and placed the trap-doors over it with the consent, licence and approval of the town. Whether the latter part of this allegation was directed only towards the town, which was then a party to the action, need not be discussed because Mr. Burbidge takes the position that it must be assumed that the work was done with such consent. Without agreeing with that as a proposition of law, it is only necessary to point out that no authority was cited for the town (or its predecessor, a rural municipality) to give such consent and to authorize an impediment to the right of travel. Then the contention was advanced that the respondent had no authority to repair the doors since they were part of the sidewalk and, therefore, situate on the highway. If, as the respondent contends, it had in fact the leave and licence of the town (or the rural municipality) to construct the areaway and install the elevator and doors, it is difficult to see how this argument can have

(1) (1896) 27 O.R. 43. (2) (1910) 21 O.L.R. 135 at 142.

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any basis since from time to time the doors were opened and used by the respondent. The decision in *Ewing* v. *Hewitt* (1) has not been overlooked but in this view of the present appeal, it need not be considered.

The decision in *Hamilton* v. *The Vestry of the Parish of St. George* (2), relied on has no application as it was concerned with the construction of an Act of Parliament and it was held that a certain area did not fall within the term "cellar" as used in the statute. Nor is the case of *Horridge* v. *Makinson* (3) of assistance as all that was held there was that where a nuisance had been created by a highway authority on a highway under their control, the owner or occupier of the land adjoining the highway was not liable in an accident caused by the nuisance.

The appeal should be allowed and the judgment at the trial restored with costs throughout. However, the costs of the motion to this Court to remit the Case to the Court of Appeal should be paid by the appellant as it was her oversight that occasioned the transcript of the evidence going to the Court of Appeal for the purposes of the appeal thereto, in the form in which it appeared; and that transcript had been approved by both parties as part of the Case submitted to this Court.

RAND J.:—The judgment in appeal was based on an error in the transcription of the testimony of the plaintiff which was corrected for the purposes of this appeal. The sentence originally appeared as "I presume I must have slipped because after, you could see the mark where I had cleared the snow off the top of the snow." This last word should have been "door". Adamson J.A., after quoting that answer, says:—

> This indicates that the snow had been packed on the sidewalk and that fresh loose snow lay on the packed snow. Slipping on the packed snow is the reason she gives for her fall. She does not say that the worn condition of the doors caused her to slip and there is no evidence on which to base such an inference.

The fact that she had slipped because of the worn condition of the studs and the slope of the doors was expressly found by the trial judge. That the defendant was under a duty to keep the substitution for the sidewalk in reasonably

(1) (1900) 27 O.A.R. 296. (2) (1873) L.R. 9 Q.B. 42.
(3) (1915) 84 L.J.K.B. 1294.

safe condition, cannot, in my opinion, be seriously questioned: but if it could be heard to say that since there was no right to be where it was, there was no duty, the action would lie in nuisance. The doors had been in place for 48 years without renewal or repair. Taken with the evidence of the plaintiff, there was, I think, sufficient support for the finding made.

I would therefore allow the appeal and restore the judgment at trial with costs here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Stubbs, Stubbs & Stubbs.*

Solicitors for the respondent: *Laird, MacInnes, Burbidge, Hetherington, Allison and Campbell.*

THE CROWN DIAMOND PAINT COMPANY, LIMITED ..... APPELLANT;

AND

ACADIA HOLDING REALTY LIMITED ..... RESPONDENT.

1951
*Nov. 27

1952
*Mar. 23

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

Negligence—Nuisance—Escape of water from unheated building through cellar wall due to dislodging of reducing plug from 4" water pipe—Liability—Forseeable risk—Whether maintenance of such pipe an ordinary user—Principle of Rylands v. *Fletcher.*

The respondent was the owner of a building divided into four adjoining units, the fourth of which was under lease to the appellant. The basement of the first unit was separated from the second by a 2' thick stone and concrete wall; the second from the third by a wooden partition; the third from the fourth by a stone wall in which there were two wooden doors. Water entered into the first unit from a 12" street main through a 4" pipe. The end of this pipe was enlarged into a "bell" into which, for the purpose of reducing the flow to 2", an iron plug was inserted. At the time the action arose, March 1, 1948, the first unit was undergoing alterations, then in progress some two months. The ground floor windows were without glass and boarded up and at least one window in the basement was broken or open. The unit was unheated except for portable oil burners used during the day. There was a 4" trap to carry off water in the

*PRESENT: Rinfret C.J. and Kerwin, Rand, Estey and Locke JJ.

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basement floor but this drain at the time was covered with 18" of concrete and sand. The temperature dropped from 19 degrees above zero during the day to 9 degrees below zero at midnight. At about 10:15 p.m. water was noticed flowing out of the basement windows, and the Water Department and Edgar LeBlanc, president of the respondent company, notified. The water officials thereupon closed off the water but LeBlanc, believing nothing further could then be done, did not visit the premises until 8 o'clock the next morning. It was then found that the reducing plug had been dislodged from the bell and that water had seeped through the different basement walls into that of the appellant causing damage to goods stored there in respect of which it claimed to recover damages. Its action was dismissed by the trial judge whose judgment was affirmed by the Supreme Court of New Brunswick.

Held: (Locke J. dissenting) that the appeal should be allowed and the case referred back to the trial Court to fix the amount of damages on evidence adduced at the trial with liberty to both sides to adduce further evidence.

Per: Rinfret C.J. and Rand J. The Appellant's claim was put on three grounds: negligence, nuisance, and the rule in *Rylands* v. *Fletcher,* L.R. 3 H.L. 330. The case for negligence was not made out. In the other grounds the first question was whether the maintenance of a 4" water pipe was an ordinary or necessary use or one to be treated as special? It was not so to the requirements of the respondent: it was equally exceptional in the general use of water; and it created a substantial addition to the ordinary risks to the neighbouring premises. These enhanced risks were prima facie risks of the person creating them and there was nothing before the Court to take the case outside the scope of the rule. *Richards* v. *Lothian,* [1913] A.C. 263 at 280 approving *Blake* v. *Woolf,* [1898] 2 Q.B. 426. *Musgrove* v. *Pandelis,* [1919] 2 K.B. 42 and *Mulholland* v. *Baker,* [1939] 3 All E.R. 253 followed. When the respondent was notified the basement had filled a duty to act promptly arose and as a minimum of precaution it should have apprised the appellant. *Sedleigh-Denfield* v. *O'Callaghan,* [1940] A.C. 880; *Pope* v. *Fraser & Southern Rolling and Wire Mills Ltd.,* 155 L.T.R. 324; *Northwestern Utilities Ltd.* v. *London Guarantee & Accident Co.,* [1936], A.C. 108.

Per: Kerwin and Estey JJ. The evidence justified the conclusion that the plug was forced out by the freezing of the pipes and that the respondent was negligent in not taking steps to prevent such an occurrence. *McArthur* v. *Dominion Cartridge Co.,* [1905] A.C. 72; *Fardon* v. *Harcourt-Rivington,* [1932] A.C. 215.

The finding that LeBlanc had reasonable grounds for believing that the water would not escape through the wall into the adjoining premises could not be supported. A reasonable man having regard to the location of the wall and its age would have appreciated the possibility of seepage.

Per: Locke J. (dissenting). There was no direct evidence of any freezing and the trial judge was right in declining to draw an inference that the frost caused the plug to be dislodged. There was no duty upon the respondent to provide a drain of such size as to carry off water admitted into the basement without fault on its part. The failure of the respondent to take steps to rid the basement of water until

8 o'clock the following morning was not in the circumstances actionable negligence. Assuming that the condition in the respondent's basement constituted a nuisance, the condition not having been brought about by any voluntary or negligent act of the appellant, failure to take steps to abate it until 8 o'clock the following morning was not undue delay imposing liability upon the respondent. *Noble* v. *Harrison*, [1926] 2 K.B. 332 at 338; *Sedleigh-Denfield* v. *O'Callaghan*, [1940] A.C. 880 at 893 and 904.

There was no evidence upon which to base a conclusion that to bring water for commercial use into a business premises in a four-inch pipe was a non-natural and not merely an ordinary use and the principle in *Rylands* v. *Fletcher* did not apply. *Sedleigh-Denfield* v. *O'Callaghan, supra* at 888.

Decision of the Supreme Court of New Brunswick, Appeal Division (27 M.P.R. 159), reversed.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), Hughes J. dissenting, affirming the judgment of Anglin J., dismissing an action for damages.

D. K. McTavish K.C. and *J. C. Osborne* for the appellant. The appellant alleged at the trial and on the appeal (1) Negligence on the part of the respondent. (2) Nuisance created by the respondent. (3) The respondent had in its control something which escaped and under the rule in *Rylands* v. *Fletcher* (2) was liable for damage done as a result of the escape. On the question of negligence, the appellant alleges that the water pipes were solely within the control of the respondent and burst as a result of freezing action, the respondent having failed in sub-zero weather to heat the premises or take any precautions to avoid such freezing. If the evidence supports the allegations made by the appellant, that is proof of such allegations and, in the absence of any explanation by the respondent, adequate proof, which must be accepted by the Court. It is not up to the appellant to establish these allegations beyond a reasonable doubt as this is not a criminal matter. The three learned judges who rendered the judgment which is the subject of this appeal, agreed that the evidence was sufficient to justify an affirmative inference (1) that the water in the pipes froze and (2) that as a result the pipes burst or expanded forcing out the plug or reducer. They further agreed that the evidence was sufficient to justify a finding that the unheated cellar

(1) 27 M.P.R. 159; [1951] 1 D.L.R. 265.

(2) (1868) L.R. 3 H.L. 330.

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caused the freezing of the water in the pipes, resulting in the forcing out of the reducer and plug, the escaping of the water into the cellar, its seeping through the basement wall of the Creamery premises and the damage to the appellant. The appellant respectfully agrees with the conclusions reached by the learned judges in this respect. The standard definition of negligence is stated by Alderson B. in *Blyth* v. *Birmingham Water Works Co.* (1) as: "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

The respondent did not show that he had taken all reasonable precautions and therefore was negligent in respect to the freezing of the pipes. *MacArthur* v. *Dominion Cartridge* (2).

The respondent was negligent towards the appellant by reason of the fact that the water so released by the bursting pipes seeped through several walls into the premises of the appellant, thus damaging its stock stored in the basement. There was additional negligence on its part in that its president and general manager, Leblanc, did nothing to prevent this seeping after he was advised that there was water on the Creamery premises which was flowing out of the basement windows. A reasonable person would have taken some action to prevent the spread of this water and if the respondent had even advised the appellant, it might have been able to remove all of its stock from the basement and the damage would have been avoided. In addition to the negligence alleged in connection with the freezing of the pipes, the respondent was negligent in not having the drain in the Creamery premises in proper working order. With respect to the finding by the Chief Justice in the Court below that it could not be reasonably held that LeBlanc should have known or suspected that the water would seep through the cellar wall. It is submitted that this finding is incorrect and that any reasonable person and more particularly an experienced plumber such as LeBlanc should instantly have foreseen the danger. In any event whether the respondent could, or could not,

(1) (1856) 11 Ex. R. 781 at 783. (2) (1905) 74 L.J.P.C. 30.

have forseen the ultimate result of its negligence, is not a question to be considered in fixing liability. It could have forseen that if a large amount of water accumulated on its premises so that water was flowing out of the basement windows damage might result to some one and therefore it owed a duty of care and the fact that it could not forsee the water seeping through several walls into the premises of the appellant is not a question to be considered. *In Re Polemis* (1); Salmond's Law of Torts, 10 Ed. 137; *Smith* v. *London & Southwestern Ry. Co.* (2).

The appellant, apart from the question of negligence, alleges the respondent created a nuisance which resulted in damage to the property of the appellant and is therefore liable to the appellant for that damage. Nuisance is wrongful interference with another's enjoyment of his lands and premises by the use of land or premises either occupied or owned by oneself. Negligence is not an essential ingredient. *Sedleigh-Denfield* v. *St. Joseph's Missions* (3); *Charing Cross* v. *London Hydraulic Power Co.* (4). These cases are in point with the appellant's case. The respondent by letting water escape from its premises to those of the appellant created a nuisance for which it is responsible in damages. See also *Humphries* v. *Cousins* (5).

The principle laid down in *Rylands* v. *Fletcher* (6) is applicable in this case. "The true rule of law is that the person who for his own purposes brings on his lands and collected and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape." The uncontradicted evidence shows that the water supply from the pipes in question was brought on the premises for the sole benefit of the respondent and not for the communal benefit of the appellant or any one else so that this case is to be distinguished from that line of cases where the defendant was held not liable for damage resulting from the release of water from a plumbing fixture which was installed in the interests of both parties. The use of

(1) (1921) 90 L.J.K.B. 1353 at 1360.
(2) (1871) L.J.C.P. 21.
(3) [1940] 3 All E.R. 349.
(4) (1914) 83 L.J.K.B. 1353.
(5) (1877) 46 L.J.Q.B. 438.
(6) L.R. 3 H.L. 330.

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water by the respondent was not for ordinary domestic purposes but was an unnatural user in the circumstances so as to bring the case within the principle. Under that rule the respondent must at its peril keep such water from escaping which it failed to do and therefore the appeal should be allowed and a new trial directed to the question of damages only.

W. G. Stewart for the respondent. There was no negligence on the part of the respondent or alternately, if there was, then the damages were such as could not reasonably have been contemplated and are such that the respondent is not liable at law. It is the obligation of the appellant to prove its case as required by the rules of law relating to the particular type of action. The true test is (1) whether on the evidence negligence may be reasonably inferred and (2) whether, assuming it may reasonably be inferred, it is in fact inferred. *Metropolitan Ry.* v. *Jackson* (1). The trial judge makes no finding on negligence nor does the Appeal Court so far as "failure" to take reasonable precautions is concerned. The appellant has not proved his case either by direct facts or reasonable inference. A Plaintiff cannot succeed if the case is to be decided by surmise or conjecture. *Wakelin* v. *London & Southwestern Ry. Co.* (2); *Mersey Docks & Harbour Board* v. *Proctor* (3); *Montreal Rolling Mills Co.* v. *Corcoran* (4). Negligence at law can be established if the facts proved and the inferences to be drawn from them are more consistent with negligence on the part of the defendant than with other causes. *Ellor* v. *Selfridge & Co. Ltd.* (5); *McGowan* v. *Stott* (6); *Daniel* v. *Metropolitan Ry.* (7). It is necessary for the Plaintiff to establish by evidence circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to. If the plaintiff's evidence is equally consistent with negligence on the part of the defendant as with other causes, there is no evidence of negligence, and judgment cannot be given against the

(1) (1877) 3 App. Cas. 193.
(2) (1886) 12 App. Cas. 41.
(3) (1923) A.C. 253.
(4) (1897) 26 Can. S.C.R. 595.
(5) (1930) 46 T.L.R. 236.
(6) 99 L.J.K.B. 357.
(7) L.R. 5 H.L. 45; 40 L.J.C.P. 121.

defendant. In *McArthur* v. *Dominion Cartridge Co.* (1) the jury expressly found negligence in the defendant. While the exact cause of the accident was not proved, yet it was established clearly that the injured person was operating a machine defective beyond doubt. The case cannot be cited as an authority here, because in the one case there was an express finding of negligence, in the other an express finding of no negligence.

The damages are too remote. *Monarch Steamship Co.* v. *A/B Karlshams Oljefabriker* (2); *Donoghue* v. *Steevenson* (3); *Longhurst* v. *Metropolitan Water Board* (4).

On the evidence it is not proper to find negligence in the respondent and the trial judge and the majority of the Court of Appeal should be confirmed in the particular finding. *Peters* v. *Prince of Wales Theater (Birmingham) Ltd.* (5); *Duncan* v. *Campbell Laird & Co.* (6).

The modern authority on "nuisance", particularly as the same applies to water or water works is to be found in *Longhurst* v. *Metropolitan Water Board (supra)*. The case deals with a public authority having statutory power but the decision of the House of Lords and particularly that of Lord Porter at page 839, who quotes with approval the principle enunciated by Rowlatt J. as follows: "A person is liable for nuisance constituted by the state of his property; (1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it." In *Noble* v. *Harrison* (7) from which the above quotation was taken, the action failed because no such knowledge was established. The general difference between the position of a statutory authority acting in the course of its duty and that of a private individual is to be found in *Green* v. *Chelsea Waterworks* (8). An example of negligence in failing to remedy a danger caused in the carrying out of authorized work, but was or should have been known to the defendants and was not remedied, is to be found in *Pope* v. *Fraser & Southern*

(1) (1905) 74 L.J.P.C. 30.
(2) [1949] 1 All E.R. 1.
(3) [1932] A.C. 562 at 580.
(4) [1948] 2 All. E.R. 834.
(5) [1942] 2 All E.R. 533.
(6) [1943] 2 All E.R. 621.
(7) [1926] 2 K.B. 332.
(8) (1894) 70 L.T. 547.

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Rolling & Wire Mills Ltd. (1). It is suggested by Lord Porter, however, that "had the danger been unknown to the defendants and had they no reasonable ground for suspecting it, the result would have been different."

In the case of *Sedleigh-Denfield* v. *O'Callaghan* (2) it is apparent that the respondents were held liable *"because with knowledge or means of knowledge,* they suffered the nuisance to continue without taking reasonably prompt and efficient means for its abatement." At page 354 Viscount Maugham states "I will begin by saying that, in my opinion the principle laid down in *Rylands* v. *Fletcher* does not apply to the present case. That principle relates only to cases where there has been some special use of property bringing with it increased danger to others, and does not extend to damage caused to adjoining owners as the result of the ordinary use of the land." See also Lord Atkin at 361 and Lord Wright at 365-66. The case was decided on the principle that the party held responsible either knew or ought to have known. The general principles of the law are clearly stated and must, it is submitted, be resolved in favour of the respondent here.

Charing Cross v. *London Hydraulic Power Co.* (3) and *Midwood* v. *Manchester Corporation* (4) are both distinguishable. In the first there was a "non-natural user" of water, in the second, an obvious dangerous thing, namely electricity was used in large quantities, the mere escape of which created a nuisance without proof of negligence.

Damage caused by the ordinary domestic use of gas, water and electricity is never actionable *except on proof of negligence. Tilley* v. *Stevenson* (5).

The rule in *Rylands* v. *Fletcher* as pointed out by Lord Simon in *Read* v. *Lyons* (6) must be confined within the strict limits laid down by the House of Lords, the conditions, then declared to be necessary for the existence of absolute liability, should be strictly observed.

There can be no doubt that in the case at Bar there was no "non-natural user." *Rickards* v. *Lothian* (7); *Peters* v. *Prince of Wales Theater* (8).

(1) (1939) 55 T.L.R. 324.
(2) [1940] 3 All E.R. 349.
(3) 83 L.J.K.B. 1352.
(4) (1905) 74 L.J.K.B. 884.
(5) [1939] 4 All E.R. 207.
(6) [1946] 2 All E.R. 471.
(7) [1913] A.C. 269.
(8) [1943] K.B. 73.

The judgment of the Chief Justice and Rand, J. was delivered by:

RAND J.:—The facts in this appeal are these. The claim is for flooding a basement and damaging goods in it. The respondent is the owner of three adjoining buildings in the City of Moncton, running east and west, and having two inside common walls. From west to east, the first was formerly used by a creamery, but had been purchased by the respondent and at the time was undergoing alterations; the next was occupied by a plumbing company and a hardware company respectively; and the third by the appellant, dealing in paints and wall papers. There was a stone basement wall between the first and second; the basements of the plumbing and hardware companies were separated by a wooden partition wall; and between the second and third a stone wall with two door openings in it. The drainage of the second and third led to a trap outlet in the southeast corner of the latter. Into the first a water service entered about two feet above the basement floor through a 4″ pipe from a 12″ street main. The end of the pipe just inside the wall was enlarged into what is known as a bell. This pipe had in 1937 been reduced to 2″ by inserting into the bell, like an inverted drinking glass, an iron reducing plug, 4″ in diameter and 5 or 6 inches in length, the closed end of which was ½″ thick. It was held in place in the bell by a packing of oakum and lead. The closed end was tapped to a diameter of 2″ and threaded, and a 2″ pipe introduced. This pipe led to a meter and from the meter to the pipe system of the creamery. The 4″ pipe was controlled by a valve at the street curb. This was the structural condition on December 17, 1947 when the creamery company vacated the premises, and the city turned off the water at the curb and removed the meter.

On January 1st the respondent took possession and commenced the work of alteration. On January 31st, at its request, the water was turned on. Some time during the month, a ½″ tap was set in the 2″ pipe, for drinking purposes.

In the course of the work, the basement floor became littered with material that probably stopped up a 4″ drainage trap. The ground floor windows were without glass and boarded up, and at least one window in the basement

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was broken or open. During the day, portable oil stoves furnished the only heat. The temperature on March 1st ranged from 19° above zero at 3:30 p.m. to 9° below zero at midnight.

Between 10:15 and 11:00 p.m. of that day, the cellar was discovered full of water and overflowing into the street. In the course of the next half hour or so, the valve at the curb was closed and Edgar LeBlanc, president of both the respondent and the plumbing company, notified. LeBlanc thought nothing could then be done and, as he says, "went back to bed". At that time there was approximately seven feet of water in the basement.

About 8:00 o'clock in the morning, LeBlanc found the adjoining basements to have from 12" to 18" of water in them. In the first there remained about 4' depth of the water which some time later in the day was pumped out.

It was then discovered that the reducing plug had been dislodged from the bell. These plugs are frequently forced out by water pressure and it was said to be difficult to remove them intact otherwise. Several suggestions seem plausible as contributory factors to the separation. Any considerable force on the 2" pipe to which the plug was annexed and which projected about 2' from the wall, such as a blow or wrench, would tend to loosen the plug in the packing; work done on the pipe as in the removal of the meter or the installation of the tap would have that tendency; or the pipe might have been struck by falling debris. It was sought to show that the water in the 4" pipe might have frozen and expanded the bell, thus loosening the packing, but I find no real evidence that in the circumstance that could possibly have taken place. But undoubtedly a slight weakening or loosening of the plug in the packing would cause it to yield to the water.

The only evidence of the time of the occurrence is the recordings of pressure in the city pumping station, and they indicate a sudden drop around 5:30 o'clock p.m. As the workmen left between 4:30 and 5:00, this would seem to put it shortly after the work for the day stopped. There might, at that time, be minor pressure increases from the closing down of places of business.

It is undisputed that the water made its way through the foundation under the first wall and into the adjoining basement, from which it passed into that of the appellant. Richards C.J. takes the word "foundation" to mean wall but LeBlanc's assent to the question: "You think it seeped through the foundation. That would be the foundation where the wall meets with the basement"? rules that out. On the floor, the appellant had stored paints, wall papers and other supplies, which were damaged.

The claim is put on three grounds: negligence, nuisance, and the rule in *Rylands* v. *Fletcher* (1).

The first must depend upon the conclusion of fact that the dislodgment could occur only through some failure on the part of the respondent's employees. Possibly that was the case, but the main work was being done by a contractor. No workman was called. Negligence in the contractor's work would be collateral as there was no apparent danger to the appellant involved in what was undertaken. In these uncertain circumstances I find no ground on which to invoke either the presumption of *res ipse loquitur* or its equivalent as a warranted inference from the proof, and the case for negligence is not made out.

The remaining grounds raise the question of a stricter liability. In the conception of negligence, general conflicting interests are accommodated on the standard of the range of foreseeable risks which would influence the conduct of the ordinary man acting reasonably: that is a rule that permeates all human relations; and as Lord MacMillan in *Read* v. *Lyons* (2), says:—

> The process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to another.

Outside of that body lie the exceptional situations.

In Rylands the illustrations given by Blackburn J. included the following examples of nuisance:—

> "The mine flooded from his neighbour's user", "the cellar invaded by the filth of his neighbour's privy," "whose habitation is made unhealthy by the fumes of noisome vapours of his neighbour's alkali works".

(1) (1868) L.R. 3 H.L. 330. (2) [1946] 2 All E.R. 471 at 476.

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In *Read* v. *Lyons, supra,* at p. 474 Lord Simon, in remarking on these illustrations says:—

> The classic judgment of Blackburn, J. besides deciding the issue before the court and laying down the principle of duty between neighbouring occupiers of land on which the decision was based, sought to group under a single and wider proposition other instances in which liability is independent of negligence, such, for example, as liability for the bite of a defendant's monkey: *May* v. *Burdett* (1). See also the case of a bear on a chain on the defendant's premises: *Besozzi* v. *Harris* (2). There are instances, no doubt, in our law in which liability for damage may be established apart from proof of negligence, but it appears to me logically unnecessary and historically incorrect to refer to all these instances as deduced from one common principle.

Viscount Maugham L.C. in *Sedleigh-Denfield* v. *O'Callaghan* (3), speaks of the "special" use called for by the rule.

In *Charing Cross* v. *London Hydraulic* (4), following *Midwood* v. *Manchester* (5), a high pressure water main in a street was in question. Through various causes it had become unsupported; it broke and a nearby electric main of the plaintiff was damaged. The Court of Appeal, consisting of Lord Sumner, Kennedy L.J. and Bray J. held the company liable equally for a nuisance and under the rule. Scrutton J. at the trial had viewed it as an ordinary use of roads to carry mains of water, gas and electricity, but he felt bound by *Midwood* v. *Manchester.* Lord Sumner, at p. 1355, says:—

> It might be sufficient to dispose of this case to say that it is indistinguishable from *Midwood & Co.* v. *Manchester Corporation* (*supra*) which is binding on this Court, but, lest there should be any misunderstanding, I think it right to express my opinion that this case is also indistinguishable from *Rylands* v. *Fletcher.*

and the reasons of Kennedy L.J. and Bray J. are to the same effect.

In the case at bar, there is, in some respects, a similar overlapping. The first question is whether the maintenance of a 4″ water pipe, a capacity much greater than the 1¼″ intended to be used by the respondent, so close to a 12″ main, held in check by the plug liable to be forced out by pressure, with an attached length of pipe exposed to being knocked about, was an ordinary or virtually necessary use of the basement or one which must be treated as

(1) (1846) 9 Q.B. 101; 16 L.J.Q.B. 64.
(2) (1858) 1 F. & F. 92.
(3) [1940] A.C. 880.
(4) 83 L.J.K.B. 1352.
(5) [1905] 2 K.B. 597.

special? However "natural" it might have been to the creamery it was not so to the requirements of the respondent: it was equally exceptional in the general use of water; and it created undoubtedly a substantial addition to the ordinary risks to neighbouring premises.

In *Blake* v. *Woolf* (1), Wright J. held the maintenance for household purposes of a water cistern on premises occupied by several tenants to be an ordinary and reasonable user of the premises as between the occupants. This case was approved in *Rickards* v. *Lothian* (2). There the water from a lavatory on the top floor of a building overflowed through the tap which had been turned on full and the waste pipe plugged by a third person. Lord Moulton, speaking for the Judicial Committee, said:—

> It is not every use to which land is put that brings into play that principle (i.e. the rule in *Fletcher* v. *Rylands*). It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

The benefit of the community must here be intended as direct or immediate, such as health, and not what might arise remotely from industry.

In *Musgrove* v. *Pandelis* (3), the keeping of a motor car in a garage with gasoline in the tank was held, on appeal, to be a dangerous agency within the rule from which liability arose for the destruction of the overhead premises through a fire from an unexplained cause in the starting of the engine. In *Mulholland* v. *Baker* (4), Asquith J. (now Lord Asquith) applied the same principle to the keeping of a drum containing twenty gallons of paraffin which was exploded by a fire spreading from a burning paper set to drive a rat out of a drain pipe. In *Collingwood* v. *Home Stores Limited* (5), the Court of Appeal held a fire caused by defective wiring without negligence not to be within the rule. Lord Wright, referring to the *Midwood and Charing Cross* decisions, *supra*, says:—

> But in all these cases there was nothing comparable to the ordinary domestic installation of electric wiring for the ordinary comfort and convenience of life. In all these cases these dangerous things were being handled in bulk and in large quantities; * * *

(1) (1898) 2 Q.B. 426.
(2) [1913] A.C. 263.
(3) [1913] 2 K.B. 43.
(4) [1939] 3 All E.R. 253.
(5) (1936) 155 L.T.R. 550.

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> These * * * seem to me to be a lot different in principle and in result from the case of the ordinary domestic pipes for gas or water or for wiring electricity, * * * *

These enhanced risks are prima facie risks of the persons creating them and there is nothing before us to take the case outside the scope of the rule. This liability is not affected by the fact that the dislodgment may have been due to the negligence of the contractor. In thus placing upon the owner the risk of harm to innocent neighbours resulting from such a special feature, the ancient maxim, imprecise and fallacious however it may be, remains the presumptive guide: *sic uti suo ut non laedat alienum.*

Richards C.J. quotes a passage from Lord MacMillan's speech in *Read* v. *Lyons, supra*:—

> I have already pointed out that nothing escaped from the defendants' premises, and, were it necessary to decide the point, I should hesitate to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives. I could conceive it being said that to carry on the manufacture of explosives in a crowded urban area was evidence of negligence, but there is no such case here and I offer no opinion on the point.

But in *Rainham Chemical Works Limited* v. *Belvedere Fish Company* (1), the House of Lords held the bringing of nitrate of soda and dinitrophenol together for the purposes of making munitions to be a danger, though unknown to the owners, which rendered them liable for an explosion which resulted from fire. Whether Rainham, Sussex, is a "crowded suburban area" was not considered. In any event, it does not appear that the buildings here are in an industrial area.

But taking the situation only from the moment when the basement had filled and the respondent notified and accepting the view that the negligence of the contractor could not bring the condition within the rule, did a duty to take reasonable action against the danger then arise, a duty attaching to a state of nuisance not the act of the owner? For at least nine hours the water was left by LeBlanc to work whatever mischief it might. We know that water permeates the soil; LeBlanc knew that surface water had seeped into the appellant's basement through or under the rear foundation wall: and that it will do so

(1) [1921] 2 A.C. 465.

generally seems to me to be a matter of common knowledge. Ermen, a plumber, in his evidence, takes that fact for granted although he would not speculate on its rate of progress.

In the Appeal Division, Richards C.J., Harrison J. concurring, considered that LeBlanc could not reasonably be expected to know that a nuisance had been created: this means that he was not chargeable with liability in relation to it and might, short of adoption, with impunity, have allowed it to remain or to seep out indefinitely so long as damaging results remained unknown.

The question is not whether he should have known that a nuisance had been created but whether he should have sensed a real danger of a nuisance. Essential facts were unknown: LeBlanc does not suggest that he had yet become acquainted with the condition of the floor in any part of the basement, much less that next the common wall. Risk connotes uncertain action arising from concealed or unknown factors against which experience has taught us to be on guard. There were such factors here and the condition presented to LeBlanc was one which should have signalled a dangerous possibility. A duty to act arose and, to be effective at all, it called for prompt measures.

It would have entailed some inconvenience to investigate the adjoining premises that night, but even that was unnecessary to notification. LeBlanc knew that if water reached the adjoining basement the way was open to the others, and as a minimum of precaution he should have apprised the appellant: *Sedleigh-Denfield* v. *O'Callaghan* (*supra*); *Pope* v. *Fraser* (1); *Northwestern Utilities* v. *London Guarantee Company* (2). At that time the goods that were damaged could easily and quickly have been removed from the lower levels of the basement: and it is a fair inference from the evidence that the water reached there in damaging quantity after LeBlanc learned what had happened.

Mr. Stewart argued that what is assumed to have been a negligently clogged trap and drain pipe in the appellant's basement was an answer to the claim. But that objection, I think, misconceives the situation. The trap and outlet were for the benefit of the appellant for ordinary drainage

(1) (1939) 55 L.T.R. 324. (2) [1936] A.C. 108.

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purposes as were the trap and outlet in the respondent's basement: and even assuming the intermediate tenants to be entitled to drain through the appellant's premises, that does not give rise to a duty toward the respondent to protect it against the consequences of its own culpable action.

I would, therefore, allow the appeal with costs throughout; as the trial judge did not find the amount of damages, the case should be referred back to him to do so, with liberty to either party to adduce further evidence. The costs of the latter, however, should be in the discretion of the trial judge.

The judgment of Kerwin and Estey, JJ. was delivered by:—

ESTEY J.:—The appellant, engaged in the selling of wallpaper and paint on premises leased from the respondent, claims damages for loss suffered when, as it alleges, due to the respondent's negligence, a four-inch water pipe froze, forcing out a plug, permitting water to flow in great quantities into the appellant's premises and injuring its stock. The appellant's action was dismissed at trial and that judgment was affirmed in the Appeal Division of the Supreme Court of New Brunswick, Mr. Justice Hughes dissenting.

The premises in question, though not constructed as one building, are now owned by the respondent and throughout this litigation have been treated as one, three-story, brick building, with basement, on Main Street in the City of Moncton. It is divided into four parts and, so far as material in this litigation, the appellant occupies the ground floor and basement of the most easterly part; the next is occupied by the Eastern Hardware Limited and the third by the Moncton Plumbing & Supply Company Limited.

LeBlanc is president of both the respondent and the Moncton Plumbing & Supply Company Limited.

The most westerly part of the premises had been vacant since December 19, 1947, and respondent, as owner, had, since some time in January, 1948, been effecting renovations in preparation for another tenant. These renovations included the removal of the entire front and part of the main and second floors of the most westerly portion of the

building. These were commenced in January and, prior to March 2, 1948, when the water escaped causing the damage here claimed, the evidence suggests the front was well advanced, "the ground floor was all renewed" and the men were working upon the ceilings and other floors. On the day in question the men were working above the basement and left the premises about 5:00 p.m. In this vacant part there was no heat except that provided by portable oil heaters, which the men carried about as their work required. Once they left there was no heat upon these premises and it is conceded that the temperature inside this building would be substantially the same as that out of doors.

The water from the city system entered this westerly part through a four-inch pipe, 5 or 6 feet below street level and about 1½ to 2 feet above the basement floor. The end of this four-inch pipe in the building was described as bell-shaped, into which a plug was inserted from 4 to 6 inches long with the outer end of solid iron about one-half inch thick. It was held in position or "lodged there with oakum and lead and corked in." It was tapped, in order to reduce the flow from 4 inches to 2 inches, and on the end of the two-inch pipe a tap was placed.

After the men left, and probably about 5:30 p.m., as determined by the change in pressure at the city pumping station, this plug came out of the four-inch pipe, with the result that the water poured into the basement and continued to do so until about 10:30 at night, when a policeman discovered water flowing from that part of the building into the street. He communicated with Coleman, a service man in the Water and Light Department of the City of Moncton, who proceeded to the premises where he found "water flowing at quite a rate on Main Street," which came out of this westerly part through a cellar window. He immediately telephoned LeBlanc, describing the condition as he found it and stating that he would turn off the water at the city main. A few minutes later he telephoned that he had, in fact, turned off the water. In the course of these conversations he asked LeBlanc to come down, to which the latter replied that "there was not much he could do at that time of the night, he didn't have the

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key." Neither did Mr. LeBlanc, nor anyone else, communicate with the other tenants, who, therefore, knew nothing of the presence of the water until the next morning.

The basement into which the water flowed has a wall between it and the next tenant, the Moncton Plumbing & Supply Company Limited. This wall, about 2 feet in thickness, extends from the basement floor to the ceiling. LeBlanc described it as "a stone wall with mortar in the joints and it looks to be a very well built wall." Upon the westerly side it has a concrete face. Between the Moncton Plumbing & Supply Company Limited and the next tenant, Eastern Hardware Limited, is a wooden partition, and that between the Eastern Hardware Limited and respondent is again a stone wall, 2 feet in thickness, with mortar in the joints, but with two wooden doors permitting passage through it. The water flowed out of the four-inch pipe and filled the basement until it flowed out of the window. It also seeped through the stone and mortar wall with the concrete face and, once through that, it passed through the wooden partition and the doors of the other stone wall into the premises of the appellant. Apart from turning the water off at the city main, nothing was done that night. LeBlanc arrived at the building about 8:00 o'clock the next morning. He says he then found about 4 feet of water in that part of the basement into which the water flowed from the pipe, about a foot in the part occupied by the Moncton Plumbing & Supply Company Limited and a foot to a foot and a half in that portion occupied by the appellant. Others deposed to larger quantities in the respective parts, but it is not questioned but that sufficient water entered the appellant's premises to do the damage here claimed.

The tenants moved out of the most westerly part and the water was turned off at the city main on December 19, 1947. It was turned on again on January 28, 1948, and remained so until March 1, 1948. The plug at the end of the four-inch pipe was placed there in 1937, according to the usual and accepted practice. In the intervening period it served its purpose without any suggestion of weakness or defect.

That the water from this four-inch pipe caused the damage is conceded. The appellant claims that the plug was forced out when the water in the pipe froze because the respondent had "failed in sub-zero weather to heat the premises or to take reasonable or any precautions to avoid such freezing." Bingham, the Water Department foreman and Plumbing Inspector for the City of Moncton, stated that it might have been forced out by frost or because of old age, defective joint, or pressure. The plug itself was not produced. LeBlanc, himself a plumber, deposed that he had this plug in his "possession for a long time and the men dismantled it," and suggested it may have been sold for junk. It is fair to assume that, if the condition of the plug had been such as to support a conclusion that it came out either because of old age or defective joint, it would have been carefully preserved and evidence adduced in regard thereto. Not only was the plug not preserved, but no evidence was adduced to support either of these possible causes.

LeBlanc, while he did not think it was forced out by frost, suggested, at his examination for discovery, that there must have been "a high pressure of water in water main on Main Street to cause that reducer to burst." At the trial, however, he deposed that he had "no idea" what forced the plug out. The suggestion that pressure may have caused it appears to be conclusively answered by the evidence. At the pumping station the pressure varied from 51 to 58 pounds between 5:00 and 10:45 o'clock that night. On Main Street the pressure would be approximately 15 pounds less. The evidence also establishes that the average pressure at the pumping station is some 60 to 65 pounds and that at this period they were conserving water and had reduced the pressure to the point where they often received complaints. Upon this evidence there is not only no support for, but it, in effect, refutes the possibility of the water pressure expelling this plug.

Bingham thought that the frost was the most likely cause. Keiver, the engineer at the city pumping station, deposed that on March 1 the temperature at 8:00 a.m. was 2 degrees below zero; 12:00 noon 11 degrees above zero; 3:20 p.m. 19 degrees above zero; 12:00 midnight 9 degrees

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below zero. He was of the opinion that the temperatures in this basement were such that the pipes might have frozen at any time between 3:00 p.m. and 12:00 midnight.

The accepted method of removing these plugs is by a blow torch. They may also be expelled by great pressure, but an attempt to do so by pounding or other force results in a breaking of the plug. In the course of the trial one witness was asked if the two-inch pipe "were hit with lumber, people or other things," would it break the pipe or dislodge the plug. His reply was that it would dislodge the plug before breaking the pipe. Such an opinion, apart from evidence that on or about the day in question such was a reasonable probability, is not sufficient to offset the evidence in this record, as found by all the learned judges in the Appeal Division, that the plug was expelled by frost.

While the water was turned on on January 28 and provided a place for the men to obtain drinking water, there is no evidence that it was so used on or about the day in question, or, if so, when. In fact there is no evidence that the workmen or anyone else was in this basement on or about the day in question.

LeBlanc, himself a plumber, expressed the opinion that if a building were unoccupied and unheated during the winter the water should be turned off at the city main and the tap in the cellar opened in order to let the water in the pipe drain out. These premises, from the point of view of temperature, were, in effect, unoccupied and unheated. If it was desirable to have water available from this tap for the workmen, it would seem, having regard to probable temperatures, but ordinary prudence to provide for the turning off of the water, or some other reasonable precautions, to prevent the freezing thereof and consequent damage.

Respondent submits that this evidence is not sufficient to support a conclusion of negligence and that any statement that the freezing of the pipes caused the expulsion of the plug was but a surmise or a conjecture. The respondent cited, in support of his contention, certain cases, including *The Montreal Rolling Mills Company* v. *Corcoran* (1), where Wilson, an experienced engineer, had been in charge of the engine and machinery in the appel-

(1) (1896) 26 Can. S.C.R. 595.

lant's mill for about two years. One day the employees of the mill heard a strange noise and, upon rushing to the engine room, "the engine and machinery were found running in perfect order, but poor Wilson was dead, his body being scattered around the room, frightfully mutilated." Wilson had been alone. Everything was found in order and there were no facts from which a conclusion or inference might be drawn as to what had taken place to cause this unfortunate death.

The case at bar, however, is quite distinguishable upon its facts. Certain causes were here suggested, but, upon the evidence, all of these were eliminated except frost. On the night in question there was sufficient frost, having regard to the state of the building, to cause just what happened and the evidence justifies the conclusion that the plug was forced out because of the freezing of the water. It is, therefore, a case more like that of *McArthur* v. *Dominion Cartridge Company* (1), where a young man employed at the respondent's works was injured when an explosion originated in an automatic machine at which the injured boy was employed. The explosion was instantaneous and the jury found it was due to negligence on the part of the company to supply suitable machinery and to take proper precautions to prevent an explosion. Their Lordships of the Privy Council pointed out that, upon the evidence, cartridges were now and then presented in a wrong posture, which would prevent the machine functioning properly, and then stated at p. 76:

> It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator. The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion.

Though the frost was sufficient to cause the freezing of the pipes, it is not suggested it was unusual at that time of the year in the City of Moncton. Indeed, the wonder is that these pipes had not frozen in the period intervening since January 28, 1948. The evidence makes it clear that the expansion consequent upon the freezing of this water would force the plug out.

(1) [1905] A.C. 72.

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The evidence, in my opinion, points directly to the low temperature in the building as the cause of the water freezing and forcing the plug out of the pipe. This was a possibility that, in the circumstances, would have been foreseen by a reasonable man, who would have taken steps to provide against it and, therefore, failure to take such precautions constitutes negligence on the part of the respondent.

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no preccautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions." *Fardon* v. *Harcourt-Rivington* (1).

I am, therefore, in agreement with the conclusions arrived at by the learned judges in the Appellate Court that the plug was forced out by the freezing of the pipes and that the respondent was negligent in not taking proper precautions to prevent such an occurrence.

The majority of the learned judges in the Appeal Division were, however, of the opinion that the respondent was not liable because

> LeBlanc had reasonable ground for believing that the water would not escape through that wall into the adjoining premises.

LeBlanc himself does not depose that he entertained such a belief. Indeed, when asked if he had, in his 25 years' experience, "ever known water to seep through two foot stone and concrete wall," he went no further than to reply: "Well, I never had much experience in that, but I was surprised when it did." He did not suggest that at any time he made a careful examination of that wall and contented himself with the statement already quoted: "a stone wall with mortar in the joints and it looks to be a very well built wall."

The evidence does not disclose the age of this building more than that it had been occupied by the Farmers' Co-Operative Creamery Company since prior to 1922. There is no evidence, apart from the cement facing already mentioned being placed on the western side of this wall, that it had been repaired or altered since the building was constructed. A conclusion is justified, however, that it was

(1) (1932) 48 T.L.R. 215 at 216.

a rather large basement with a sufficient quantity of water therein, when LeBlanc was communicated with, to exert a substantial pressure. LeBlanc knew the drain or outlet for water in that basement was covered with 18 inches of concrete and sand and, therefore, that it would either not function or, if so, only at a reduced capacity. Further, LeBlanc knew that in 1947 water had seeped through the outside wall in that part of the building occupied by the appellant and had, in fact, warned them, because of this, to keep the drain clear.

Water in such a volume exercises very great pressure and will find the smallest passages of escape and, wherever possible, will wear away the sides of those small passages and increase the flow. This is common knowledge and more particularly would be known to a plumber in the position of LeBlanc.

With the greatest possible respect for those learned judges who hold a contrary opinion, I think the finding that LeBlanc had reasonable ground for believing that the water would not escape through that wall into the adjoining premises cannot be supported. It rather seems that a reasonable man, having regard to the location of the wall and the fact that it had been there for at least 25 years, and probably a much longer time, would have appreciated the possibility of such cracks, or other openings, having developed in the wall as to make seepage a probability. Moreover, the quantity of water there impounded to permit of it flowing through the window into the street would indicate a very substantial force being exerted upon that wall, which, upon the evidence, it was never constructed to withstand.

The foregoing disposes of this appeal. It does, however, appear desirable to point out that event if, as found by the majority of the learned judges in the Appeal Division, LeBlanc had reasonable grounds for believing that the water would not seep through the wall and, therefore, the damage, as claimed, was not foreseeable to a reasonable man, nevertheless the damage might be recovered. While the point has not been finally determined, there is authority that foreseeability, while relevant in deciding the issue of

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negligence, is not relevant in determining what damage may be recovered arising out of, or consequent upon, that negligence.

The appellant also based its claim upon nuisance and the principles underlying *Rylands* v. *Fletcher* (1). In view, however, of the conclusions arrived at, it is unnecessary to discuss these.

The appeal should be allowed with costs throughout and judgment entered that the appellant is entitled to recover from the respondent such damages as may be fixed by the trial judge. The case should be sent back to him for that purpose with leave to both parties to call such further evidence as they may be advised. The costs of this reference should be left to the discretion of the trial judge.

LOCKE J. (dissenting):—In so far as the appellant's claim is based upon negligence in permitting the escape of the water into the cellar of the premises formerly occupied by the Farmers' Co-Operative Creamery Company, the case pleaded is that in consequence of the failure of the respondent to heat the premises the water pipe burst and thereafter, due to the drainage from the cellar being inadequate, the water escaped into the premises of the appellant causing damage.

There is no evidence that the water pipe burst, the only evidence as to the means by which the water escaped being that of Leblanc, president of the respondent company, that the plug or sleeve inserted into the four-inch water pipe inside the cellar by the former tenant had been forced out in some manner. Leblanc had been examined for discovery in advance of the trial and then said that the plug was in the respondent's possession if the other side wanted it as an exhibit but, unfortunately, it was not produced or identified and thereafter it had apparently been dismantled for junk and was not available at the trial. In view of what took place at the examination for discovery, I think no inference unfavourable to the respondent is to be drawn from the fact that the plug, an examination of which might have indicated how it had been forced from the four-inch pipe, was not produced.

(1) (1868) L.R. 3 H.L. 330.

I agree with the learned trial judge that there were no facts proven from which he could properly draw any inference as to the manner in which the plug was dislodged. It had been inserted into the four-inch water pipe some years previously at the instance of the Farmers' Co-Operative Creamery Company, being secured by molten lead and oakum in accordance with what was shown to be standard practice. It was the appellant's contention that the water freezing had forced out the plug. Presumably (though this is not made clear) this means freezing in the four-inch pipe since freezing in the two-inch pipe could not dislodge the plug. There was no direct evidence of any freezing in either pipe and it was the undisputed evidence that more than four weeks prior to the date the water escaped, the water, which had been shut off at the main in the street, was turned on and that during the intervening period the employees of the contractor employed by the respondent company to make extensive alterations to the building had drawn water every day for drinking purposes from the tap in the two-inch pipe screwed in to the base of the plug. The water apparently escaped into the cellar at some time on March 1, 1948, and evidence was given that on that day, in the very early morning, the temperature had been 4 degrees below zero, that at 8.00 a.m. it was 2 below, at noon 11 above zero and at 3.30 p.m. 19 above zero, which was the highest temperature of the day. Later that day the temperature dropped again and it was 9 below at midnight. From the fact that, as shown by the plaintiff's witness Keiver, the engineer in charge of the city pumping station, the water pressure dropped suddenly between 4.15 and 5.45 p.m. it might properly be inferred that it was at about this time the plug became detached or was forced from the pipe and the water commenced to escape.

The evidence tendered by the appellant in an endeavour to prove that freezing was responsible for the plug being dislodged was that of Keiver and Wesley Bingham, the Water Department foreman and plumbing inspector for the City of Moncton. The former, a stationary engineer, said that if there was no fire in the building it took very little frost to freeze a pipe and that, assuming there was no heat in the building, the pipes would have been liable to freeze on March 1st. Bingham, who had been in the city's

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employ for over 30 years, said that frost was the most common factor in causing breaks and leaks in water pipes. While he had not in giving evidence in chief hazarded the opinion that the plug had been forced out by the water in the pipe freezing, on redirect examination, in answer to a leading question asked by counsel for the appellant, he said that if the water in the pipe (without specifying whether he meant the four-inch or the two-inch pipe) froze solid enough, the expansion would be sufficient to loosen the plug which would be forced out and that this was one of the things he suggested might have happened in this case. LeBlanc, for the respondent, a plumber with 25 years' experience, said that he had never heard of a four-inch plug being dislodged by frost. His company had purchased the building and taken possession on January 1, 1948, and the contractor employed in renovating the building had used portable oil heaters on the ground floor of the premises to keep them sufficiently warm for the workmen to carry on the work. It was on January 28th that the water was turned on and while no evidence was given as to the temperatures which had prevailed in Moncton between that date and March 1st, LeBlanc said that January and February were generally the coldest months of the year, and the learned trial judge might properly infer, as he did, that on many occasions during this period the temperature had been below freezing. There had been, according to LeBlanc, no trouble with freezing in the building during this period. This being the state of the record, Anglin J. was, in my opinion, right in declining to draw the inference that frost had caused the plug to be dislodged. There were, as was indicated in the evidence, other possible causes such as the plug being struck a heavy blow in the course of the work of reconstruction being carried on in the building or by reason of some latent weakness or defect in the connection, but whether it was one of these or some other cause appears to me to be simply a matter of conjecture.

As to the claim that there was negligence on the part of the respondent in failing to provide the cellar with drains adequate to carry off the volume of water which would escape from the four-inch pipe if the plug were dislodged, or alternatively in seeing that the existing drain should be kept clear, I agree with the conclusion of the learned

trial judge. It is clear upon the evidence that even had the existing drain been kept clear of debris, it could not have carried off promptly the volume of water which would escape if the plug were dislodged. I am further of the opinion that there was no duty resting upon the respondent as the owner of the building to provide a drain of such size as to immediately carry off water admitted into the basement without fault on its part.

While the appellant had further pleaded that after the escaping water had filled the cellar of the respondent's premises, to its knowledge no steps had been taken to prevent it escaping into the premises occupied by the appellant, this point does not appear to have been considered by Anglin J. On appeal, Richards C.J., with whom Harrison J. agreed, was of the opinion that in view of the nature of the existing stone wall between the appellant's cellar and the premises lying to the east, a reasonable person would assume (as LeBlanc said that he did in fact assume) that the water would not escape during the night and cause damage. I respectfully agree with the conclusion of the learned Chief Justice that the failure of the respondent to take steps to rid the basement of the water until the following morning at 8 o'clock was not actionable negligence.

There are two branches of the claim in so far as it is based upon nuisance. Contending that the cellar filled with water was in law a nuisance, it is said firstly that it was created through the negligence of the respondent in permitting the escape of water from the four-inch pipe, and secondly that even if the escape of the water from the pipe was not due to the respondent's negligence, the latter is liable on the ground that after LeBlanc learned that the cellar had become filled with water he took no immediate steps to abate the nuisance. For the reasons which I have stated, I am of the opinion that the presence of the water in the basement was not due to the negligence of the respondent, but of course negligence is not a necessary condition of a claim for nuisance. In *Noble* v. *Harrison* (1), Rowlatt J. said that a person is liable for a nuisance constituted by the state of his property: (1) if he causes it; (2) if by the neglect of some duty he allowed

(1) [1926] 2 K.B. 332 at 338.

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it to arise; and (3) if: when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it. In *Sedleigh-Denfield* v. *O'Callaghan* (1), Viscount Maugham approved the following statement of the law as to the liability for the continuation of a nuisance, taken from the 5th edition of Salmond on Torts: (p. 260)

> When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.

Lord Wright said (p. 904) that if the nuisance were due to a latent defect or the act of a trespasser or stranger, the occupier was not liable unless he did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. In my opinion, if it be assumed that the condition existing in the cellar of the respondent's premises at the time LeBlanc was notified in the late evening of March 1st constituted a nuisance, the condition not having been brought about by any voluntary or negligent act of the appellant his failure to take steps to abate it until 8 o'clock on the following morning was not undue delay imposing liability upon the respondent.

There remains the contention of the appellant that upon the application of the principle in *Rylands* v. *Fletcher* (2), the respondent is liable. In *Blake* v. *Woolf* (3), water had escaped from a cistern maintained on the defendant's premises causing damage. Wright J. stated that the general rule as laid down in Rylands' case is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter such as large quantities of water which his neighbour keeps upon his land, but that the general rule is qualified by some exceptions, one of which is that where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part no liability attached to him. In *Rickards* v. *Lothian* (4), Lord Moulton, in delivering the judgment of the Judicial Committee, referring to the principle laid down in *Rylands*

(1) [1940] 2 A.C. 880.
(2) (1868) L.R. 3 H.L. 330.
(3) [1898] 2 Q.B. 426.
(4) [1913] A.C. 263.

v. *Fletcher,* said that it is not every use to which land is put that brings that principle into play, but that it must be some special use bringing with it increased danger to others and not merely the ordinary use of the land. Lord Moulton further adopted a passage from the judgment of Lord Robertson in *Eastern and South African Telegraph Company* v. *Capetown Tramways Companies* (1), where, referring to the principle, he said that it:—

> subjects to a high liability the owner who uses his property for purposes other than those which are natural.

and expressly approved the passage from the judgment of Wright J. in *Blake* v. *Woolf* above referred to.

Since the respondent in the present matter did not, of his own motion or by reason of his negligence, cause the basement to be filled with water or maintain it in that state for an unreasonable time after learning of the existence of the condition, the only possible ground for the application of the principle in *Rylands'* case appears to me to be that maintaining a four-inch pipe connecting with the principal water main of the city, capable of discharging a volume of water into the premises which would endanger the property of adjoining owners, involved liability upon this principle. Apart from the evidence of a witness, Coleman, a service man in the employ of the Water Department of the City of Moncton, that the flow of water from a four-inch pipe is more than the ordinary user, there was no suggestion that water for industrial purposes is not commonly brought upon such premises through the medium of such a pipe. In *Rylands* v. *Fletcher,* Cairns, L.C., after saying that the owners or occupiers of the close on which the reservoir was constructed might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used, said that if, not stopping at the natural use of their close, they had desired to use it for any purpose which might be termed a non-natural use, they were doing so at their own peril. In *Sedleigh-Denfield's* case *supra,* Lord Maugham said that the principle in *Rylands* v. *Fletcher* related only to cases where there had been some special use of property bringing with it increased danger to others and that it did not extend to damage caused to adjoining owners, as the result of

(1) [1902] A.C. 393.

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ordinary use of the land. I find no evidence in the present matter upon which to base a conclusion that to bring water for commercial use into business premises in a four-inch pipe is a non-natural, and not merely an ordinary, use of them. In my opinion, the principle does not apply to a case such as this.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Friel & Friel.*

Solicitors for the respondent: *Stewart & Savage.*

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*Apr. 23, 24, 25

*Jun. 30

LA COMPAGNIE FRANÇAISE DU PHENIX (DEFENDANT) ..... APPELLANT;

AND

THE TRAVELERS FIRE INSURANCE CO. (PLAINTIFF) ..... RESPONDENT.

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

Insurance—Fire—Contents of building—Whether objects lost in fire were part of contents—Whether variation of statutory conditions—Subrogation—Quebec Insurance Act, R.S.Q. 1941, c. 299, ss. 240, 241—Articles 1156, 1570, 1571, 2573 C.C.

The insured entered into contracts of insurance with the appellant and several other companies for a total fire insurance of $250,000, apportioned $150,000 upon the building and $100,000 on the contents. These policies were "blanket policies", identical in terms and each one limiting the issuing company's share of the total risk. The insured was authorized to augment or diminish the total amount but had to maintain an insurance "de même forme, teneur et portée" of a total of $250,000. The word "contents" was defined: "Tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré".

Subsequently the insured acquired an insurance with the respondent in the sum of $10,000 on certain "objets d'art". These were part of the contents of the buildings and initially included under the appellant's policy.

A fire having occurred, the respondent paid the full amount of the loss on the "objets d'art", took a transfer from the ensured and, as the appellant denied any liability to pay a pro rata share, brought action against him. The appellant contended that the "objets d'art" did not

*PRESENT: Rinfret C.J. and Taschereau, Kellock, Estey and Fauteux JJ.

fall within the term "contents" in his policy since they were differently assured. The trial judge dismissed the action, but a majority in the Court of Appeal for Quebec reversed that judgment.

Held (Kellock and Fauteux JJ. dissenting): that the appeal should be allowed and the action dismissed, since the "objets d'art" did not come within the term "contents" as defined in the appellant's policy and were, therefore, not covered by its policy at the time of the loss.

The words "qui n'est pas autrement assuré" are a part of the sentence describing the subject matter and peril insured, and are not a variation of the statutory conditions within the meaning of ss. 240, and 241 of the *Quebec Insurance Act*.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing, St. Jacques and Hyde JJ.A. dissenting, the judgment of the trial judge which had dismissed the action.

A. J. Campbell Q.C. for the appellant. The property described in the policy issued by the respondent was otherwise insured within the meaning of that phrase as used in the appellant's policy and consequently was not covered by the appellant's policy. Otherwise insured means differently insured i.e., a different kind of coverage. The appellant's coverage was a blanket coverage as opposed to the respondent's coverage which was a specific one. That is the meaning that has been assumed throughout by the parties to that policy. Moreover, if it could be said that the provisions of that policy are not free from obscurity, the intention of the parties may be ascertained by taking into consideration the surrounding circumstances and by examining the conduct of the parties themselves insofar as it throws light on the interpretation they may have placed upon their contractual rights.

When one takes into consideration all of the terms of the wording, it is clear that the consent to other insurance is to other blanket insurance of the same form, range and wording. Therefore, even if the property described in the respondent's policy was not "autrement assuré", there was no consent given by the appellant to such insurance and accordingly the appellant ceased to cover.

The so-called transfer and subrogation does not justify the institution of the action. Article 1156 C.C. does not apply, because if the appellant was in any way liable to its assured for the loss of the collection, it was liable in virtue

(1) Q.R. [1951] K.B. 224.

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of its obligation to its assured and not in virtue of an obligation owed by it to the assured jointly with others. In view of the fact that each company is only bound for its share, there cannot be any legal subrogation under 1156 C.C. The assured can no longer attack the policy for illegality because he has accepted the validity of that policy by the inference to be drawn from the fact that he has claimed the whole amount from the respondent. Furthermore, no subrogation was ever given by the "École" because the requirements of s. 4 of Statute 16 George V (1926), c. 49, which requires two signatures from the "École", were not met.

The sentence "tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré", used to define the contents in the appellant's policy is not a variation of the statutory conditions, because this sentence is not a condition of the policy but simply a description or limitation of the risk: *Curtis's & Harvey* v. *North British and Mercantile Insurance Co. Ltd.* (1); *The London Assurance Corp.* v. *The Great Northern Transit Co.* (2); *Palatine Ins. Co.* v. *Gregory* (3) and *Ross* v. *Scottish Union & National Ins.* (4).

John T. Hackett Q.C. and R. S. Willis for the respondent. The words "et qui n'est pas autrement assuré" come in conflict with certain conditions of the policy and in consequence are subject to the provisions of ss. 240 and 241 of the *Quebec Insurance Act*, and are, therefore, without binding effect on the insured. This sentence is not only descriptive of the property insured but is also a stipulation contradicting the statutory conditions. The test is not whether the stipulation is a condition or a description, but whether the stipulation varies, contradicts, etc. *The W. Malcolm MacKay Co.* v. *The British American Ass. Co.* (5) which was approved by the Privy Council in *Palatine Ins. Co.* v. *Gregory* (*supra*).

Even if the words were purely descriptive, they would not have the effect of freeing the appellant from the obligation to pay by virtue of Article 2573 C.C.

(1) 55 D.L.R. 95.
(2) (1899) 29 Can. S.C.R. 577.
(3) [1926] 1 D.L.R. 792.
(4) (1918) 58 Can. S.C.R. 169.
(5) [1923] S.C.R. 335.

The interpretation of the words when read in conjunction with the permission to increase or diminish the total amount of the insurance without notifying the insurers thereof, means that there had to be $250,000 of insurance at all times in like form, tenor and bearing, but once that requirement had been met with, the assured was free to increase the total amount of its insurance in any way it elected. If, however, the Court should come to the conclusion that the language is ambiguous, it should be interpreted against the appellant by the application of the rule *contra proferentem.*

The respondent is entitled to exercise any and all the rights of the insured. He is suing under a sale or transfer of rights. Any right may be transferred if law or policy does not forbid it. There is nothing in the *Insurance Act* to support the contention that the assured may not transfer his rights to impugn a variation. Considering the wording of the statute (16 George V., c. 49) and the Order in Council and that payment was payable to the Province, which got the money, then the subrogation was rightly signed and was good. The person to give the subrogation is the payee (the Province in this case) and not the assured. Article 1156 C.C. is applicable because the appellant had an interest in the payment of these indemnities.

The CHIEF JUSTICE:—Telle qu'elle fut intentée, l'action de "The Travelers Fire Insurance Company" alléguait exclusivement l'émission, en date du 7 février 1940, par la Compagnie Française du Phénix (défenderesse) d'une police d'assurance contre le feu en faveur de la Corporation des Écoles techniques ou professionnelles, pour une période de trois ans depuis sa date, pour la somme de $60,000, assurant certains effets contenus dans la bâtisse de l'École Technique de Montréal, y compris l'École du Meuble.

Il y fut stipulé que l'indemnité qui pourrait devenir due, au cas de sinistre, serait payable au Gouvernement de la province de Québec.

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La déclaration ajoutait que, le 2 juin 1940, alors que cette police d'assurance était en vigueur, des pertes causées par le feu, au montant de $7,070.53, furent éprouvées par l'assurée aux objets suivants:

> Objets d'art et des meubles faisant partie des collections du musée de l'École du Meuble, seulement lorsque contenus dans le bâtiment deux étages, construit en brique solide, avec toiture en patente, occupé comme École du Meuble, situé à Montréal, Province de Québec, et portant le N° 2020 rue Kimberley.

L'intimée ajoutait que ces objets étaient également assurés, en outre de la Compagnie Française du Phénix, par la Compagnie d'Assurance du Canada contre l'incendie, au montant de $10,000; La Nationale, Compagnie Anonyme d'Assurance contre l'Incendie et les Explosions, pour le même montant; "Commerce Mutual Fire Insurance Company", "The Stanstead & Sherbrooke Fire Insurance Company", "The Mercantile Fire Insurance Company" et "The Missisquoi & Rouville Mutual Fire Insurance Company", conjointement pour un montant de $20,000; et par l'intimée elle-même, "The Travelers Fire Insurance Company", pour un montant de $10,000.

Chacune de ces polices d'assurance, sauf celle de l'intimée, stipulait que l'assurance porterait sur le contenu des immeubles de l'appelante et que l'on devrait entendre par "contenu": "tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré."

L'appelante prétendait que cette stipulation était une variation des conditions statutaires n° 9 et que, comme elle n'était pas indiquée dans la police en la manière exigée par la loi, elle était en conséquence sans effet légal et n'engageait pas l'assurée.

Les pertes totales causées par l'incendie déjà mentionné s'élevèrent à $76,852.14 et chacun des assureurs paya en conséquence sa part respective de ce montant de $76,852.14, moins $3,000 supportés par "The Phoenix Assurance Company, Limited, of London, England", en vertu d'une autre police d'assurance.

L'appelante, cependant, refusa de payer une somme de $1,939.85, représentant sa part dans le montant de $7,070.53 pour l'indemnité due sur les objets d'art et autres meubles énumérés plus haut.

L'intimée se fit donc subroger par l'École du Meuble et le Gouvernement de la province de Québec dans leurs droits contre l'appelante, et, après en avoir signifié le document de subrogation à l'appelante, l'intimée intenta contre cette dernière l'action dont il s'agit dans la présente cause.

C'était là tout ce qui était allégué dans la déclaration par laquelle l'action a débuté.

L'appelante produisit une plaidoirie écrite niant que la police d'assurance, en vertu de laquelle elle pouvait être tenue responsable, contint une variation aux conditions statutaires, et que les mots "tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré" fussent autre chose que la description de l'objet de l'assurance; qu'elle avait acquitté tout ce qu'elle devait à la Corporation des Écoles techniques ou professionnelles, ainsi qu'au Gouvernement de la province de Québec, comme représentant sa proportion dans le montant de $76,852.14; et que la somme de $7,070.53, à laquelle référait la déclaration de l'intimée, était uniquement la responsabilité de cette dernière qui, en la payant au Gouvernement de la province de Québec, n'avait fait rien autre chose que d'acquitter sa propre dette.

Jusque là, il ne s'agissait donc que d'une action bien simple dans laquelle l'intimée alléguant le paiement et la subrogation faite en sa faveur en réclamait la part de l'appelante.

Il n'était donc aucunement question d'une action récursoire, où l'intimée aurait allégué avoir payé pour le compte de l'appelante et lui en aurait demandé le remboursement.

Ce n'est que dans la réponse que l'on trouve au paragraphe 5 de l'allégation suivante:

> 5. That Defendent, with the other Insurers mentioned in paragraph 3 of the Declaration, is liable for its respective share of the total loss of $7,070.53, with interest thereon from the 2nd day of August, 1940.

Il apparaît au dossier et cela est confirmé par l'information que nous possédons, qu'une action semblable fut instituée par l'intimée contre les autres compagnies d'assurance déjà mentionnées et il fut convenu que la preuve et l'enquête seraient communes à chacune de ces actions.

Il ne fait pas de doute que cette nouvelle allégation contenue dans la réponse non seulement aurait dû se trouver dans la déclaration, mais que, comme elle n'y

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était pas, même si l'intimée avait demandé la permission au tribunal de l'introduire par voie d'amendement, il est improbable que cette permission eût pu être accordée, vu qu'elle changeait complètement la nature de l'action de l'intimée et qu'elle avait pour effet de transformer une simple action directe contre l'appelante en exercice des droits du Gouvernement de la province de Québec et de l'assurée en une action récursoire.

Cependant, l'appelante a négligé de se prévaloir de la possibilité de faire rejeter cette allégation de la réponse, qui est restée dans les plaidoiries écrites, tant en Cour Supérieure qu'en Cour du Banc de la Reine (en appel), et il semble bien que la Cour Suprême n'a pas d'autre alternative que de considérer le litige à la fois comme comportant une action directe et une action récursoire, même en dépit du fait qu'il soit douteux que cela ne constitue pas un cumul de recours incompatibles ou contradictoires ne tendant pas à des condamnations de même nature où l'appelante, par voie d'exception dilatoire, eût pu contraindre l'intimée à faire option, en vertu de l'article 177 du *Code de Procédure Civile.*

A notre humble avis, cette situation met l'appelante dans une position défavorable. Sur la déclaration, telle que rédigée d'abord, elle n'avait qu'à rencontrer la réclamation de l'assurée et à lui opposer, entre autres, le contrat d'assurance par lequel l'assurée se trouvait liée au moins par acquiescement. Au contraire, lorsque l'intimée ajoute aux droits dans lesquels elle a été subrogée la prétention qu'elle n'a fait que payer une somme due par l'appelante et qu'elle est autorisée à se faire rembourser par cette dernière, il s'agit alors d'un droit tout différent où les moyens de défense de l'appelante ne sont plus les mêmes.

L'appelante n'aurait qu'à se blâmer elle-même si cela devait tourner à son désavantage. Mais je ne vois pas comment nous pouvons traiter la cause comme si le paragraphe 5 de la réponse ne se trouvait pas au dossier.

Il importe tout d'abord de signaler que la police d'assurance émise par l'intimée était d'une nature différente de celle des autres compagnies. Alors que les autres polices d'assurance couvraient "le contenu des bâtiments décrits à l'article précédent" et également "les choses, décrites ci-après sous le titre "contenu" se trouvant dans un rayon

de 50 pieds" des bâtiments, alors que le "contenu" était décrit comme "tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré", la police de l'intimée, au contraire, était spécifique et ne couvrait que les "objets d'art et autres meubles faisant partie des collections du musée de l'École du Meuble".

Même en envisageant le paragraphe 5 de la réponse de l'intimée, il est donc tout à fait inexact de dire que cette dernière était sur un pied d'égalité avec les autres compagnies d'assurance.

L'appelante et les six autres compagnies assuraient les mêmes objets, bien que pour des montants différents, à savoir: "tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré". Du moment que ce qui se trouvait dans les immeubles et qui n'était pas autrement assuré lors de l'incendie était détruit par le feu, chacune des six compagnies, ainsi que l'appelante, devenait responsable pour la perte dans la proportion du montant pour lequel chacune avait assuré. Mais le détenteur de ces polices, propriétaire de ce qui était contenu dans les immeubles, avait stipulé—comme il en avait le droit—que ces polices ne couvriraient pas ce qui était autrement assuré. Il lui appartenait de décider pour lui-même la nature de la police d'assurance qu'il désirait obtenir et l'étendue du risque dont chaque police répondrait.

L'assurée consentit, entre autres, avec l'appelante, un contrat par lequel cette dernière s'est obligée, moyennant une rémunération, appelée prime, à certaines prestations, au cas où se réaliseraient certaines éventualités (à savoir: l'incendie), relative à des biens déterminés dans la police. Il fut convenu entre l'assureur et l'assurée que les biens pour la perte desquels l'assurée aurait le droit de réclamer une indemnité seraient ceux qui se trouveraient dans les immeubles de l'assurée, au moment de l'incendie, mais ne comprendraient pas ceux qui étaient "autrement assurés".

Je ne puis me convaincre qu'il ne s'agit pas là de la description des objets assurés et que ceux qui étaient "autrement assurés" se trouvaient par le fait même de cette autre assurance soustraits à la description et cessaient d'être assurés par la police de l'appelante. C'est bien ainsi que toutes les autres compagnies d'assurance intéressées ont compris la convention. Chacune d'elle a opposé à l'action

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de l'intimée la même contestation que celle de l'appelante. Elles étaient toutes réunies devant la Cour Supérieure et devant la Cour du Banc de la Reine (en appel). A la suite du jugement de cette dernière Cour, les autres compagnies d'assurance n'ont pas jugé à propos de persister; elles se sont simplement soumises au jugement qui les condamnait. Par là, elles ont été contraintes de payer, mais il n'y faut voir aucun acquiescement; et, d'ailleurs, l'acquiescement des autres compagnies ne saurait être invoqué contre l'appelante. Si elle a raison, le fait que les compagnies qui étaient sur le même pied qu'elle ont fini par céder ne saurait prévaloir contre son droit à elle.

Mais il résulte inéluctablement que, lorsque l'École du Meuble a décidé d'assurer spécialement les objets d'art et les autres meubles spécifiquement décrits dans la police d'assurance de l'intimée, ces objets d'art et ces autres meubles se sont trouvés autrement assurés par l'intimée, et, par le fait même, ont cessé d'être assurés par l'appelante et les autres compagnies. Il s'ensuit que, lorsque l'intimée a invoqué contre l'appelante les droits que prétendaient posséder l'École du Meuble et le Gouvernement de la province de Québec, elle a voulu tenir l'appelante responsable de la perte d'objets qui n'étaient plus assurés par l'appelante. Vainement l'intimée aurait-elle prétendu que l'École du Meuble n'avait pas le droit de prendre une autre assurance ou une assurance supplémentaire, car, en outre que cette question ne pouvait être soulevée que par La Compagnie Française du Phénix, ou par les six autres compagnies qui avaient assumé le risque originairement, si cette assurance supplémentaire constituait une infraction à leur convention, c'eut été là une objection appartenant exclusivement à chacune de ces compagnies, ainsi qu'à l'appelante, et l'intimée ne pouvait la soulever. En le faisant, l'intimée eut excipé du droit d'autrui.

D'ailleurs, le problème ne se pose pas puisque les polices d'assurance elles-mêmes émises par l'appelante et les six autres compagnies autorisaient l'assurée à obtenir cette police d'assurance supplémentaire.

La Cour Supérieure a maintenu l'action de l'intimée en étant d'avis que les mots "qui n'est pas autrement assuré" ne faisaient pas partie de la description des objets qui se trouvaient assurés par l'appelante au moment de l'incendie,

mais en les considérant comme une variation des conditions statutaires. Et, comme ces mots n'étaient pas inscrits dans la police d'assurance conformément aux exigences de la Loi de Québec, elle a décidé que l'École du Meuble n'était pas liée par eux et que l'appelante ne pouvait pas en avoir le bénéfice. Elle cite la décision du Conseil Privé dans *Curtis's & Harvey* v. *North British and Mercantile Insurance Company Limited* (1) et un passage du jugement de Lord Dunedin qui, à mon humble point de vue, me paraît contraire aux prétentions de l'intimée. Il se lit comme suit:

> Their Lordships think that it is the policy of the statute to make a hard and fast rule that every fire policy shall have attached to it these statutory conditions, and that they cannot be varied so as to be binding on the insured, unless the variations are authenticated in the prescribed manner. The result will be that, "if not varied, they remain in full force, *but any other stipulation and covenant which may define or limit the risk can also receive effect in so far as it does not contradict the statutory conditions which are paramount.*"

Il y est bien dit: "but any other stipulation and covenant which may define or limit the risk can also receive effect in so far as it does not contradict the statutory conditions which are 'paramount'."

La Cour Supérieure cite encore un jugement de notre Cour dans *The London Assurance Corporation* v. *The Great Northern Transit Co.* (2). Voici le passage en question:

> In this case the policy insured the *SS. Baltic* whilst running in the inland rivers and canals during the season of navigation. To be laid up in a case of safety during the winter months from any extra hazardous building.

Sedgewick J. at page 583:—

> One other point remains. It is contended that the stipulation contained in the words "whilst running" etc., is a *condition* without the meaning of the Ontario Insurance Act, and in as much as it varies from or is in addition to the conditions by that Act made statutory the policy should comply with section 115 of the Act which provides that such *variations* or additions should be printed in conspicuous type and in ink of different colour. So far as this point is concerned, I entirely agree with the view taken by the learned Chief Justice of the Court of Appeal and Mr. Justice Osler. The *stipulation* in question is in no sense a condition but rather a description of the subject matter insured. It is descriptive of and has reference solely to the risk covered by the policy and, not to the happening of an event which by the statutory conditions would render the policy void. The statute, therefore, does not apply.

(1) 55 D.L.R. 95.

(2) (1899) 29 Can. S.C.R. 577.

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De nouveau, cette Cour a décidé que les mots "whilst running in the inland rivers and canals during the season of navigation" n'étaient aucunement une condition mais plutôt une description de l'objet assuré.

A un moment de son jugement, la Cour Supérieure semble s'être demandée si les mots "non autrement assuré" pouvaient être considérés comme une garantie, mais elle paraît avoir écarté cette prétention.

En effet, il paraîtrait surprenant qu'un propriétaire qui assure garantirait qu'il maintiendrait sur les lieux, jusqu'à l'époque de l'incendie, les effets pour lesquels il a demandé une assurance. Tout simplement la police d'assurance ne couvre pas autre chose que la perte des effets qui se trouvent sur les lieux au moment de l'incendie et l'assuré ne peut réclamer rien d'autre. Cet argument équivaudrait à prétendre qu'un propriétaire assuré s'engage à ne jamais éliminer de son immeuble les effets qui s'y trouvaient lorsque la police d'assurance a été émise. Or, c'est lui-même qui a stipulé que cette police ne couvrirait que les effets qui n'étaient pas autrement assurés à l'époque de l'incendie et il aurait les mains liées pour l'empêcher d'assurer autrement ces mêmes effets.

Autant dit pour la question de savoir quelle est la nature de cette stipulation ("et qui n'est pas autrement assuré") et si vraiment elle est autre chose que la désignation ou la description des effets qui se trouveront assurés au moment de l'incendie.

Mais j'avoue comprendre encore moins la prétention que cette stipulation serait contraire aux conditions statutaires qui, en définitive, semble le motif de la décision de la Cour Supérieure et celui de la majorité de la Cour du Banc de la Reine (en appel) (1).

J'insiste sur le fait qu'il faut y trouver un changement aux conditions de la police d'assurance aux termes de l'article 241 de la *Loi des Assurances de Québec,* c'est-à-dire, une variation des conditions mentionnées dans cette *Loi.* Or, je cherche encore en quoi l'addition des mots "et qui n'est pas autrement assuré" peut être considérée comme une variation des conditions statutaires, car il ne s'agit pas évidemment de ce que l'intimée semble soumettre

(1) Q.R. [1951] K.B. 224.

d'une prétendue contradiction entre les mots en question et les autres stipulations de la police d'assurance. Il faut nécessairement pour que ces mots aient été illégalement introduits dans la police d'assurance de l'appelante qu'ils constituent un changement aux conditions statutaires proprement dites et qu'ils n'y aient pas été imprimés en caractères voyants et en encre d'une couleur différente. Ce n'est certainement pas l'article 7 des conditions statutaires avec lequel l'on pourrait dire que les mots en discussion entrent en conflit. Je n'ai même pas besoin de le reproduire, car cela est évident.

Ce n'est pas, non plus, à l'article 8 des conditions statutaires que les mots incriminés comportent une dérogation. Cet article est à l'effet que la compagnie d'assurance n'est pas responsable de la perte, s'il y a quelque autre assurance antérieure dans une autre compagnie "à moins que le consentement de la compagnie à cet effet n'apparaisse dans la police ou au dos de la police . . . ou à moins que la compagnie n'ait fait défaut de s'y opposer par écrit dans les deux semaines après avoir reçu un avis par écrit de l'intention ou du désir d'effectuer l'assurance subséquente, ou ne s'oppose par écrit après ce temps, mais avant que l'assurance subséquente ou additionnelle soit effectuée." Or, en l'espèce, le consentement de la compagnie d'assurance à augmenter ou à diminuer le montant total des assurances est clairement prévu dans les clauses de la police de l'appelante. Mais, d'ailleurs, ce serait là une objection ou une défense qui appartiendrait à la compagnie d'assurance appelante et ce ne serait sûrement pas l'assurée qui pourrait invoquer une pareille contravention au contrat—si cette contravention existait—dont elle se serait elle-même rendue coupable. De toute façon, je ne vois pas en quoi les mots "et qui n'est pas autrement assuré" pourraient venir en conflit avec cet article 8.

Il reste l'article 9 qui pourvoit que dans le cas où une autre assurance aurait été prise sur la propriété décrite, au cas où telle autre assurance serait encore en vigueur au moment de la perte, chaque compagnie d'assurance n'est responsable que pour sa part ou sa proportion de la perte ou du dommage, sans tenir compte des dates des différentes polices d'assurance.

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Je continue de me demander en quoi l'addition des mots "et qui n'est pas autrement assuré" vient en conflit avec cet article des conditions statutaires. L'on prétend que l'effet de l'insertion de ces mots enlève à chaque compagnie et, en particulier, à l'intimée, je suppose, le droit d'exiger le paiement de sa part par les autres compagnies. Que l'on remarque bien qu'il s'agit d'une "autre assurance sur la propriété décrite dans la police", c'est-à-dire, sur la même propriété. Je ne me demande pas si les autres compagnies d'assurance qui avaient émis une police semblable à celle de l'appelante, auraient pu prétendre que c'était là une dérogation à l'article 9. La question ne se pose pas, bien qu'il est juste de faire remarquer que chacune des six autres compagnies d'assurance a soulevé, à l'encontre de la réclamation de l'intimée, la même objection que l'appelante fait dans le présent appel et que, je le répète, elles ne se sont soumises qu'à la suite du jugement de la Cour du Banc de la Reine (en appel) qu'elles n'ont pas jugé à propos de porter devant la Cour Suprême du Canada, ainsi que le fait l'appelante présentement. Mais en quoi l'intimée, avec une police d'assurance différente, qui couvre des objets d'art et des meubles dont l'assurée elle-même a stipulé que ces objets, étant autrement assurés, cesseraient d'être assurés par l'appelante, peut-elle prétendre que l'article 9 s'applique à elle? Au moment de la perte, l'intimée assurait des objets d'art et des meubles pour lesquels elle avait spécifiquement assumé le risque et ces mêmes objets d'art et ces meubles avaient cessé d'être assurés, ou avaient été soustraits à la police d'assurance de l'appelante, par l'acte de l'assurée elle-même. C'est cette dernière qui a jugé à propos d'assurer spécialement les objets d'art et les meubles en question et qui avait stipulé que, dès le moment où elle les assurait autrement, l'appelante cesserait d'en être responsable par le fait qu'ils étaient autrement assurés.

De toute façon, je m'accorde avec les jugements dissidents de MM. les Juges St-Jacques et Hyde et, en réalité, je ne fais vraiment que réaffirmer les arguments et les motifs

contenus dans ces jugements. Je suis même impressionné par ce passage des raisons de M. le juge Casey, qui a signé le jugement formel de la Cour, et qui se lit comme suit:

I am prepared to concede that the words "autrement assuré" limit the risk. Also I take as established that when the fire occurred the effects in question were insured under a policy separate and distinct from those issued by respondents. What I cannot accept however, is the conclusion drawn by respondents from these two premises; I cannot admit as a conclusion that the goods were excluded by the descriptive words "autrement assuré".

Bien respectueusement, du moment que l'on concède que les mots "autrement assuré" limitent le risque, il m'est impossible de suivre le savant juge dans sa conclusion. Si les mots cités limitent le risque, dès lors ils font partie de la description du risque, et "tout ce qui, lors de l'incendie, se trouvait dans les immeubles et qui était autrement assuré"—à savoir, assuré par la compagnie intimée—n'était pas assuré par la compagnie appelante.

Et il est important de se rendre compte à quelle conséquence nous conduirait la prétention de l'intimée et le jugement dont est fait appel. Cela équivaudrait ni plus ni moins à dire que l'appelante pourrait être appelée à contribuer à la perte d'effets qu'elle n'assurait pas.

Pour toutes ces raisons, j'en viens donc à la conclusion que l'appel doit être maintenu et que l'action de l'intimée doit être rejetée, avec dépens, dans toutes les Cours.

TASCHEREAU J.:—Plusieurs de mes collègues, dont j'ai eu l'avantage de lire les notes, ont rapporté les faits de cette cause. Il serait en conséquence superflu de les exposer au complet de nouveau. Je désire cependant ajouter les considérations suivantes pour lesquelles, je crois que l'appel qui nous est soumis doit être maintenu.

Les polices émises contre le feu, au bénéfice de La Corporation des Écoles Techniques ou Professionnelles de Montréal, qui comprend l'École du Meuble, l'ont été par les compagnies suivantes:—

La Compagnie Française du Phénix	$150,000 00
La Compagnie d'Assurance du Canada contre l'Incendie	25,000 00
La Nationale de Paris	25,000 00
La Stanstead & Sherbrooke Fire Insurance Company et al	50,000 00
Total	$250,000 00

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Ces compagnies ont assumé l'obligation d'indemniser l'assurée contre l'incendie, mais leur risque était limité à $150,000 sur les immeubles et à $100,000 sur leur contenu, et la responsabilité de chacune était proportionnelle au montant de la police. Il a été convenu entre l'assurée et les compagnies d'assurance, dans des polices rédigées de façon identique, que la Corporation s'engageait à maintenir "en vigueur une assurance de même forme, teneur et portée au montant total de $250,000, divisé à raison de $150,000 sur les bâtiments et de $100,000 sur le contenu." En outre, l'assurée a été autorisée "à augmenter ou à diminuer le montant total de ses assurances sans en avertir les assureurs; ceux-ci renonçant au préavis pour toute assurance souscrite antérieurement ou postérieurement au présent contrat."

Toutes ces polices sont ce que l'on est convenu d'appeler des "blanket policies", ou si l'on aime mieux des polices susceptibles de fluctuations ou de changements et qui couvrent des biens en général, plutôt que des biens spécifiques et déterminés. (Black, Law Dictionary, 3rd Edition, page 226).

Les clauses 8 et 9 des conditions statutaires de ces polices se lisent ainsi:—

8. La compagnie n'est pas responsable de la perte, s'il y a quelqu'autre assurance antérieure dans une autre compagnie, à moins que le consentement de la compagnie à cet effet n'apparaisse dans la police ou au dos de la police, ou si quelqu'autre assurance subséquente est effectuée par une autre compagnie, à moins et avant que la compagnie n'y consente, ou à moins que la compagnie n'ait fait défaut de s'y opposer par écrit dans les deux semaines après avoir reçu un avis par écrit de l'intention ou du désir d'effectuer l'assurance subséquente, ou ne s'oppose par écrit après ce temps mais avant que l'assurance subséquente ou additionnelle soit effectuée.

9. Dans le cas où il y a eu consentement comme susdit à toute autre assurance sur la propriété décrite dans cette police, cette compagnie, si telle autre assurance reste en vigueur, advenant une perte ou un dommage, n'est responsable que du paiement d'une partie proportionnelle de cette perte ou de ce dommage sans égard aux dates des différentes polices.

Il résulte de ceci que l'assurée devait toujours maintenir ses polices à $250,000, "de mêmes force, teneur et portée", qu'elle avait le droit de les augmenter, mais de ne jamais les réduire à un niveau plus bas que celui stipulé, qu'elle pouvait agir ainsi sans donner avis à ses assureurs par suite du consentement écrit de ces derniers, et que dans

le cas d'incendie, toutes les compagnies d'assurance, même celles qui avaient émis des polices subséquentes, étaient tenues proportionnellement au paiement des pertes, sans égard à la date des polices.

Or, il est arrivé que la Corporation des Écoles Techniques ou Professionnelles de Montréal, quelque temps après s'être assurée avec les compagnies précédemment mentionnées, a fait émettre par l'intimée, La Travelers Fire Insurance Company, une nouvelle police couvrant jusqu'à concurrence de $10,000, les effets suivants:—

$10,000. Sur Objets d'Art et des meubles faisant partie des collections du musée de l'École du Meuble, seulement lorsque contenus le bâtiment à deux étages, construit en brique solide, avec toiture en patente, occupé comme *École du Meuble,* situé à Montréal, Province de Québec, et portant le No. 2020 rue Kimberley.

Après un incendie, dont les dommages se sont élevés à $76,852.14, survenu le 2 juin 1940, les comptes ont été payés et l'intimée a déboursé la somme de $7,070.53 pour les effets qu'elle avait assurés. Elle a réclamé de la Compagnie Française du Phénix, en vertu de la clause 9 des conditions statutaires, sa proportion du risque, soit $1,939.85 plus les intérêts, ce qui forme un montant supérieur à $2,000, nécessaire pour donner juridiction à cette Cour. Cette réclamation a été rejetée par la Cour Supérieure, mais maintenue par la Cour d'Appel (1), MM. les juges St-Jacques et Hyde étant dissidents.

L'intimée, qui a payé en totalité la somme de $7,070.53, a été subrogée dans les droits de l'assurée contre ses co-assureurs, mais nous n'avons à considérer que sa réclamation contre l'appelante-défenderesse. Celle-ci invoque l'une des clauses de la police qu'elle a émise et qui par l'opération de la subrogation limiterait les droits de l'appelante à ceux de l'assurée. Cette clause est à l'effet que La Compagnie Française du Phénix assure le contenu des immeubles de La Corporation des Écoles Techniques ou Professionnelles, mais est exclu du risque, "tout ce qui n'est pas autrement assuré." L'appelante prétend que les "objets d'art de l'École du Meuble", étant assurés par la police de la Travelers Fire Insurance, il en résulterait que l'appelante ne pourrait être appelée de même que ses co-assureurs à partager proportionnellement avec l'intimée qui seule aurait assumé ce risque.

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Je m'accorde avec cette prétention, non pas parce qu'il existe une autre police d'assurance émise par la Travelers, qu'en vertu des polices l'assurée avait incontestablement le droit de prendre, mais parce qu'il existe une police "différente" que celles déjà émises, et qu'en conséquence, l'assurée est "autrement assurée" aux termes mêmes de la police qui limite ainsi les obligations de l'appelante. "Autrement assurée" a nécessairement le sens de "différemment assurée."

Les compagnies d'assurance ont voulu, et c'est le risque qu'elles ont assumé en considération de la prime qui leur a été versée, que des polices de "mêmes forme, teneur et portée", que celles émises par elles, atteignent toujours la somme de $250,000 avec permission de dépasser ce montant. Il était donc essentiel que chaque police additionnelle, pour qu'intervienne la responsabilité proportionnelle, soit une police générale (blanket policy). Lorsque, comme c'était son droit, l'assurée a fait émettre une police additionnelle sur des biens "spécifiques", comme dans le cas qui nous occupe, les effets assurés sont devenus "autrement" c'est-à-dire "différemment assurés" et ont cessé de faire partie du risque couvert par l'appelante. Ils en ont été soustraits par la volonté même des parties contractantes.

Il est rationnel qu'il en soit ainsi, et que les quatre compagnies d'assurance qui ont émis les premières polices, consentent à partager le risque avec d'autres compagnies qui émettent des polices identiques, mais refusent de le faire avec d'autres qui assurent hors leur connaissance, les biens d'une façon différente. C'est précisément pour cela qu'on y insère cette clause qui exclut les objets "autrement assurés." Ignorer ces mots serait les effacer de la police. Il faut nécessairement leur donner un sens. Le pouvoir qui est donné à l'assurée d'augmenter ses assurances générales, ne vient nullement en conflit avec la clause qui exempte de responsabilité les assureurs des biens "autrement assurés."

Comme second moyen l'intimée invoque l'article 241 de la Loi des assurances, c. 299, S.R.Q. 1941, qui se lit ainsi:—

241. Si l'assureur désire faire des changements aux conditions de la police, en omettre quelqu'une ou en ajouter de nouvelles, il doit être ajouté au contrat contenant les conditions imprimées, des mots à l'effet suivant, imprimés en caractères voyants *et en encre d'une couleur différente*:

"CHANGEMENTS DANS LES CONDITIONS"

Cette police est émise sous les conditions ci-dessus avec les changements et les additions qui suivent: (énoncer les changements et les additions).

"Ces changements sont faits en vertu de la Loi des assurances de Québec et restent en vigueur en autant que le tribunal ou le juge auquel sera soumise une question s'y rattachant, considérera juste et raisonnable de la part de la compagnie d'en exiger l'application."

Aucun tel changement, addition ou omission, à moins d'être distinctement exposé de la manière indiquée dans le présent article n'est légal ou obligatoire pour l'assuré.

C'est la prétention de l'intimée qu'il y a eu une variation des conditions statutaires, qui ne lie pas l'assurée, parce qu'on aurait omis d'indiquer en encre de couleur différente que l'assureur, pour les biens "autrement assurés" ne participera pas proportionnellement dans le cas d'incendie. Je suis d'opinion que ce moyen est non fondé, car il ne s'agit pas d'une condition, mais plutôt d'une limitation de responsabilité. C'est une description des biens assurés qu'on a voulu faire et ça a été l'intention des parties de déterminer la quantité et l'identité des objets que la police devait couvrir. L'appelante et l'intimée n'ont pas assuré les mêmes biens. Il ne peut être question de paiement proportionnel.

Enfin, il est inutile, à cause de ma conclusion, d'examiner la question de savoir si le transfert avec subrogation, obtenu par la demanderesse-intimée était suffisant pour la justifier d'instituer la présente action.

L'appel doit donc être maintenu, et l'action rejetée avec dépens de toutes les cours.

The dissenting judgment of Kellock and Fauteux JJ. was delivered by

KELLOCK J.:—The policy here in question was issued on February 7, 1940, by the appellant in a form common to a number of other policies issued concurrently therewith by companies underwriting a total sum of $250,000, of

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which $150,000 was on buildings and $100,000 on their contents, the share of this insurance taken by the appellant being $150,000. The relevant provisions, which I have numbered for convenience of reference, are as follows:

> $100,000. Sur le contenu des bâtiments décrits à l'article précédent et sur les choses décrites ci-après sous le titre "contenu" se trouvant dans un rayon de 50 pieds de ceux-ci.
>
> 1. L'on entendra
>
> par contenu: tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré . . . .

(This is followed by an enumeration including therein articles which would otherwise have been excluded from the coverage by statutory condition 7.)

> 2. L'assurance portera sur ce qui appartient à l'assurée, sur les choses qui, vendues, n'auraient pas encore été livrées et sur celles qui lui sont confiées à titre de commissionnaire, de consignataire ou pour réparation et enfin, sur tout ce dont elle peut être tenue responsable.
>
> 3. L'assurance portera également sur les choses que l'assurée achète à tempérament et sur lesquelles elle a un droit de détenteur précaire, sous condition suspensive en vertu du contrat de vente portant que le titre de propriété reviendra à l'assurée une fois le prix entièrement payé.
>
> 4. L'assurée s'engage à maintenir en vigueur une assurance de mêmes forme, teneur et portée au montant total de $250,000, divisé à raison de $150,000 sur les bâtiments et de $100,000 sur le contenu. Si elle ne se conforme pas à cette convention, l'assurée deviendra co-assureur pour le déficit.
>
> 5. L'assurée est autorisée:
>
> *a*) à augmenter ou à diminuer le montant total de ses assurances sans en avertir les assureurs; ceux-ci renonçent au pré-avis pour toute assurance souscrite antérieurement ou postérieurement au présent contrat. Cette prérogative ne libère pas l'assurée, cependant, de la convention relative au montant minimum d'assurance mentionné précédemment.

The position of the appellant is that the words "qui n'est pas autrement assuré" in para. 1 form part of the description of the risk and that as, at the time of the loss, part of the contents were insured under the respondent's policy, such goods ceased to be covered by the policy of the appellant, with the result that the latter is under no obligation to contribute to the loss. The respondent, on the other hand, contends that its policy was issued within the permission provided for by para. 5 and that, by reason of statutory condition 9, the appellant is liable for a rateable proportion of the loss and that the language in para. 1 upon which the appellant relies, cannot be given effect as against the statutory condition.

It is undoubted that the words, the meaning of which is in dispute, viz. "qui n'est pas autrement assuré", taken alone, might very well be considered to come within the principle of such a case as *London Assurance Co.* v. *Great Northern Transit Co.* (1), as forming part of the description of the risk, with the result for which the appellant contends. In *Republic Fire Ins. Co.* v. *Strong* (2), a case in this court, not reported in the regular reports, the policy provided that

> This policy does not attach to or become insurance upon property herein described which at the time of any loss is *otherwise insured,* until the liability of such other insurance has been exhausted, and shall then cover only such loss or damage as may exceed the amount due from such insurance.

It was held that under such a policy there could be no contribution. The coverage according to its terms, applied only after all other insurance had been paid.

Coming back to the case in hand, if a policy were written so as to provide coverage only until or so long as the property insured should not be covered by any other insurance, a clause in such a policy giving the assured permission to effect other insurance could have no relevancy, to say nothing, for the moment, as to a clause permitting the assured to "increase" his insurance. An insurer whose policy is to cease to cover upon any other insurance being effected on the insured property has no interest in giving permission to his assured to effect other insurance. Such permission is only relevant to prevent the avoidance, by the operation of statutory condition 8, of the existing insurance if further insurance is effected. But under a policy such as I am now considering, that result would be effected by the terms of the policy itself.

Accordingly, a provision that the policy will cease to attach if other insurance is effected, and a provision in the same policy that the assured may "increase" his insurance, assuming, as it does, that the policy which contains that permission will continue, are prima facie antagonistic. It is therefore necessary, in the case at bar, to scrutinize these provisions to see if the repugnancy may be resolved.

(1) (1899) 29 Can. S.C.R. 577. (2) [1938] 2 D.L.R. 273.

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The words "autrement assuré" which, according to Larousse, are the equivalent of "d'une autre façon assuré," considered apart from any context, are capable of more than one meaning, namely, that the interest of the assured (1) is not already insured; (2) will not be insured by any other insurer at the time of loss; (3) will not be covered by insurance taken out at the instance of any other person.

The appellant contends for still another meaning, namely, that, as put in its factum,

> not insured otherwise than in virtue of the blanket coverage provided by the appellant's policy.

This contention is explained to mean that if at the time of any loss there is in existence any other insurance effected by the assured on the goods which does not cover the entire contents and which is not of the same "forme, teneur et portée" as the appellant's policy, the goods, or any specific part of them so covered, will be "autrement assuré" within the meaning of the appellant's policy and not covered thereby.

This meaning for which the appellant contends is not, as already pointed out, a meaning which the words in question bear when taken by themselves without a context. Such a result is only to be reached by reading into para. 1 words which are not there, but which are to be found only in para. 4. To reach such a result it is necessary for the appellant, as it does, to contend further that the same words are also to be read into para. 5 so as to qualify the permission provided by that paragraph. Unless the clear language of para. 5 is to be thus modified, this whole contention falls. There are, in my view, a number of reasons why the contention cannot be accepted.

In the first place, unlike the words in question in para. 1, which are capable of more than meaning, the language used in para. 5 is perfectly clear and proceeds on the basis that if the permission which it contains is acted upon, either in the continuance of insurance already existing upon the goods at the date of issue of appellant's policy or by the placing of additional insurance, the insurance provided by the appellant's policy and those of the other members of the group will remain in force. No other effect can be given to the word "augmenter."

Further, the words which Mr. Campbell seeks to read into para. 5 are to be found only in para. 4, and it is to be observed that para. 5 expressly refers to para. 4, but for one purpose only, namely, to make it perfectly clear that the permission given by para. 5 to "diminuer" the total amount of insurance is not to free the assured from the obligation imposed upon him by para. 4, to keep in force insurance to the extent of $100,000 at least. The reference to the latter paragraph has nothing at all to do with "augmenting" the insurance beyond $100,000.

Again, it is to be observed that the notice which is dispensed with by para. 5 is notice with respect to "any" insurance, even though already in existence. As paras. 1 to 5 inclusive are not to be found in the standard printed portion of the policy but are specially typed-in clauses, it would be the merest chance that existing insurance at the time the appellant's policy was effected would be found to be of the same "forme, teneur et portée." This consideration alone is sufficient to show that the parties had no intention, when providing for renunciation of notice with respect to "toute" insurance, of using that word in any sense other than the word ordinarily bears, namely, that permission was granted to the assured to maintain "any" existing insurance, *whether blanket or covering specific goods only,* no matter what the form of the contract. It follows that the intention was the same with respect to subsequent insurance. It may be observed also at this point that the same considerations render inapt the first two possible meanings of the language of para. 1 set out above.

Mr. Campbell argues, however, that the respondent, by its act in effecting the respondent's policy, adopted the construction of the appellant's policy for which he contends. Mr. Campbell says that the respondent's policy was for the full value of the specific property to which it applied and that the assured thus recognized that the appellant's policy no longer applied to that property.

In considering this contention, it will be convenient to refer first to the other insurance effected by the assured on May 31, 1940, on specific property, namely, the policy for $3,000 in the Phoenix of London upon property loaned to the assured by a number of named firms for exhibition

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purposes. The actual loss with respect to this last-mentioned property due to the fire in question, which occurred on June 2, 1940, was $5,248.19. It would appear hardly likely that the assured, in effecting a policy for only $3,000 on this property, did so with the intention that he would thereby bring about a situation in which the policies of the appellant and the other members of the group would cease to attach to this property, thereby causing this property to be uninsured for over forty per cent of its value. I do not think, with respect, that it can be reasonably argued that the assured had any such intention, or that its intention was other than to provide, by the additional insurance, ample coverage in case the protection provided by the group policies should prove insufficient under any circumstances.

It is further to be observed that the Phoenix of London policy was for a term of sixteen days only, and it is hardly likely that it was contemplated there would be any change in the composition of the articles on exhibit during this period.

When one comes to the situation under the respondent's policy, which was issued on February 22, 1940, within approximately two weeks of the appellant's policy, it is to be observed that it was to run for a period of three years, and while the face amount of the policy may have been the value at the date of its issue of the particular goods of that description which were actually on the premises at that time. The itemized list formed no part of the policy delivered to the assured, and the description of the property insured was not limited to particular items then on the premises, but was a coverage generally of

meubles faisant partie des *collections* du musée de l'École du Meuble.

These collections might run to much more or much less in value than $10,000 as the composition thereof might change from time to time within the three-year period. In these circumstances, I am unable, with respect, to see any ground upon which a court could be asked to find that the assured had "adopted" a construction of the appellant's policy which, for reasons already given, that policy cannot on its own language reasonably bear.

It is further suggested that the permission granted by para. 5 may be restricted to additional insurance on the buildings only, and thus bring about a result under which the paragraph does not come in any way in conflict with the language of para. 1 with respect to contents. In my opinion, it is sufficient to say that para. 5 does not purport to be limited to additional insurance on buildings and the appellant does not so contend.

As to the suggestion that the "montant total" would be increased if specific insurance were placed on some items, with the result that the appellant's insurance remained on the remainder, this may be true enough, but the idea behind the paragraph is that if the permission is acted upon the result will be, in all cases, more protection for the assured, not less. The Phoenix of London policy affords a good example. When it was effected the total insurance on the contents became $103,000, but under the appellant's contention, the result was that $2,542 value became uninsured. Such a situation might well be aggravated if further insurance were placed on other specific goods. Moreover, had the Phoenix of London policy covered all the contents, instead of being limited to part only, the result, according to the argument of the appellant, would have been that the appellant and its group would have ceased to be on the risk, and the assured would have been left with $3,000 insurance only. To be consistent, Mr. Campbell was obliged to go, and did go, this far. Thus, in seeking to "augment" his total insurance with the permission granted by para. 5 so to do, the assured would have actually reduced his protection almost to the vanishing point. The parties might, of course, have so contracted, but only, in my view, by clear words not to be found at all in para. 5 as it stands. Such a result can, in my opinion, be reached only by reading into the paragraph words which are not there, in violation of the fundamental canon of construction applicable to a contract of this nature, namely, that it is to be construed contra proferentem.

With respect to the third of the possible meanings of the words "autrement assuré" set out above, paras. 2 and 3 of the appellant's policy are relevant. Under their provisions the insurance is to extend to everything belonging to the assured, as well as to goods which it has sold but

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not delivered and goods in its possession on consignment or for repair or on any basis involving responsibility on the part of the assured for them. The insurance is also to cover goods bought on "conditional sale" contracts. In any of these situations where the assured would not have an absolute title, it might very well be that, in many instances, insurance would have been placed on the goods by the other persons interested in them, such as, for instance, by an unpaid vendor. It is not unusual in such circumstances for an unpaid vendor in his insurance to cover also the interest of the purchaser in the goods. An example of such a situation is afforded by the circumstances in *Keefer* v. *Phoenix Ins. Co.* (1).

It may very well have been in the contemplation of the parties in the case at bar that the appellant's policy should not apply in similar circumstances so as to oblige the appellant and the other members of the group to contribute in any way to indemnify the assured when its interest would be covered by such other insurance. This view of the language of para. 1 acquires additional strength from the fact that under para. 5 it is "l'assurée" who is authorized to augment or diminish the total amount of "ses assurances."

This is a reasonable construction of the language used, and when the policy is so construed all its provisions are brought into harmony. If for any reason, however, this is not the true view, the result, in my opinion, is that the ambiguous words to be found in para. 1 cannot stand with the clear language actually used in para. 5, and being repugnant thereto, they fall to the ground. It is impossible to write out of the policy the clear provisions of para. 5 or to amend it so as to give to the ambiguous words of para. 1 the meaning for which the appellant contends.

The insurance provided by the respondent's policy, therefore, being authorized by the terms of para. 5, it came within the words "any other insurance on the property herein described" (that is, described in the appellant's policy) in statutory condition 9, and the appellant is bound to contribute rateably with respect to the loss.

(1) (1900) 31 Can. S.C.R. 144.

The appellant next contends that the respondent was in any event not entitled to sue, as the "subrogation" in writing is signed only by the president of the assured, whereas the incorporating statute, 16 Geo. V, c. 49, s. 4, prescribes as follows:

> The signatures of the president or of the vice-president and of the secretary-treasurer shall suffice in all legal matters of the corporation.

Assuming that this contention is well taken, the Government of the Province of Quebec, to whom the loss is payable under the policy, is also a party, and the document as executed was authorized by Order in Council. In *Guerin* v. *Manchester* (1), it was held that a party to whom, as in the case at bar, loss under a fire insurance policy is payable, is entitled to sue and that this right of action may be assigned. In the case at bar, the provisions of Articles 1570 and 1571 of the *Civil Code* were met, so that the appellant is in a position to maintain its action claiming through the Government of the Province, regardless of any defect in his title as claiming through the assured; *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.* (2). I think, therefore, the appeal should be dismissed with costs.

ESTEY J.:—La Corporation des Écoles Techniques ou Professionnelles, the insured, entered into contracts of insurance, identical in terms, with the appellant and several other companies on February 7, 1940, for a total insurance of $250,000, apportioned $150,000 upon the buildings and $100,000 on the contents. The appellant's share was $150,000.

On February 22, 1940, the insured entered into a contract of insurance with the respondent in the sum of $10,000 on the "Objets d'Art et des meubles faisant partie des collections du musée de l'École du Meuble, ..." (hereinafter referred to as "objets d'art"). These were a part of the contents of the building and initially included under the appellant's policy.

On June 2, 1940, a fire occurred by which the insured suffered a total loss of $83,922.67 in respect of both buildings and contents. The loss of the "objets d'art," etc., as insured by the respondent, totalled $7,070.53. The respondent paid the full amount and, as the appellant denied any

(1) (1899) 29 Can. S.C.R. 139. (2) [1903] A.C. 59.

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liability to pay a pro rata share, this action is brought to recover that share in the sum of $1,939.85. If liability be found, the amount of $1,939.85 is not contested.

The learned trial judge dismissed the action. The majority of the Appellate Court (1), Mr. Justice St-Jacques and Mr. Justice Hyde dissenting, allowed the appeal.

The appellant's policy provided:

L'on entendra

1° par bâtiments: les immeubles mêmes, leurs annexes et allonges communicantes, les couloirs reliant les bâtiments, les cheminées et le tunnel, et tout aménagement fixe à l'intérieur et à l'extérieur.

2° par contenu: tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré. A titre indicatif seulement: l'ameublement, les livres, les œuvres d'art, les objets exécutés ou en voie d'exécution, ... les objets exclus par l'article 7 des conditions statutaires reproduites dans la police et, enfin, les effets et les choses appartenant aux élèves et aux professeurs.

The appellant contends that, by virtue of the words "qui n'est pas autrement assuré," when the respondent placed its insurance on "objets d'art" these "objets" were no longer covered by its policy.

The respondent contends that appellant consented to this further insurance within the meaning of Statutory Conditions Nos. 8 and 9 and, therefore, the appellant and its co-insurers must pay a pro rata share of the loss; that, in so far as the words "qui n'est pas autrement assuré" be relied upon to prevent that result, they constitute a variation of Condition No. 9 which, not being endorsed on the policy in conspicuous type and in ink of different colour, as required by s. 241 of the *Insurance Act* (R.S.Q. 1941, c. 299), is not binding upon the insured.

The appellant's policy also provided:

L'assurée s'engage à maintenir en vigueur une assurance de mêmes forme, teneur et portée au montant total de $250,000, divisé à raison de $150,000 sur les bâtiments et de $100,000 sur le contenu. Si elle ne se conforme pas à cette convention, l'assurée deviendra co-assureur pour le déficit.

This policy further provided:

L'assurée est autorisée:

a) à augmenter ou à diminuer le montant total de ses assurances sans en avertir les assureurs; ceux-ci renoncent au préavis pour toute assurance souscrite antérieurement ou postérieurement au présent contrat. Cette prérogative ne libérera pas l'assurée, cependant, de la convention relative au montant minimum d'assurance mentionné précédemment.

(1) Q.R. [1951] K.B. 224.

The relevant paragraphs in the appellant's policy quoted above are, for convenience, hereinafter referred to as paras. 1, 2 and 3. The words "bâtiments" and "contenu," in the first paragraph, are described with such particularity as to leave no doubt but that they were prepared in a manner to justify the adoption of Lord Watson's view that they should be regarded as "the deliberate act of both parties." *Birrell* v. *Dryer* (1).

The possibility of further insurance upon both buildings and contents, or either, was obviously present to the minds of the parties as they completed the contracts of insurance of which the appellant's is one. Only in relation to the contents did they adopt the words "qui n'est pas autrement assuré" and make them part of the sentence describing the subject matter and the peril insured. Though expressed in the past tense, the parties have construed these words as referring to insurance to be subsequently placed. As insurer, the appellant has so construed these words, at least from the moment this claim was made. That the insured so construed them from the outset is evidenced by the fact that within fifteen days after the appellant's policy became effective it insured the "objets d'art" up to their full insurable value. A few months later, May 31, 1940, the insured entered into a still further contract of insurance with the Phoenix Assurance Company, Limited of London, England, upon certain contents loaned to the institution. At the time the appellant's policy was taken out there was no other insurance upon the property. It should also be noted that the respondent has brought this action on the basis that these words applied to subsequent insurance and has so contended throughout this litigation.

When the parties are in agreement as to the meaning of a provision, a court, in the absence of compelling reasons to the contrary, should construe the document in accord therewith. *Adolph Lumber Company* v. *Meadow Creek Lumber Company* (2), *Forbes* v. *Watt* (3); Pollock on Contracts, 13th Ed., 373.

(1) (1884) 9 App. Cas. 345 at 354.
(2) (1919) 58 Can. S.C.R. 306 at 307.
(3) (1872) L.R. 2 Sc. App. 214 at 216.

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On the basis of this construction, and leaving aside, for the moment, the respondent's contention, the position here is not unlike that where the steamer "Baltic" was insured against fire "whilst running on the inland lakes, rivers and canals during the season of navigation" and when "laid up in a place of safety during winter months from any extra hazardous building." The ship had been laid up for a period of approximately three years prior to the fire and it was held that in that circumstance the ship was not covered. Mr. Justice Sedgewick wrote the judgment of the Court and stated:

> The stipulation in question is in no sense a condition but rather a description of the subject matter insured. It is descriptive of and has reference solely to the risk covered by the policy and not to the happening of an event which by the statutory conditions would render the policy void. The statute, therefore, does not apply.

The London Assurance Corporation v. *The Great Northern Transit Company* (1).

Where the policies insuring ten houses contained a provision "while occcupied by . . . . as a dwelling-house," it was held that if, at the time of the loss, one of the houses was unoccupied or otherwise used, it was not covered.

> While vacant, as they were for many months prior to, and at the time of, the fire because of failure to rent them, the houses in respect of which it has been held that the plaintiffs cannot recover did not answer the description of the subject matter in the policy and were therefore not covered by the insurance.

Mr. Justice Anglin (later C.J.) in *Ross* v. *Scottish Union and National Insurance Company* (2).

In a fire insurance policy the words "only while the premises are occupied as a private dwelling" were held to be words of description. Riddell J.A. stated:

> Unless there is something in the policy itself or in the legislation to take the present out of the authority of the cases cited, the company have a perfect defence, as the building at the time of the fire was not "occupied as a private dwelling," it was not occupied at all . . . . what is suggested as such is not a stipulation at all, it is part of the description of the property insured as the cases cited above conclusively compel us to hold.

Cooper v. *Toronto Casualty Ins. Co.* (3).

(1) (1899) 29 Can. S.C.R. 577 at 584.

(2) (1918) 58 Can. S.C.R. 169 at 179.

(3) [1928] 2 D.L.R. 1007 at 1008.

See also *Schmidt* v. *Home Insurance Co.* (1).

The contract of insurance must describe the property and the risk or peril insured against. It was the "Baltic," not at all times, but as described in the policy, that constituted the subject matter and the peril insured against. In the same manner it was the houses only while occupied. These are distinguishable from those cases where there is a description of the property and the peril and then, in the contract, a provision that the risk will be varied or altered by the failure on the part of the insured to maintain or observe an undertaking on its part. In *W. Malcolm Mackay Company* v. *British America Assurance Company* (2), the policy insuring lumber against loss or damage by fire contained the following clause:

> Warranted by the insured that a clear space of 300 feet shall be maintained between the property hereby insured and any standing wood, brush or forest and any sawmill or other special hazard.

Duff J. (later C.J.) stated at p. 344:

> The description embraces, I think, any lumber of the insured company so situated, and the clause in question cannot, I think, be read as importing merely a qualification of this description. I think it is a warranty against the presence of any of the lumber of the insured company within the prohibited space.

See also *St. Paul Lumber Company, Limited* v. *British Crown Assurance Corporation, Limited* (3); *Fidelity-Phenix Fire Insurance Company of New York* v. *McPherson* (4); *Palatine Ins. Co.* v. *Gregory* (5).

Parties are at liberty to select the subject matter and peril to be insured. In so far as the words chosen constitute a part of the description, they are not, under the foregoing authorities, a stipulation within the meaning of s. 240 of the *Quebec Insurance Act*. In appellant's policy, that portion of the description here in question reads:

> par contenu: tout ce qui se trouve dans les immeubles et qui n'est pas autrement assuré.

The last portion of this sentence is an essential part of the description and, as such, does not constitute a stipulation within the meaning of s. 240. In the *Cooper* case supra Mr. Justice Middleton expressed his disapproval of

(1) [1934] 2 D.L.R. 78.
(2) [1923] S.C.R. 335.
(3) [1923] S.C.R. 515.
(4) [1924] S.C.R. 666.
(5) [1926] 1 D.L.R. 792.

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this distinction and suggested legislative action. Ontario thereafter amended its s. 106(1), corresponding to s. 240 of the Quebec Act, by adding thereto the words:

> nor shall anything contained in the description of the subject matter of the insurance be effective in so far as it is inconsistent with, varies, modifies or avoids such condition.

1929 S. of O., c. 53, s. 12(1).

This amendment was considered in *Renshaw* v. *Phoenix Insurance Company* (1). Section 240 of the Quebec Act does not contain a provision similar in effect to that contained in the Ontario amendment of 1929.

The foregoing constitutes an answer to the respondent's contention which may be summarized as follows:

> The contents of the buildings were insured from February 7th to February 22nd, 1940. On that day, additional insurance was placed on some of the contents, with the permission of the Defendant. Condition 8 had been complied with. So had condition 9, and "on the happening of any loss or damage", the Defendant is "liable only for the payment of a rateable proportion of such loss or damage."

When, on February 22, 1940, the respondent's policy became effective, the coverage under the appellant's policy upon the same contents was automatically removed. There never was a moment when the appellant's and respondent's policies covered the same contents. That was the position at the time of the loss and, therefore, the provisions of Conditions 8 and 9, which contemplate at the time of the loss an enforceable coverage of the same property, have no relevancy. *Home Insurance Co. of New York* v. *Gavel* (2).

The parties hereto do not agree as to the effect of the consent to further insurance provided for in para. 3. The appellant sought to restrict its meaning to only those policies which are "de mêmes forme, teneur et portée" as its own. The respondent, however, contends that the provisions of para. 3 are sufficiently comprehensive to apply to its policy.

The respondent's view relative to the construction of para. 3 is more in accord with the language used. This para. 3 is phrased in rather general terms and the words "le montant total de ses assurances" do not suggest they are limited in their application to "(le) montant total de $250,000" in para. 2 and do not import into para. 3 the

(1) (1943) 10 Ins. L.R. 92. (2) [1927] S.C.R. 481.

words "de mêmes forme, teneur et portée" from para. 2. The language of para. 3 appears sufficiently comprehensive to cover the appellant's consent to respondent's policy.

If, however, we assume, as the respondent contends, that the appellant, by virtue of para. 3, consented to the former's policy, that does not alter the position. The language of both policies, including the words "qui n'est pas autrement assuré," notwithstanding the consent, remains the same. In the result, the consent, in relation to respondent's policy, is of no effect and may be looked upon as surplus. This construction does not involve any repugnancy between paras. 1 and 3. Even if these paragraphs be construed in a manner that recognizes some repugnancy, that construction should be avoided, if reasonably possible. Here the language of para. 1 is specific, while that of para. 3 is general. If the general terms of the latter be construed not to apply to the words "qui n'est pas autrement assuré," thereby avoiding the suggested repugnancy, that should be done, particularly if consistent with the intention of the parties as disclosed in relation to the contract as a whole. As stated in the oft-quoted maxim of Bacon, Rule 10:

> for all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person.

Moreover, the parties to a contract must be presumed to have attributed a meaning and purpose to its several parts which, when read together, constitute a complete consistent contract and, therefore, repugnancy should be, if reasonably possible, avoided.

This construction, which so limits the general words of para. 3, appears to be most in accord with the intention of the parties, as it would appear they never intended, by this general provision, to contradict the specific words "qui n'est pas autrement assuré." Moreover, this construction does not nullify nor indeed eliminate the necessity for para. 3. The parties, as they completed appellant's contract, would contemplate other insurance in general which would include other policies on the buildings only, or upon the buildings and contents, in language identical to that of the appellant, or otherwise. It is clear that the consent in para. 3 would have meaning and effect as to some of these

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and it is unnecessary here to construe its precise effect in relation to all of them. It is sufficient to observe its effect in relation to the respondent's policy in question in this litigation.

It should be noted that under the appellant's policy the total coverage throughout remained the same. When the respondent's policy became effective it alone covered the contents therein specified, but, by virtue of the appellant's policy remaining in total the same, there was a larger coverage upon the contents.

The policy with the Phoenix Assurance Company, Limited of London, England, placed by the insured on certain borrowed chattels was not equal to the full insurable value of this borrowed property. It was the right of the insured to place such amount thereon as it might decide and no conclusion can be drawn therefrom such as in the respondent's policy, which covered the specified contents up to their full insurable value. The appellant did make an ex gratia payment on account of the loss suffered by the insured, but neither this nor the foregoing circumstance is of assistance in determining the issues raised in this litigation.

The words "qui n'est pas autrement assuré" are a part of the sentence describing the subject matter and peril insured. They limit or qualify that subject matter or peril, but are nevertheless a part of the description. They are not, in this policy, a stipulation contrary to any provision, or any variation, addition or omission to Statutory Conditions 8 and 9 within the meaning of s. 240 of the *Quebec Insurance Act*.

The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Brais, Campbell & Mercier.*

Solicitors for the respondent: *Hackett, Mulvena & Hackett.*

JAMES GOODFELLOW ROBSON (APPELLANT) ..... } APPELLANT;

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*Feb. 20, 21
*April 22

AND

THE MINISTER OF NATIONAL REVENUE (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Taxation—Revenue—Income Tax—Shareholder—Distribution of profits in form of stock in another company—Capital or Income—Liability of shareholder to Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1).

The appellant was the president and principal shareholder of the Timberland Lumber Co. which in 1938 purchased from funds representing accumulated profits, shares of the Salmon River Logging Co. at $100 per share. The latter company accumulated substantial profits from the date of purchase until 1944 when Timberland sold the shares to its own shareholders in proportion to their holdings at $100 per share. In 1945 the shareholders disposed of the shares at $750 each. The appellant having been assessed for the year 1944 on the estimated market value of the Salmon River Logging Co. shares, less the cost of the shares to him, as a dividend deemed to have been received from Timberland, appealed to the Exchequer Court of Canada which affirmed the assessment.

Held: 1. The difference between the price paid to Timberland by its shareholders for the Salmon River shares and their true value was an annual net profit or gain in the sense of being a dividend or profit directly received from stocks within the meaning of s. 3(1) of the *Income War Tax Act.*

2. The shares sold were not an accretion of capital but a dividend paid in money's worth and represented taxable income. *Pool* v. *The Guardian Investment Trust Co.* [1922] A.C. 347, approved in *Commissioners of Inland Revenue* v. *Fisher's Executors,* [1926] A.C. 395 at 403; *Weight* v. *Salmon,* 19 T.C. 174 at 193, 194.

3. It was a profit in 1944 when the money's worth was received and not in 1945 when the shares were sold. It was an immediate distribution of profits and not a declaration of a distribution payable at some subsequent time.

4. On all the evidence the value of $600 per share as found by the trial judge was a fair and just figure.

Judgment of the Exchequer Court of Canada [1951] Ex. C.R. 201, affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1) Sidney Smith J., Deputy Judge, affirming an assessment made against the appellant under the *Income War Tax Act* for the year 1944.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Fauteux JJ.

(1) [1951] Ex. C.R. 201.

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J. L. Lawrence for the appellant. The 580 shares did not have a value in excess of $580,000 but if so the excess value was not a dividend or deemed to be a dividend under the *Income War Tax Act*. Such excess value was not income of the appellant under s. 3 of the Act or under any other provision of the Act and in any event no income in respect thereto was received by the appellant in 1944. The object of the sale by Timberland was to secure needed funds and not to distribute profits and was a bona fide sale. None of the reasons given by the appellant for the sale to its shareholders were contradicted in evidence and the trial judge made no finding of fraud or dishonesty. The Court should not submit its judgment for the judgment of businessmen in business matters. *Hirsche* v. *Sims* (1). Timberland is a separate legal entity from its shareholders and the sale should be considered as a contract between independent parties. *Salomon* v. *Salomon & Co.* (2); *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (3).

The shares of Salmon River held by Timberland were a capital asset of Timberland. The shares were purchased to give an enduring benefit to Timberland. Any profit made on the sale of the shares would not be income of Timberland. *British Insulated & Helsby Cables* v. *Atherton* (4); *Minister National Revenue* v. *Dominion Natural Gas Co. Ltd.* (5); *Southern* v. *Borax Consolidated Ltd.* (6).

Capital is not defined in the *Income War Tax Act* but if an asset does not come under the head of inventory, that is the property in which a company trades, then for all the purposes of the Act it should be treated as capital. In England capital invested in inventory is called circulating capital as opposed to fixed capital. Shaw and Baker "The law of Income Tax" 1937, p. 154; *Inland Revenue Commsr.* v. *Blott* (7). The attitude of Parliament towards the sale by a company of its assets to its shareholders is shown in s. 32B of the *Income War Tax Act*. The respondent has made no attempt to rely on this section and the reason is obvious because the sale of the shares of Salmon River by

(1) [1894] A.C. 654.
(2) [1897] A.C. 22.
(3) [1940] A.C. 127.
(4) [1926] A.C. 205.
(5) [1941] S.C.R. 19.
(6) [1940] 4 All E.R. 412.
(7) [1920] 1 K.B. 114; [1920] A.C. 171 at 194.

Timberland would not create income of Timberland. If s. 3 is to be interpreted as found by the trial judge then s. 32B is unnecessary and that would not logically follow since Parliament is presumed to know the law. *Queen* v. *Walford* (1); *Young & Co.* v. *Mayor of Royal Leamington Spa* (2). The inclusion in s. 32B of the words "which assets if sold at the market price would create income of the corporation within the meaning of this Act" clearly indicate that only where a corporation receives or would receive income can a shareholder be deemed to receive a dividend. This is a step beyond the provisions of s. 3 and obviously it is as far as Parliament intended to go. The trial judge has gone far beyond s. 32B in holding that similar provisions should apply in every sale by a corporation of assets to its shareholders whether or not such sale would create income of the corporation.

A company is not competent to declare a dividend except in accordance with its authorized procedure. *Bouch* v. *Sproule* (3). The extract from the Articles of Association as filed requires a recommendation by the directors and a declaration by the company in general meeting in order to declare a dividend. This was not done. What the company declares a certain translation to be that it is; if it declares it to be a dividend then it is a dividend; if it declares it to be a sale it is a sale and not a dividend. *Commsr. of Inland Revenue* v. *Blott* (4); *Commsr. of Inland Revenue* v. *Fishers Executors* (5).

The resolutions of Timberland were for a sale only and were approved by Salmon River and by Green Point only on that basis. The real and only purpose was to effect a sale and this would be so even though the shares were sold at an under-valuation and even though the shareholders contemplated a benefit to themselves as well as Timberland.

S. 3 must be strictly construed. The relevant words apply to a dividend not to a sale. If Parliament had intended s. 3 to apply to a transaction such as this it would have enacted legislation such as is found in s. 8 (1). Under that section the sale might attract taxation yet that section does not declare the transaction to be a dividend or even

(1) (1846) 9 Q.B. 626 at 635.
(2) [1883] App. Cas. 517 at 526.
(3) (1887) 12 A.C. 385.
(4) [1920] 2 K.B. 657.
(5) [1926] A.C. 395.

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presumed to be a dividend. No such words appear in the Act as it existed in 1944 and should not be read into the Act. *Parkington* v. *A.-G.* (1); *Brooks* v. *Commsr. of Inland Revenue* (2); *Canadian Eagle Oil Co.* v. *The King* (3); *Taplin* v. *Commsr. of Internal Revenue* (4).

W. R. Jackett Q.C. and *F. J. Cross* for the respondent.

The appellant received the profit arising from the purchase of the Salmon River shares as a shareholder of Timberland and as a profit from his Timberland shares even though the profit arose out of a sale transaction and was received as a free distribution. *Weight* v. *Salmon* (5); *Ede* v. *Wilson* and *Cornwall* (6). He received the profits arising from the purchase in the year he purchased the shares. *Gold Coast Selection Trust* v. *Humphrey* (7).

The profit received by the appellant was properly included in computing his income for the 1944 taxation year by virtue of s. 3 as being a dividend or profit directly or indirectly received in the year from stocks or other investments, *Commsr. of Inland Revenue* v. *Blott* (8), and the amount of the profit as fixed by the Minister and trial judge is justified on the evidence.

The judgment of the Chief Justice, Kerwin, Taschereau and Fauteux, JJ. was delivered by:—

KERWIN J.:—This appeal is concerned with the assessment to income tax of the appellant under the *Income War Tax Act* in the year 1944. I agree with the reasons for judgment of the trial judge except that I find no occasion to consider any of the decisions in the Courts of the United States referred to by him.

His findings of fact are the only possible ones on the evidence. The appellant was the President and Managing Director of Timberland Lumber Co. Ltd., and its principal shareholder. That company had obtained 100 shares, at $100 each, of Salmon River Logging Company Limited, which latter had profits after payment of taxes in each of the years 1938 to 1943 inclusive, of various amounts ranging from about $65,000 to about $126,000. Timber-

(1) (1869) L.R. 4 H.L. 100.
(2) (1914) 7 T.C. 236.
(3) (1946) 27 T.C. 205 at 208.
(4) (1930) 41 Fed. R. 2d 454.
(5) (1934) 19 T.C. 174.
(6) [1945] 1 All E.R. 367.
(7) [1948] A.C. 459 at 469.
(8) [1921] A.C. 171 at 194, 196.

land held earned profits and the object of its shareholders, including the appellant, was to distribute those profits. This is made quite clear from the company's annual statements and the letters to the Income Tax Inspector from the firm that acted as auditors of that company and also of the Salmon River Company. These letters also show that originally it was the intention to declare a dividend of the Salmon River shares to the shareholders of Timberland. What was finally done was that Timberland sold to its shareholders, in proportion to their holdings, the Salmon River shares at $100 per share. The shareholders, including the appellant, thus secured shares that represented profits and which profits had never been capitalized by Timberland.

Upon these facts the case falls within subsection 1 of s. 3 of the *Income War Tax Act* because the difference between the price paid to Timberland by its shareholders of $100 for each share of the Salmon River Company and the true value was an annual net profit or gain in the sense of being a dividend or profit directly or indirectly received from stocks within that part of subsection 1 of s. 3 of the Act, reading as follows:—

and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source.

Mr. Lawrence suggested that this should be read:— "The interest * * * received from money at interest upon any security or without security * * * dividends from stocks * * * profits from any other investment." This, however, is not the correct interpretation as what is included is: (*a*) the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security: and (*b*) the interest, dividends or profits directly or indirectly received from stocks or from any other investment. The same construction results from a consideration of the French version of the text:—

et doit comprendre l'intérêt, les dividendes ou profits directement ou indirectement reçus de fonds placés à intérêt sur toutes valeurs ou sans garantie, ou d'actions, ou de tout autre placement, et, que ces gains ou profits soient partagés ou distribués ou non, et aussi les profits ou gains annuels dérivés de toute autre source, y compris.

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Kerwin J.

The distribution of the shares by Timberland was not a distribution of capital of that company. As the correspondence and the balance sheets of Timberland show, those shares were not an accretion of capital but were a dividend paid in money's worth and represented taxable income: *Pool* v. *The Guardian Investment Trust Co.* (1), a decision of Sankey J., as he then was, approved, although distinguished, in *Commissioners of Inland Revenue* v. *Fisher's Executors* (2), by Viscount Cave, at 403, with the concurrence of Lord Atkinson. Here, as in the *Pool* case, the distributing company distributed, not shares in its own stock, but shares in the stock of another company. The fact that the shares were not freely distributed but were purchased at $100 per share means only that each shareholder, including the appellant, was receiving a profit to the extent of the difference between the price he could get for it and the price he had actually paid: *Weight* v. *Salmon* (3), at pp. 193, 194, per Lord Atkin, with whom all the other peers agreed. Furthermore, it was a profit in 1944 when the money's worth was received and not in 1945 when each share was sold for $750. It was an immediate distribution of profits and not a declaration of a distribution payable at some subsequent time such as was found in *Associated Insulation Products Ltd.* v. *Golder* (4).

On the evidence the true value was properly fixed by the trial judge at $600 per share in 1944. The appellant called as a witness Mr. J. C. Wilson, a member of the firm of auditors that acted for both companies. He fixed the value at $113 per share but, as the trial judge points out, the letter of June 20, 1944, from Mr. Wilson's firm to the Income Tax Inspector disagrees with his view at the trial that in 1944 the outlook for Salmon River was a poor one, since that letter states: "It appears that Salmon River will accumulate funds fairly rapidly from now on." The trial judge, therefore, declined to accept Mr. Wilson's estimate and with that conclusion I agree. Mr. Beer, called on behalf of the respondent, put the book value at approximately $400 with the value computed on earnings at something more, and he testified that in arriving at that figure

(1) [1922] 1 K.B. 347.
(2) [1926] A.C. 395.
(3) (1935) 19 T.C. 174; 51 T.L.R. 333.
(4) [1944] 2 All E.R. 203.

he had made no allowance for wartime appreciation in fixed assets due to rising prices. On all the evidence $600 per share is a fair and just figure and the appellant is liable to income tax imposed upon the difference between that amount and the sum of $100 paid by the appellant on his purchase from Timberland of each share of Salmon River.

In this view of the matter, I find it unnecessary to deal with the respondent's contention that section 18 of the Act also applies. The appeal should be dismissed with costs.

RAND J.:—The investment by the Timberland Company in the Salmon River Company was made from funds representing accumulated profits; and if the shares so obtained had been distributed among the shareholders of Timberland there can be no doubt that they would have been income within the meaning of s. 3 of *The Income War Tax Act* as "dividends or profits directly or indirectly received . . . . from stocks". In *Pool* v. *The Guardian Inv. Company* (1), such a distribution took place and the judgment of Sankey J. (as he was) was approved by Cave L.C. in *I.R.* v. *Fisher's Ex.* (2); and *I.R.C.* v. *Reid's Trustees* (3), shows that "dividends" are taxable regardless of the nature of the fund out of which they are paid.

But such a distribution can be made under the guise of a sale, and here Smith J. has found that to have taken place. Shares purchased originally by Timberland for $100 each were, seven years later, made the subject of an agreement purporting to sell them to the shareholders of Timberland for the same price. One year still later, they were disposed of by the shareholders for $750 each. Those striking facts were buttressed by the frank disclosure of the desire to make a distribution of the shares, as to the mode of which the advice of the Income Department was sought; and I agree with Smith J. that the form adopted was simply what was thought to be a means of avoiding the taxation consequences of declaring a dividend.

(1) [1922] 1 K.B. 347. (2) [1926] A.C. 395.
(3) [1949] 1 All E.R. 354.

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Rand J

The remaining question is of the value of the shares found, namely, $600 when they were received. In this, Smith J. has, I think, dealt carefully and thoroughly with all relevant factors, and I am quite unable to say that his conclusion was unwarranted or indeed that it was not dictated by what was before him.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. L. Lawrence.*

Solicitor for the respondent: *F. J. Cross.*

CANADIAN PACIFIC RAILWAY COMPANY ET AL (PLAINTIFFS) .. } APPELLANTS;

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*Feb. 27, 29
Mar. 3, 4
*Jun. 30

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF SASKATCHEWAN .....

AND

THE MINISTER OF NATURAL RESOURCES AND INDUSTRIAL DEVELOPMENT OF THE PROVINCE OF SASKATCHEWAN (DEFENDANTS) ..... } RESPONDENTS,

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF ALBERTA .. } INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Mineral Taxation—Imposition of tax on owner of minerals—Tax based on acreage and assessed value—Whether direct or indirect—Whether land tax—Whether intention to have it passed on—Severability—Mineral Taxation Act, 1948 (Sask.), c. 24, ss. 3, 6, 22—B.N.A. Act, 1867, s. 92(2).

By virtue of the *Mineral Taxation Act, 1948, c. 24* and amendments, the Province of Saskatchewan purported to impose an annual tax on each owner of minerals within the Province regardless of whether minerals were or were not present within, upon or under the land. "Owner" was defined as a person registered in a land title office as the owner of any minerals. "Mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land.

The *Act* provided that in a "non producing area", the tax would be at the rate of 3 cents per acre of land. The Lieutenant-Governor was given the power to declare any area in the province a "producing area", and provision was made for the assessment at their fair value of minerals in a producing area. Until an assessment was made the owner was liable to pay at the rate of 50 cents per acre of land and fraction thereof in such an area. Following an assessment, the owner would be liable to pay a tax at the rate prescribed from time to time by the Lieutenant-Governor in Council but not exceeding ten mills on the dollar of the assessed value of the minerals. Non-payment of the tax resulted in forfeiture of the minerals to the Crown.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

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The trial judge held that the *Act* was *intra vires* as imposing direct taxation. The Court of Appeal for Saskatchewan held that the 3 cent tax was a direct tax, but that the 50 cent tax and the mill rate tax were indirect.

Held (the Chief Justice dissenting), that the appeal should be dismissed and the cross-appeal allowed.

Each of the three taxes is a land tax, is clearly direct taxation and not imposed with the intention that it should be passed on to someone else.

City of Halifax v. *Fairbanks' Estate* [1928] A.C. 117; *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co.* [1950] A.C. 87; *A.G. for B.C.* v. *C.P.R.* [1927] A.C. 934; *A.G. for Manitoba* v. *A.G. for Canada* [1925] A.C. 561 and *Glenwood Lumber Co.* v. *Phillips* [1904] A.C. 405 referred to.

APPEAL and CROSS-APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) which had reversed the judgment of the trial judge and had declared the Act *ultra vires* in part.

E. C. Leslie, I. D. Sinclair and Allan Findlay for appellants. The Act is not in pith and substance in relation to direct taxation and is therefore beyond provincial competence. The tax is imposed upon the owner in respect of mineral rights and in respect of the minerals themselves. A tax thus imposed is analogous to a tax on the producer of a commodity in respect of a commodity and such a tax is indirect taxation: *Bank of Toronto* v. *Lambe* (2); *The Security Export Co.* v. *Hetherington* (3). It appears from the reasoning in the judgment of *Caledonian Collieries* v. *The King* (4) that had the tax been imposed in respect of the coal before its sale or while it was still in the ground, there could have been no question that it would be an indirect tax because an allowance would be made for such a tax in the price charged. This view is also supported by the case of *Esquimalt* (5) in this Court. And in the Privy Council (6) it would have been quite unnecessary for Lord Greene to have drawn the careful distinction he did between a land tax and a tax on standing timber if a tax on standing timber was regarded as a direct tax.

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.
(2) 12 A.C. 575.
(3) [1923] S.C.R. 539.
(4) [1928] A.C. 358.
(5) [1948] S.C.R. 403.
(6) [1950] A.C. 87.

If a tax in respect of minerals which have been removed is an indirect tax, a tax in respect of the right to remove the minerals is also an indirect tax, because here also, an allowance would be made for the tax in the price of sale.

The validity of the submission that the tax is direct because it will not in fact be passed on will disappear when the operation of the legislation is examined. But the fact that it may not be possible in a given case to pass it on does not effect the general tendency of the tax on mineral rights which is that it will be passed on. The legislature contemplated that this would be its normal effect and tendency. *The Security Export Co.* v. *Hetherington* (*supra*), *Esquimalt* (*supra*), *Grain Futures Case* (1); *The A.G. for British Columbia* v. *C.P.R.* (2); *The A.G. for Manitoba* v. *The A.G. for Canada* (3) and the *City of Charlottetown* v. *Foundation Maritime Limited* (4). This is not as contended, a land tax within the case of *City of Halifax* v. *Fairbanks' Estate* (5).

The interest in land in respect of which the tax in question is imposed is the right to extract or produce from the land a commodity which will be the subject of commercial transactions. Such an interest in land cannot be considered as falling within the well recognized class of land taxes that have always been regarded as direct taxes. The situation here is analogous with the tax on growing crops of the Agricultural Land Relief Act case (6).

Licenses which have been held to be a tax may be supported under section 92 para. 9 even though it be an indirect tax: *Lawson* v. *Interior Tree Fruit* (7) and *Shannon* v. *Lower Mainland Dairy Products Board* (8).

The provisions imposing the 3 cent rate are not severable and accordingly if the two other rates are *ultra vires*, the entire enactment is *ultra vires*. It is apparent from a consideration of the Act as a whole that it was intended to work out a single comprehensive scheme of taxation. If parts of it are invalid, the remaining parts cannot stand unless it can be assumed that the legislature would have enacted such remaining parts without the invalid parts and

(1) [1925] A.C. 561.
(2) [1927] A.C. 934.
(3) [1925] A.C. 561.
(4) [1932] S.C.R. 589.
(5) [1928] A.C. 117.
(6) [1938] 4 D.L.R. 28.
(7) [1931] S.C.R. 357.
(8) [1938] A.C. 708.

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the converse is true. *The A.G. for Alberta* v. *The A.G. for Canada* (1); *The A.G. for Manitoba* v. *The A.G. for Canada* (2) and *The A.G. for British Columbia* v. *The A.G. for Canada* (3).

M. C. Shumiatcher, Q.C. for the respondent, Minister of Natural Resources. The Act is clearly a taxing statute intended to raise a revenue for the purposes of the province. The tax is imposed with respect to property or alternatively, the tax is imposed upon property. The cases of *Glenwood Lumber Co.* v. *Phillips* (4), *Macpherson* v. *Temiskaming* (5), *Clarkson* v. *Bouchard* (6) and *Gowan* v. *Christie* (7) are relied on.

Minerals being land or an interest in land, a mineral tax of the type here imposed is not new or unusual. Mineral rights have been the subject of taxation for a considerable number of years in Saskatchewan, Alberta, Ontario and British Columbia. The impost under the Act in pith and substance constitutes direct taxation. There is no relation between the tax and the amount of product produced, therefore it cannot be a tax on a commodity. The tax is on capital, i.e. the value of the land. *Bank of Toronto* v. *Lambe* (8). The effect of the judgment in *City of Halifax* v. *Fairbanks' Estate* (9) is that a tax upon land and interests in land is a direct tax. The situation here is somewhat similar to the *Brewers* Case (10). There is a difference between a growing crop and minerals, the time limit being so short in the crop case as to be immaterial. The tax is directed at the crop which is a chattel in contemplation of severance. Timber and minerals are an interest in the land. The crops, whether growing or not, are chattels. The fact that the tax or a portion thereof may be said to be passed on in no way alters the fact that, being a tax upon property or an interest in property, it is direct taxation. The *A.G. for British Columbia* v. *Kingcome Navigation Co. Ltd.* (11); *The King* v. *Caledonian Collieries Ltd.* (12) and the *Agricultural Land Relief Act*

(1) [1947] A.C. 503.
(2) [1925] A.C. 561.
(3) [1937] A.C. 377.
(4) [1904] A.C. 405.
(5) [1913] A.C. 145.
(6) [1913] A.C. 828.
(7) L.R. 2 H.L. 283.
(8) 12 A.C. 575.
(9) [1928] A.C. 117.
(10) [1897] A.C. 231.
(11) [1934] A.C. 45.
(12) [1928] A.C. 358.

case (1). There is no such tendency as in the case of *Charlottetown* v. *Foundation Maritime Ltd.* (2) inherent in the provisions of the present statute since there exists no relationship between the tax and the marketable commodity. The Mineral Tax Act provides for a levy upon or in respect of the land and contemplates payment by the owner of that land. No passing on is contemplated. Furthermore, if the tax was a direct tax when set at 1 cent per acre, it did not become an indirect tax when it was increased to 3 cents per acre. The nature of a tax does not alter with its quantum.

The acreage tax in *R. M. Bratts* v. *Hudson's Bay Co.* (3) was held to be a direct tax. The cases of *Rattenbury* v. *Land Settlement Board* (4) and the *City of Montreal* v. *The A.G. for Canada* (5) are also of assistance.

P. G. Makaroff, Q.C. for the respondent, the A.G. for Saskatchewan. The tax is taken directly from the registered owner of minerals apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making or stand to make profits from the ownership of mineral rights. The difference in the three taxes is not in character but only in the method of assessment. The validity of a taxing statute is not affected by the method of assessment.

There is a presumption at law that the legislature has not exceeded its power.

The principles of severability are well known and reference is made to *Toronto* v. *York Township* (6) and the *Rattenbury* case (4). If there is any doubt as to the constitutional validity of any one of the procedures adopted or capable of adoption and application, such is clearly severable in the event that one procedure is held to be *ultra vires*, that provision ought to be severed from the balance of the statute which, read as a whole, is a taxing statute imposing direct taxation in the province. As the 3 cent tax is a blanket tax over the whole of the province, the two other taxes may be taken away and the Act will still be complete. The legislature would have enacted the Act just for the 3 cent tax.

(1) [1938] 4 D.L.R. 28.
(2) [1932] S.C.R. 589.
(3) [1919] A.C. 1006.
(4) [1929] S.C.R. 52.
(5) [1923] A.C. 136.
(6) [1938] A.C. 415.

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J. J. Frawley, Q.C. for the Intervenant, the A.G. for Alberta, adopted the arguments advanced on behalf of the respondents.

THE CHIEF JUSTICE (dissenting)—The appellants sought to have the Minerals Taxation Acts and Amendments of the Province of Saskatchewan declared *ultra vires*. There were other conclusions in their statement of claim and some of them were passed upon by the Court of Appeal of the Province of Saskatchewan (1), but before this Court the only point discussed was whether the tax imposed ought to be classed as an indirect tax and, therefore, outside the powers of the Legislature of the Province of Saskatchewan.

The task of deciding the point, to my mind, is not an easy one. In *City of Halifax* v. *Estate of J. P. Fairbanks* (2), Viscount Cave, delivering the judgment of their Lordships of the Privy Council, insisted upon the fact that in considering the question raised it was important to bear in mind that the problem to be solved was one of law and that the framers of the *British North America Act* evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described. From this he inferred that the distinction between direct and indirect taxation was well known before the passing of the *British North America Act* and, he says, it is undoubtedly the fact that before that date the classification was familiar to statemen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Viscount Cave stated that the well known formula of John Stuart Mill no doubt was valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed.

That judgment was handed down in 1928, but the Judicial Committee in *Attorney General for British Columbia* v. *Esquimalt and Nanaimo Rly. Co.* (3) said this about Viscount Cave's judgment in the Fairbanks case:—

> Lord Cave, in delivering the judgment of the Board, used expressions which, if not correctly understood, might appear to lay down too rigid a test for the classification of taxes; but, as is pointed out by Lord Simon

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.

(2) [1928] A.C. 117.

(3) [1950] A.C. 87 at 119.

L.C. in the judgment of the Board in the later case of *Atlantic Smoke Shops, Ltd.* v. *Conlon* (1943) A.C. 550, those expressions "should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article".

In *Bank of Toronto* v. *Lambe* (1), Lord Hobhouse, delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached, and stated that the drafters of the *British North America Act* "must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies".

This language was approved by the Board in *The King* v. *Caledonian Collieries, Ltd.* (2).

In view of these pronouncements of the Judicial Committee, I feel that Lord Cave's suggested classifications should not be strictly adhered to.

In *City of Charlottetown* v. *Foundation Maritime, Ltd.* (3), this Court said:—

> The question of "direct taxation" as defining the sphere of provincial legislation has often been the subject of pronouncements by this Court and by the Judicial Committee of the Privy Council. The effect of the decisions, when analyzed, is substantially as follows:
>
> In every case, the first requisite is to ascertain the inherent character of the tax, whether it is in its nature a direct tax within the meaning of section 92, head 2, of the British North America Act, 1867 (Attorney General for British Columbia v. McDonald Murphy Lumber Co. Ltd. (1930) A.C. 357 at 363 and 364). The problem is primarily one of law; and the Act is to be construed according to the ordinary canons of construction: the court must ascertain the intention of Parliament when it made the broad distinction between direct and indirect taxation.
>
> These taxes (in 1867) had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies.
>
> As applied, however, to taxes outside these well recognized classifications, the meaning of the words "direct taxation", as used in the Act, is to be gathered from the common understanding of these words which prevailed among the economists who had treated such subjects before the Act was passed (*Attorney General for Quebec* v. *Reed* (1884) 10 A.C. 141 at 143); and it is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (Political Economy ed. 1886, vol. 11, p. 415) has been judicially adopted as affording a guide to the application of section 92, head 2. Mill's definition was held to embody "the most obvious indicia of "direct

(1) 12 A.C. 575. (2) [1928] A.C. 358.
(3) [1932] S.C.R. 589 at 593.

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and indirect taxation" and was accepted as providing a logical basis for the distinction to be made between the two. The expression "indirect taxation" connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And Mill's canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on (*The King* v. *Caledonian Collieries, Ltd.*, (1928) A.C. 358). It is the normal or general tendency of the tax that will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed or from the results which in the ordinary course of business transactions must be held to have been contemplated.

In the present case there are really only two sections of *The Mineral Taxation Act* (Chapter 24 of the Statutes of Saskatchewan, 1948, as amended by Chapter 23 of the Statutes of 1949 and Chapter 22 of the Statutes of 1950) which have to be considered. These are section 3 imposing a tax at the rate of three cents for every acre on "every owner of minerals" . . . "not situated within the producing area", and section 22 imposing a tax at the rate of fifty cents for every acre of land on the "owner of minerals within, upon or under any land situated within a producing area".

By force of section 5 of the Act "producing areas" are those which are so declared by order of the Lieutenant Governor in Council, and the latter may designate the mineral or minerals in respect of which the portion of the province therein described is constituted a "producing area". For those areas so designated assessors are provided to assess "at their fair value all minerals, within, upon or under any parcel of land so constituted". They prepare an assessment roll in which shall be set out as accurately as may be a brief description of each such parcel of land, a brief description of the minerals assessed, the names and addresses of the owners of the minerals and the assessed value thereof.

Section 7 deals with the method of assessment and section 6, dealing with the imposition of the tax, states:

> Every owner whose name appears on the assessment roll mentioned in section 7 shall be liable for and shall on or before the thirty-first day of December in each year pay to the minister a tax at such rate as the

Lieutenant Governor in Council may from time to time prescribe not exceeding ten mills on the dollar of the assessed value of his minerals as shown on the assessment roll subject to any changes made on appeal.

We were told that so far no assessment has been made under these sections and we need not trouble ourselves with the question as to how the assessors are to arrive at the "fair value" of minerals which are within, upon or under the land and, indeed, which may not exist at all, for, it should be mentioned, that apparently the *Act* is to apply whether there are or are not minerals within, upon or under the land.

What we have to consider for the purpose of this appeal is, therefore: What is the true nature of the tax imposed under section 3 or under section 22 of the *Act*, the first applying to every owner at the rate of three cents for every acre, and the second to the owners of minerals, within a producing area, at the rate of fifty cents for every acre of land in respect of which they are such owners? Of course, we are not concerned about the question of how the *Act* may be made to work, or even whether it is workable at all. The only point is whether it is *ultra vires* of the Legislature of Saskatchewan. The answer to be given is not helped by the definition of the word "mineral" in the Act. Subsection 4 of section 2 is as follows:—

"Mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land . . .

Then there are certain exceptions with which we need not concern ourselves for the purpose of the present decision.

The peculiarity of that definition is:

(1) It comprises an incorporeal right and a corporeal thing, to wit, the right to work, win and carry away minerals and also the mineral itself.

(2) It proceeds to define "mineral" by the same word.

We are told that "mineral" is a "mineral" and while one might say that such a definition is clearly insufficient, it might also be pointed out that defining a word by the same word is hardly a way of indicating the meaning of the word.

On the other hand, the word "land" is not defined in the *Act* and I fail to see how, for the purpose of knowing what the Legislature had in mind, we may go to some other

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statute where that word may be defined. In the latter case the definition is evidently that given as usual for the purpose of that particular Act and it may not be imported into *The Mineral Tax Act of 1948*. It does not matter that the "certificate of title" as set out in subsection 2 of section 2 is stated to mean "a certificate of title granted pursuant to the provisions of The Land Titles Act". We are asked to say that the tax provided for by the legislation which is the subject of the appeal is a tax on land, and when "land" is not defined in the statute under consideration it seems to me to be contrary to the usual canons of construction to look for the meaning of the word "land" in a different statute.

Here we are dealing with *The Mineral Tax Act, 1948*, and, therefore, with taxation on minerals. The least that we can say is that the attempt to tax a right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, is certainly a tax which, at the time of Confederation, could not find its place in the two categories of taxation spoken of in the Fairbanks case; and from all points of view it should be considered as a new species of taxation, sufficient to satisfy Viscount Cave in the Fairbanks case and obliging the Court to apply the Mill's formula "as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed" (*City of Halifax* v. *Fairbanks' Estate* (1)). It is clearly a tax which does not belong to the "established classification of the old and well known species of taxation" and which "makes it necessary to apply a new test to every particular member of those species".

We are not called upon here to transfer a tax universally recognized as belonging to one class to a different class of taxation in accordance with the Mill's formula. It is undoubtedly a new form of taxation, the nature of which must be ascertained in order to decide whether it is direct or indirect.

As I said before, the obvious intention of the *Act* is to tax minerals. Not only must we gather this from the title of the *Act* itself, but from its whole purport. Of course,

(1) [1928] A.C. 117 at 125.

the owner of the minerals is taxed and that is in accordance with the observations of Lord Thankerton in *Provincial Treasurer of Alberta* v. *Kerr* (1), where he says:—

> Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property or in respect of transactions or actings of the taxpayer. It is at least unusual to find a tax imposed on property and not on persons . . .

But it is clear from the Act that the subject matter of the tax is not the person of the owner, but the minerals and, in the circumstances, I find some difficulty in assimilating the tax with which we are concerned to a tax on land. With respect, I repeat that we cannot, for that purpose, look for the definition of the word "land" in some other statute. The Mineral Tax Act does describe the words "parcel of land", but the definition there given applies to a different subject.

If it is correct to look at the tax as a tax on minerals and not as a tax on land, then it cannot be taken as belonging to the obvious category of direct taxation; and the nature of the tax is rather to be assimilated to what was under consideration in the *Caledonian Collieries* case *supra*. Indeed, as it happened in that case, coal was the subject matter of the tax, and both in this Court and in the Judicial Committee the tax was considered to apply to a commodity and to the sale of that commodity. At p. 362 of the judgment of the Privy Council it is stated:—

> Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

Much reliance was placed by the respondents on the decision of the Privy Council in *Attorney General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.* (2). I may say that I am not at all embarrassed by the decision of the Judicial Committee in that appeal. First, it must be remembered that that judgment was given on a reference and it has been invariably stated that judgments on references are not necessarily binding, because in a concrete case the circumstances might alter the general application

(1) [1933] A.C. 710 at 718. (2) [1950] A.C. 87.

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of the principle laid down in such judgments; and, secondly, in the Nanaimo case the reference was not made on existing legislation, but the question was only whether the proposed legislation might be adopted by the Legislature of British Columbia along the lines of the report of Chief Justice Sloan. As to that Lord Greene had this to say at p. 114:—

> In construing questions of this nature, which do not purport to give more than an outline of the proposed legislation, the method applicable in construing a statute must not, in their Lordships' opinion, be too rigidly applied. In the completed legislation many sections of an explanatory or machinery nature would be included. Ambiguities would be cleared up, gaps would be filled, and it may often be necessary in construing what is no more than a "projet de loi" to assume a reasonable intention in that regard on the part of the legislature.

And at p. 113 Lord Greene repeated:—

> The answer to the question whether the tax is or is not a direct tax is to be found in their opinion primarily by an examination of the nature and effect of the tax as collected from the language describing it.

Moreover, the Nanaimo judgment insists upon the fact that the judicial committee is there dealing with what was undoubtedly a tax on land:—

> It will be the owner of the land and not the owner of the timber who will be liable to the Crown for the tax.
> (p. 116).

> The conclusion, therefore, at which their Lordships have arrived is that the tax is in reality a tax on land and not a timber tax.
> (p. 118).

> This case, in their Lordships view, affords a good example of the caution with which the "pith and substance" principle ought to be applied. The object of that principle is to discover what the tax really is; it must not be used for the purpose of holding that what is really a direct tax is an indirect tax on the ground that an equivalent result could have been obtained by using the technique of indirect taxation. The use of the word "camouflage" in the argument of the respondents appears to their Lordships to be due to a misapplication of the principle.
> (p. 120).

It will be seen, therefore that the foundation of the judgment in the Nanaimo case was that their Lordships came to the conclusion that it was the land which was to be assessed and that the tax was imposed on the land; and

they quoted from the judgment of O'Halloran J.A., who dissented in the Court of Appeal for British Columbia, as follows:—

> Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is a colourable tax on its products, and that such a tax is not in truth a tax on the land itself.

All that was said because the contention on behalf of the respondent, the Esquimalt and Nanaimo Rly. Co.—a contention which found favour in this Court (1), was that it was in reality a tax on timber and not a tax on land. On the contrary, in the present case there is no question of taxing the land. The acreage tax under section 3 is upon the owner of minerals and not upon the owner of land, and so it is under section 5 and still more so under sections 6 and 7, because what the assessor is to ascertain is the "fair value of all minerals within, upon or under any parcel of land situated within a producing area". The assessor is to give a "brief description of the minerals assessed"; and the tax prescribed by section 6, if the occasion should occur, is to be at a certain rate "not exceeding ten mills on the dollar of the assessed value of his minerals as shown on the assessment roll". Then, if we turn to section 22, we find that "every owner of minerals . . . . shall be liable for and shall, on or before the thirty-first day of December in each year in which such minerals have not been assessed under the provisions of this *Act*, pay to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner". This remark is strengthened by the very definite definition of the word "mineral" in subsection 4 of section 2, where it is stated to mean "the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land . . . ."

I would think that it is significant that the *Act* itself does not give any definition of the word "land". It is to the "minerals" and not to the "land" that the *Act* is directed. I am of the opinion, therefore, that the present case is distinguishable from the *Nanaimo* judgment and, on the

(1) [1948] S.C.R. 403.

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contrary, falls within the *Caledonian Collieries* judgment. If that be so, as I think it is, I would agree with Gordon J.A., in the Court of Appeal for Saskatchewan, and declare the *Act in toto ultra vires* of the legislature of the Province of Saskatchewan. Of course, incidentally I also agree with that part of the judgment of Martin C.J., concurred in by Proctor J.A., insofar as they declare *ultra vires* that part of the *Act* which relates to the "producing area."

In view of my conclusion it becomes unnecessary to pass upon the question of severability.

I would, therefore, allow the appeal with costs throughout and dismiss the cross-appeal with costs against the respondent.

The judgment of Kerwin, Taschereau, Cartwright and Fauteux, JJ. was delivered by:

KERWIN J.:—The appellants are the Canadian Pacific Railway Company and certain other companies who brought an action against the respondents, the Attorney General for the Province of Saskatchewan and the Minister of Natural Resources and Industrial Development of the Province of Saskatchewan, in the King's Bench in Saskatchewan, for a declaration that *The Mineral Taxation Act of Saskatchewan,* being chapter 27 of the Statutes of 1944 (2nd Session) and amendments were *ultra vires* the legislature of the province, and for certain other relief. At the date of the trial this *Act* and the amendments thereto had been repealed and replaced by *The Mineral Taxation Act,* being chapter 24 of the 1948 Statutes and the appellants were permitted to amend their statement of claim so that the important question raised was whether the last mentioned *Act* (as amended in 1949, after the commencement of the action but before the trial) was *ultra vires.* In 1950, after the conclusion of the trial and before judgment, other amendments were enacted but it is not contended that the latter are not relevant since, by express provision, they were made retroactive. What we are called upon to decide, therefore, is whether the 1948 *Act* as thus amended in 1949 and 1950 is *ultra vires.*

The trial judge and the Court of Appeal (1) dealt with several other matters raised by the parties who, however, have now abandoned their contentions with respect thereto. The appellants no longer claim (*a*) that the delegation of certain powers to the Lieutenant-Governor in Council by subsections 1 and 2 of section 5, is *ultra vires;* (*b*) that even if the 1948 Act is *intra vires* in all respects, it is inoperative in respect of the appellant Canadian Pacific Railway Company. On the other hand, the respondents abandoned their claim that the action was not properly brought against the Attorney General and the Minister of Natural Resources and Industrial Development.

The *1948 Mineral Taxation Act* and the amendments thereto of 1949 and 1950 (hereafter referred to compendiously as the *Act*) provide for the imposition of taxes. Under the general scheme of the Act all the land in the Province of Saskatchewan may be divided into two categories, one of which, for convenience, may be termed the non-producing area, and the other of which will mean producing areas or a producing area. In the non-producing area a tax is imposed by section 3 on the owner of minerals within, upon, or under any land, at the rate of three cents per acre or fraction thereof.

A producing area is established by a declaration of the Lieutenant-Governor in Council under the authority of subsection 1 of section 5, which also delegates to that body the power to increase, decrease or abolish any producing area. In any such declaration, the Lieutenant-Governor in Council may, by virtue of subsection 2 of section 5, designate the mineral or minerals in respect of which the designated area is being, or was, constituted a producing area. Provision is made for the appointment of an assessor who, by section 7, is to assess at their fair value all minerals upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced. By section 6, everyone whose name appears on the assessment roll, prepared by the assessor, shall be liable for and shall on or before the thirty-first day of December in each year pay

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.

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to the Minister a tax at such rate as the Lieutenant-Governor in Council may from time to time prescribe, not exceeding ten mills on the dollar of the assessed value of his minerals. By section 22, every owner of minerals within, upon or under any land situated within a producing area shall be liable for and shall, on or before December 31st, in each year *in which such minerals have not been assessed,* pay to the Minister a tax at the rate of fifty cents per acre or fraction thereof. What happened was that by successive orders of the Minister of Natural Resources and Industrial Development upon whom the powers were conferred by the 1944 Act (and also the 1948 Act before amendment), a certain area was declared a producing area; that area was increased; coal was designated as the only mineral; and, finally, the producing area was decreased. No assessment was ever made in the producing area. In the result, therefore, under section 22 a tax was imposed of fifty cents per acre on every "owner" of the "mineral" coal in the producing area, while in the non-producing area, in which is included all other owners, a tax of three cents per acre became payable under section 3. However, the terms of the *Act* providing for a tax at an annual rate on the dollar must be considered together with the other relevant provisions.

The trial judge, Thomson J., declared that all classes of taxation were valid and in the Court of Appeal (1), Culliton J.A. (with whom McNiven J.A. agreed) came to the same conclusion. The Chief Justice (with whom Proctor J.A. agreed) considered that only the taxation in the non-producing area was valid while Gordon J.A. considered the *Act ultra vires in toto.*

The main contention is that the *Act* does not impose direct taxation within the Province under section 92(2) of the *British North America Act* but in my view that argument is not sound. Dealing first with a non-producing area, section 3 imposes the three cents per acre tax upon "every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land". By paragraph 6 of subsection 1 of section 2, " 'owner' means a person who is registered in a land titles office as the owner

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.

of any mineral or minerals whether or not the title thereto is severed from the title to the surface;" By paragraph 4 of subsection 1 of section 2:—

> "mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land,

By paragraph 2 of subsection 1 of section 2:—" 'certificate of title' means a certificate of title granted pursuant to The Land Titles Act". *The Land Titles Act* is presently R.S.S. 1940, chapter 98, and under section 2(1) thereof " 'certificate of title' means the certificate (Form A) granted by the registrar and entered and kept in the register". By section 10 of *The Land Titles Act*:—

> 10. "Land" or "lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements, appertaining thereto, and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted;

These provisions make it plain that the tax in the non-producing area is imposed upon the owner of any mineral or minerals within, upon or under any land, or the owner of the right to work, win and carry away such minerals. Where a person appears from a certificate of title under *The Land Titles Act* as the owner of the mines or minerals or has the right to work, win and carry them away, he is liable to the tax of three cents per acre whether there be minerals in the land or not. This is a land tax and is clearly direct taxation: *Halifax* v. *Fairbanks* (1); *Attorney General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.* (2). In substance this is the view of all, save one, of the members of the Courts below who have considered the matter.

If, in the *Act*, no provisions had been made in producing areas for an assessment roll and the imposition of a tax at an annual rate on the dollar, and section 22 had merely provided that every owner of minerals within a producing area should pay a tax at the rate of fifty cents per acre, the same result would follow. The mere fact that provision is made for an assessment roll, etc., does not in my opinion

(1) [1928] A.C. 177. (2) [1950] A.C. 87.

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change the character of the tax. Section 7 provides that the assessor is to assess at their fair value all minerals within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced, or to the knowledge of the assessor have at any time been produced. In such assessment roll there is to be set out, among other things, a brief description of each such parcel of land and of the minerals assessed. "Parcel of land" is defined by paragraph 7 of subsection 1 of section 2 as meaning:—

> 7. "parcel of land" means all the separately described areas, within the boundaries of a section according to the system of surveys under The Land Surveys Act or within the boundaries of a river lot, which are contiguous and in respect of which the same person is the owner of the minerals. For the purpose of this paragraph, separately described areas which have at least part of their boundaries in common or which are separated only by a highway, road or railway right of way shall be deemed to be contiguous, and separately described areas adjoining at only one point shall be deemed to be not contiguous;

This is not a tax on production. In the *Esquimalt* case, (1), Lord Greene, speaking for the judicial committee, adopted, at page 115, as correct what had been said by O'Halloran J.A. in that case:—

> Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is a colourable tax on its products, and that such a tax is not in truth a tax on the land itself.

These remarks apply with equal force to the problem now under consideration and it was for these reasons that the trial judge and McNiven J.A. and Culliton J.A. came to the same conclusion.

Finally, there is nothing to indicate that the legislature was not in truth doing what it purported to do, that is, impose a direct tax for the raising of a revenue for provincial purposes. On this point I am content to adopt the reasoning of those members of the Courts below who so held.

The appeal of the plaintiffs should be dismissed with costs and the cross-appeal of the defendants should be allowed with costs. The judgment at the trial should be restored. The defendants are entitled to the costs of the appeal by the plaintiffs to the Court of Appeal but there should be no costs of the cross-appeals to that Court.

(1) [1950] A.C. 87.

RAND J.:—This is an appeal arising out of *The Mineral Taxation Act, 1948, of Saskatchewan.* The province has purported to tax all minerals within its boundaries except those within, upon or under railway lands, the land within any city, town or village, or within any registered subdivision of lots for residential or business purposes or for a cemetery.

"Mineral" is defined by sec. 2(4) as meaning "the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land."

The tax scheme imposes, first, a general annual levy of three cents on every taxable acre or fractional part of an acre not within what may be declared to be a "producing area". The language of sec. 2, providing this initial tax, is:—

> Every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land not situated within a producing area, shall be liable for and shall on or before the thirty-first day of December in each year pay to the minister a tax at the rate of three cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

Then, by sec. 5, the Governor-in-Council is authorized from time to time to declare any portion of the province to constitute a "producing area", and, in any manner, to modify or abolish such an area.

Sec. 7 directs an assessment each year "at their fair value" of all minerals "within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced, and shall prepare an assessment roll in which shall be set out as accurately as may be a brief description of each such parcel of land, a brief description of the minerals assessed, the names and addresses of the owners of the minerals and the assessed value thereof". Subsection (2) authorizes him to resort to all available information pertinent to that value. Section 2(7) defines "parcel of land" to mean:—

> . . . . all the separately described areas, within the boundaries of a section according to the system of surveys under The Land Surveys Act or within the boundaries of a river lot, which are contiguous and in

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respect of which the same person is the owner of the minerals. For the purpose of this paragraph, separately described areas which have at least part of their boundaries in common or which are separated only by a highway, road or railway right of way shall be deemed to be contiguous, and separately described areas adjoining at only one point shall be deemed to be not contiguous;

Finally, by section 22, it is provided that:—

Subject to subsection (2) of section 5, every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land situated within a producing area shall be liable for and shall on or before the thirty-first day of December in each year in which such minerals have not been assessed under the provisions of this Act, pay to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

The appellants are the owners of minerals, both severed and unsevered in title from the fee simple, and have brought this action for a declaration that the statute is *ultra vires;* and the narrow question presented is whether the annual tax of mineral *in situ,* as a component of the soil, having a special discrete value to be realized upon some manner of removal from the soil, is direct taxation within the meaning of these words as used in head 2 of section 92 of the *British North America Act.*

The argument assumed that there is mineral of some nature and quantity in all lands, and the tax has, therefore, in fact in all cases a real subject-matter. The contention of the appellants is, moreover, that the three categories of tax must stand or fall together. Mr. Leslie, in his able and frank argument, urged that, although for the purposes of taxing land as such, the value of all its component parts, ascertained by some means or other, may be reflected, yet when a mineral component is segregated as a subject-matter of tax, that becomes equivalent to the taxation of an article in commerce, an article, in effect, on its way to market, in which the tax is gathered up as part of the charges intended and expected to be recouped in the price.

That, for the purposes of a land tax, the assessed value of land can reflect the value of its products, such as timber, even though the timber represents substantially the entire value, was laid down by the judicial committee in the case of *British Columbia* v. *Esquimalt & Nanaimo Railway Company* (1). This Court (2) had held the proposed imposts to be a tax in substance on the timber as and when

(1) [1950] A.C. 87. (2) [1948] S.C.R. 403.

severed, but that view was rejected. I can see no difference, for this purpose, between the reflected value of a "growing" product and one, such as mineral, of a somewhat desparate character and of a limited quantity or existence: they are all, in contemplation of law, part of the soil.

The reflected value of a severable portion of land can only be determined, in a practical sense, by estimating its worth *in situ* in relation to its market worth as a commodity, after making allowance for all costs and risks: to which, for the total tax on the land, would be added the residual value of the soil, that is, of such part as was not involved in realizing the value of the severable portion: at least, counsel could suggest no other means or method by which, as in the *Nanaimo* case, the land tax could be computed, and none has occurred to me; and the market price of the land as an entirety would be based on the same factors. If, then, these can be so combined and treated as a single tax on the land, what is there in the nature of taxation or the subject-matter of taxation to prevent the two components from having their individual value ascertainments carried right into the same or different assessments so long as the tax is against each only as it is *in situ?* Since a mineral occupies space, its taxation includes the space it fills, and in every sense is directed against the land.

In *Esquimalt,* Lord Greene takes as a significant consideration the fact that the tax was charged upon the land only and did not attach to the severed timber. That is the effect of section 23(*a*) here: the tax is in respect of materials *in situ,* and only against them as they form part of the land does the charge apply.

Lord Greene in the same case speaks of the "fundamental difference" between the "economic tendency" of an owner to try to shift the incidence of a tax and the "passing on" of the tax regarded as the hallmark of an indirect tax. In relation to commodities in commerce, I take this to lie in the agreed conceptions of economists of charges which fall into the category of accumulating items: and the question is, what taxes, through intention and expectation, are to be included in those items? If the tax is related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the

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tax tends to cling as a burden to the unit or the transaction presented to the market. However much, in any case, these may be actually "intended" or "expected" to be passed on, it is now settled that they are to be so treated: *Attorney-General for British Columbia* v. *C.P. Railway Company* (1); *R.* v. *Caledonian Collieries* (2).

In the case, on the other hand, of any large public undertaking, the taxes on its fixed assets might wipe out any operating profit and its revenue have to be increased to avoid such a result; but that, obviously, would not convert them into indirect taxes.

Here we have an intermediate case: a capital asset which, in the course of its business exploitation, becomes used up. The tax is not in any way related to the course of that exploitation. It is an annual levy on the total quantity then existing; and that capital tax could not, in the sense of a general tendency, be taken to be intended and expected to be passed on to the consumer as an element of the price: it might be paid for years before a ton of mineral was removed. There might be the "economic tendency" to transfer some of it to price, but that is as irrelevant here as in *Esquimalt*.

The tax, at the moment of imposition, is in fact against land; it is an annual impost; the charge securing it is limited to land; and it is not an item related to or recognized as reflected in the cluster of charges intended and expected to be recouped in the price of the marketed commodity. It is of the nature of a fixed asset tax rather than a transaction tax; and it is therefore direct. That being so in the case of the tax based on an annual assessment of value, it is much more clearly so in the cases of the flat acreage rates.

I would therefore dismiss the appeal, allow the cross-appeal and restore the judgment at trial. The respondents will be entitled to their costs in this Court and in the Court of Appeal.

(1) [1927] A.C. 934. (2) [1928] A.C. 358.

KELLOCK J.:—In my opinion, the question involved in this appeal does not lend itself to extended discussion and it is unnecessary to re-state the nature of the legislation under which it arises. The legislation is said to be *ultra vires* the provincial legislature on the ground that, properly understood, its effect is to impose taxation on an article of commerce and is thus indirect.

It is well settled that ownership of mineral *in situ* as an interest in land may be severed from ownership of the "surface" rights. There is in principle no reason, in my opinion, why, although taxation in respect of the unity of ownership is direct, and taxation of the "surface" rights is also direct, taxation in respect of the mineral rights should be regarded in any other light. The tax here in question is an annual levy, payable notwithstanding that the mineral never becomes a commodity. Such a tax, in my opinion, is simply a land tax.

I would dismiss the appeal of the plaintiffs and allow the appeal of the defendants, both with costs. The defendants should have the costs of the appeal by the plaintiffs to the Court of Appeal. There should be no costs of the cross-appeals to that court.

ESTEY J.:—The appellants, owners of the mineral rights under a large acreage in Saskatchewan, submit that by the enactment of *The Mineral Taxation Act* (S. of S. 1948, c. 24, as amended 1949, c. 23, and 1950, c. 22) the Province of Saskatchewan has imposed indirect taxation and, therefore, acted beyond its authority within the meaning of s. 92(2) of the *British North America Act*. Section 92(2) reads:

> 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,—
>
> 2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

Under the foregoing section, therefore, the Province can impose only those taxes which are properly classified as direct. Since 1887 (*Bank of Toronto* v. *Lambe* (1)), John Stuart Mill's definition of direct and indirect taxes has been adopted as an appropriate basis upon which, in a legal

(1) 12 App. Cas. 575; 1 Cam. 378.

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sense, particular taxes may be classified under one or other of these headings. This definition reads:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. Such are the excise or customs.

Whether a tax is direct or indirect within the meaning of Mill's definition is determined "primarily by an examination of the nature and effect of the tax as collected from the language describing it." *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry Co.* (1).

The statute imposing the tax is entitled *The Mineral Taxation Act.* In s. 2(4) the word "mineral" is defined and the material part thereof reads as follows:

> 4. "mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land, ...

The certificate of title here referred to is that defined in s. 2(1) of *The Land Titles Act* (1940 R.S.S., c. 98) as "the certificate (form A) granted by the registrar and entered and kept in the register." By s. 61 of the same act, once "a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land . . ." "Land" is then defined by s. 2(10) to include mines and minerals.

Sections 3, 6 and 22 are the charging sections of this Mineral Taxation statute. In each the tax is imposed upon the owner of minerals. "Owner" is defined in s. 2(6) and the relevant portion thereof reads:

> 6. "owner" means a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface; . . . .

Section 3 imposes a flat rate of three cents per acre upon the owner of minerals in a non-producing area of the province. This area includes the entire province except that which from time to time may be declared by the Lieutenant-Governor in Council, under s. 5, a producing area.

(1) [1950] A.C. 87.

When an area has been declared to be a producing area the statute contemplates that each owner of minerals therein shall pay the tax computed upon one or other of two methods. Under s. 7

> the assessor shall . . . . assess at their fair value all minerals within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced . . .

Then under s. 6

> Every owner whose name appears on the assessment roll mentioned in section 7 shall . . . . pay to the minister a tax . . . . not exceeding ten mills on the dollar of the assessed value of his minerals . . . .

However, any owner in a producing area whose name does not appear on the assessment roll mentioned in s. 7 and, therefore, not subject to the tax under s. 6, comes within the provisions of s. 22, under which he shall pay

> to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

Section 23(*a*) provides that the tax imposed shall be a special lien upon the mineral or minerals in respect of which it is payable. This feature was regarded as of great significance by the judicial committee in *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co. supra* at p. 115.

Under s. 27, if the owner leases any mineral or minerals to another person, or grants the right to work the minerals in his land, he shall remain liable for this tax and any agreement to the contrary "shall be null, void and of no effect." It is then provided that any such lessee or other person in the section mentioned may pay the tax and realize the same as a debt owing to him from the owner.

This statute imposes a tax upon every person "registered in a land titles office as the owner of any mineral." As "land" is defined in *The Land Titles Act* (R.S.S. 1940, c. 98, s. 2(10)) to include mines and minerals, it follows that the language of the statute imposes a tax upon an interest in land. The intention of the legislature to levy a tax upon an interest in land is found not only in the language adopted in this act, but by the fact that at the same session it amended the City, Town, Village and Rural Municipality Acts (respectively chapters 126, 127, 128 and 129, R.S.S. 1940), by which the municipal bodies could no longer impose a tax upon that interest in land subject to

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taxation under *The Mineral Taxation Act*. As minerals are, in effect, presumed to exist within, upon, or under the areas described in the certificates of title throughout the province, there is here created a provincial tax upon an interest in land, while the municipal bodies continue to impose taxes upon the remaining interest therein.

The appellants contend that granting the ownership of minerals *in situ* constitutes an interest in land and, in that sense, a tax imposed upon that interest is a land tax, it does not necessarily follow that the tax here in question is a direct tax. The mere designation of a tax as a tax on land, or an interest therein, does not, of course, make it a land tax, but if, in substance, it is a tax upon land or an interest therein then it has consistently been classified as a direct tax. The appellants, in support of their contention, submit that the mineral, as an interest in land, has no value until such time as it may be removed from the land and become a commodity of commerce. It is true that a mineral has no value in use until it is extracted, but a contention that it has no value while a constituent part of the land cannot be accepted as accurate. It is rather more in accord with fact to suggest that with respect to such a mineral *in situ* it is in itself a matter of value which increases as the certainty of the quantity and the quality of the mineral becomes known. This value, so long as the flat rates of three and fifty cents per acre are imposed (and these alone have so far been imposed), would not enter into the computation of this tax. It would, of course, where the computation is upon the assessment basis, as provided under ss. 6 and 7. Even if we assume that this assessment value reflects the productive value of the land, that would not preclude its remaining a taxation upon land. *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co. supra.*

The tax here in question is a tax upon an interest in land and, both within and without the producing area, is imposed irrespective of whether the mineral is being removed or not. The tax within the producing area is higher and in that area may be computed upon an assessment basis or a flat rate of fifty cents per acre, but no distinction is made in either case between the owner removing the mineral and the owner allowing it to remain *in situ*.

Four of the learned judges in the Court of Appeal (1) were of the opinion that the tax, as here imposed in a non-producing area, of three cents per acre was direct, Chief Justice Martin stating:

> The tax of three cents per acre imposed in Section 3 of the Act is in respect of the taxpayer's particular interest in the property and it is intended and desired that he should pay it though it may be possible for him to pass the burden to someone else.

The majority of the learned judges were of the opinion that the tax as imposed in a producing area, whether computed on either the assessed value or as a flat rate of fifty cents per acre, was, however, indirect. Neither the increase from three to fifty cents, nor the change to a computation of the tax upon an assessment basis, with the greatest possible respect, alters or affects the true nature and character of the tax, which remains the same in both the producing and non-producing areas, which, as already stated, include the entire province. The majority of the learned judges appear to have been influenced by the decision of *The King* v. *Caledonian Collieries, Limited* (2). There the province of Alberta imposed a percentage tax upon the gross revenues from coal mines and this gross revenue was interpreted to mean "the aggregate of sums received from sales of coal," and to be "indistinguishable from a tax upon every sum received from the sale of coal." The parties contesting the validity of the tax in that case were producers of coal and the tax was, therefore, upon coal as a commodity in commerce rather than as it rested undisturbed in the soil. In the case at bar the tax is in relation to the mineral or minerals which constitute an interest in land and is imposed upon the owners without regard to whether that interest, or any part of it, will ever be removed from the land. It would, therefore, appear, with great respect, that the *Collieries* case is quite distinguishable.

Counsel for the appellants argues that the taxpayer of this tax will seek to pass it on. That may well be true. It is usually true that the taxpayer seeks to do so, but that is not the test. The true test is whether, by virtue of its nature and character, the tax is of a type such that,

(1) [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.
(2) [1928] A.C. 358; 2 Cam. 494.

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having regard to its normal tendencies, it will be passed on. As stated by Lord Hobhouse in *Bank of Toronto* v. *Lambe supra* at p. 582:

> The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

In *The King* v. *Caledonian Collieries, Limited supra* it was contended that the tax there imposed upon the gross revenue received by the mine owner was not indirect, *inter alia* because it could not be passed on. Their Lordships stated:

> Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

An analysis of *The Mineral Taxation Act* indicates that the legislature here imposes a tax upon an owner of an interest in land rather than in relation to any commodity or commercial transaction. Taxes in respect of the latter have been held *ultra vires* the provinces. *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (2); *The King* v. *Caledonian Collieries, Limited supra; Attorney-General of British Columbia* v. *McDonald Murphy Lumber Co. Ltd* (3). Taxes in relation to the former have been held to be direct and, therefore, within the competence of the province to impose. *City of Halifax* v. *Fairbanks' Estate* (4). In the latter case Lord Cave, speaking on behalf of the Privy Council stated at p. 126:

> It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; and, judged by that test, the business tax imposed on an owner under s. 394 is a direct tax.

Newcombe J., writing the judgment of the majority of the Court, stated in *Rattenbury* v. *Land Settlement Board* (5):

> Therefore, within the authority of the Fairbanks case, 1928 A.C. 117, as I interpret it, taxation upon land and upon the owner of the land is within the category of direct taxation, ...

(1) [1925] A.C. 561; 2 Cam. 381.
(2) [1927] A.C. 934; 2 Cam. 441.
(3) [1930] A.C. 357; Plax. 43.
(4) [1928] A.C. 117; 2 Cam. 477.
(5) [1929] S.C.R. 52 at 73.

Both parties cited *A.G. for B.C.* v. *Esquimalt and Nanaimo Ry. Co. supra.* In that case their Lordships of the Privy Council stressed the fact, as already intimated, that the nature and character of the tax should be determined from the language of the statute creating it.

There was a distinction, in their Lordships' opinion, between the tax there in question and an ordinary land tax, in that it was an impost to be discharged once and for all. Here, however, that distinction is not present and the tax is in its nature identical with the ordinary land tax. As stated by Mr. Justice Thomson:

> It is a re-occurring tax against the "owner of minerals" levied annually against the same person as long as he continues the owner and without regard to whether any attempt is ever made to lease or work the minerals or not.

The references of their Lordships to a timber tax must be read in relation to the contention there made that, though the language creating the tax described it as a land tax, in effect it was a tax upon timber as and when cut. Their Lordships did not accept this contention and in the course of their reasons stated at p. 117:

> It is natural that the legislature in imposing a tax of this nature should give the assessee the opportunity to defer payment until such time as he could provide himself with the necessary money by reaping the produce of his land.

and at p. 118:

> . . . . the tax is in reality a tax on land and not a timber tax. The existing land tax imposed by provincial legislation is imposed on both timber-bearing lands and non-timber-bearing lands.

Once it is determined that the true nature and character of the tax is in relation to land, that case holds that the mere fact it is computed upon the productive capacity of the land does not alter or change its nature and character.

The appeal on the part of the appellants should be dismissed with costs, the respondents' cross-appeal should be allowed with costs and the judgment at trial restored. In the Court of Appeal the respondents should have their costs upon the appeal but no costs as to their cross-appeals.

LOCKE J.:—The appellant companies are the owners of the mineral rights in something more than three and a half million acres of land in the province of Saskatchewan. With unimportant exceptions, these lands are part of those

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conveyed to the various companies by the Crown as grants in connection with the construction of the lines of railway forming part of the Canadian Pacific Railway system. To what extent the title to these properties originally vested in the companies by letters patent from the Crown have been brought under the provisions of the *Land Titles Act* (cap. 98, R.S.S. 1940) is not disclosed by the evidence. As shown by one of the exhibits filed, the letters patent vested in the grantee an estate in fee simple reserving only to the Crown the free use, passage and enjoyment of all navigable waters flowing through the land. As to such parts of the land as were brought under the operation of the *Land Titles Act*, a certificate of title filed shows that when the surface rights were sold a new certificate of title was issued to the purchaser, the title of the railway company to the minerals being then evidenced either by the certificate of title bearing an endorsement showing it to be cancelled as to the surface rights or by the issue of a new certificate of title for the mineral rights. Not all of the mineral rights remained in the companies in all of the lands but the rights retained in all are such that would be affected by the taxation imposed by the *Mineral Taxation Act 1948*.

Section 3 of that *Act* imposes a tax of three cents an acre and every fraction of an acre upon the:—

> owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land, not situated within a producing area.

By section 22 a tax of fifty cents for every acre and fraction thereof is imposed upon every such owner of minerals situated within a producing area, in each year in which such minerals have not been assessed under the provisions of section 7 of the *Act*. Where the Minister has declared that any portion of the province shall constitute a producing area, the mineral or minerals to be assessed in such area may be designated by him, and after their value has been assessed under the provisions of section 7 every owner whose name appears on the assessment roll shall be liable to a tax at such rate as the Lieutenant-Governor in Council may prescribe, not exceeding ten mills on the dollar of the assessed value.

"Owner" is defined by subsection 6 of section 2 as a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface. Subsection 4 of section 2 defines "mineral" as meaning:—

> the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land.

I respectfully agree with the learned trial judge that whatever may be the meaning of the first part of this so-called interpretation section, it cannot restrict the effect of the latter part, and that the words "mineral or minerals within, upon or under any land," must be construed in their natural and ordinary sense. In view of the fact that the appellants are the owners of some or all of such minerals as may be contained in all of the lands in question, nothing is to be gained by considering the question as to whether a tax upon the right to work, win and carry away such minerals can be supported as direct taxation.

The right of the owner of minerals found on or under the surface of land, whether held in conjunction with the ownership of the surface rights or separately from such rights, is an interest or estate in land. It is in respect of the ownership of such interest that this taxation is imposed. A tax so imposed is not to be distinguished, in my opinion, from a tax upon the interest of the owner of the surface of the land in the sense of being direct unless, under the guise of taxing that interest, the legislature is really attempting to impose a tax upon the minerals as commodities after they have been mined. The question is not, in my opinion, concluded by the language of the taxing section and the fact that the tax is imposed in respect of an interest in land, since, as was said by Viscount Haldane in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), the question of the nature of a tax is one of substance and does not turn only upon the language used by the local legislature which imposes it, but on the provisions of the Imperial Statute of 1867.

(1) [1925] A.C. 561 at 566.

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This is on the face of it a tax upon land and thus a tax of a kind which was at the time of the passing of the *British North America Act* everywhere treated as a direct tax. The tax is imposed annually and whether or not such minerals as exist may ever be mined or removed. In like manner the taxes imposed by municipalities upon owners of surface rights are payable, whether or not the land be put to any use. While it may well be true that as and when the minerals or the right to mine them are sold by the present owners, the tendency will be to endeavour to obtain recoupment of the amounts paid as mineral tax to the province by increasing the price demanded this fact does not of itself establish that the legislation contemplated that the tax be thus borne in whole or in part by others or be in any sense imposed upon the minerals or commodities as and when they were removed.

Taxes of a like nature have been imposed by several of the provinces of Canada and in one for a long period of years. By the *Placer Mining Act of British Columbia* (sec. 152, cap. 136, R.S.B.C. 1897) there was imposed upon the owner of every mineral or placer claim of which a Crown grant had been issued an annual tax of twenty-five cents on every acre and fractional part of an acre conveyed by the grant. Taxation of this nature has been continuously imposed in that province since that time and is now imposed upon every owner of a mineral claim, with certain defined exceptions by the *Taxation Act* (sec. 55 and 56, cap. 332, R.S.B.C. 1948). An acreage tax was imposed upon the owners of all mining rights in Ontario by the *Mining Tax Act* (cap. 26, R.S.O. 1914, sec. 15). In Manitoba, by the *Mining Tax Act,* the owner, holder, lessee or occupier of every mineral claim is liable to an annual tax of $5.00 (sec. 3 cap. 207, R.S.M. 1940). In Alberta, by the *Mineral Taxation Act 1947,* taxation of a similar nature to that imposed by the Saskatchewan Statute here in question is imposed. The fact that the legislation in British Columbia, Ontario and Manitoba has not, so far as I am aware, been attacked on the ground that it is *ultra vires* as being indirect taxation, does not, of course, establish its validity. It is not without significance, however, that a tax of this nature is apparently regarded by those engaged in the mining industry as a proper exercise of provincial powers to tax land and interests in land and as a direct tax.

I think the decision of the judicial committee in *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Company* (1), does not assist in determining the present matter. The proposed taxes referred to in Questions 5 and 6 which are mentioned at pages 93 and 94 of the report were to be imposed upon the land but in the case of Question 5 to be payable only as and when the merchantable timber was cut and severed from the land, and in the case of Question 6 at the election of the taxpayer only as the timber was cut. The time at which these taxes were to become payable and the fact that if the timber was not cut they would never become payable lent support to the view that, while expressed as a land tax, the real intention was to impose taxation upon the commodity after it had been severed from the land. Had it been proposed that the taxes be levied annually and upon the owner in respect of its ownership of the timber and the right to cut and remove it as an incidence of that ownership and thus a tax upon an interest in land (*Glenwood Lumber Company* v. *Phillips* (2)), the decision in the matter would have directly touched the question with which we are concerned.

With great respect for the contrary opinion of the majority of the learned judges of the Court of Appeal, it is my view that each of the three taxes in question is a direct tax and not imposed with the intention that it should be passed on to someone else and that the province is not by this legislation attempting indirectly to impose a tax on the minerals as and when they are mined and sold. I would accordingly dismiss the appeal with costs and allow the cross-appeal with costs. There should be no costs of the cross-appeal in the Court of Appeal.

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

Solicitor for the appellants: *E. H. M. Knowles.*

Solicitor for the A.G. of Saskatchewan: *Makaroff, Carter and Carter.*

Solicitors for the Minister of Natural Resources and Industrial Development: *Schumiatcher & McLeod.*

Solicitor for the A.G. for Alberta: *H. J. Wilson.*

(1) [1950] A.C. 87.

(2) [1904] A.C. 405, 408.

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*Apr. 2, 3
*Jun. 30

ARSÈNE BILODEAU (PLAINTIFF).....APPELLANT;

AND

LIONEL DUFOUR AND JEAN-MARIE DUFOUR (DEFENDANTS) .....} RESPONDENTS.

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

Road, use of—Civil fruits—Possession by sufferance of the Crown—Droit de superficie—Arts. 400, 1608, 2196 C.C.

In the years preceding 1948, the appellant built a road on Crown and colonization lands in the County of Charlevoix, P.Q. In 1948, following a tariff established by contract, the respondents paid the appellant a certain sum for the use of the road. But in 1949, after the expiration of the contract, the respondents refused to pay for their further use thereof. The action was dismissed by the Superior Court and by the Court of Appeal for Quebec.

Held: The appeal should be allowed and the action maintained.

Although the appellant was not the owner of the bed on which he built his road, he nevertheless acquired by sufferance of the State, the real owner thereof, a possession available against third parties and which gave him the right to the civil fruits.

Furthermore, he acquired, to the knowledge of the State, a "droit de superficie" giving him the undisputable ownership of the surface of the road against third parties.

Held further, that s. 103 of R.S.Q. 1941, c. 93, has no application since the road works were not executed through the appellant's own timber limits.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, Galipeault C.J.A. dissenting, the dismissal of the action by the trial judge.

Gustave Monette, Q.C., and *Edgar Gosselin, Q.C.,* for the appellant. Since the contract did not mention when the payments for the use of the road would cease to be due, it follows that that part of the contract was still in force in 1949.

Subsidiarily, the appellant's title to the road resting as it did on his possession thereof, there was in favour of the appellant a presumption of ownership as a result of which the provisions of Art. 1608 C.C. can be invoked in order to claim the civil fruits.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Estey and Cartwright JJ.

(1) Q.R. [1951] K.B. 545.

Subsidiarily, the appellant bases his claim on the maxim "nul ne peut s'enrichir aux dépens d'autrui".

Furthermore, the appellant acquired a "droit de superficie" on the road which gave him the right to the civil fruits. *Tremblay* v. *Guay* (1).

Frédéric Dorion, Q.C., for the respondents. The contract was definitely expired. There can be no question of a tacit renewal. Even if Art. 1608 C.C. applied, there is no evidence of the annual value of the occupation and furthermore, that Article applies only between the owner and the occupant and not between the possessor and the occupant.

There cannot be any question of the "droit de superficie". There is no distinction between the works and the ground. Even if we could assume a "droit de superficie", the recourse was to prevent the use, or to prove damages or the enrichment without cause. And it is not sufficient to say that the non-payment was an impoverishment, he had to prove the fact of it and the amount. *Tanguay* v. *Price* (2).

The judgment of the Court was delivered by

TASCHEREAU, J.—Le demandeur, marchand de bois de St-Siméon, Comté de Charlevoix, réclame du défendeur la somme de $1,642.13. Il allègue dans sa déclaration que, pour se rendre à ses propriétés au Lac Port aux Quilles, qui sont situées à environ cinq milles au nord de la route nationale, il a construit et a entretenu un chemin privé pour en permettre l'accès. En 1945, ce chemin a été prolongé sur une distance de sept milles, dans la direction du nord, depuis le Lac Port aux Quilles jusqu'aux limites forestières de la Compagnie Price Brothers, pour qui le demandeur faisait la coupe du bois.

Pour l'amélioration et la construction de ces deux parties de route qui s'étendent sur une distance de douze milles, le demandeur a dépensé à peu près $40,000, et il a utilisé ce chemin pour le transport du bois et pour conduire les pêcheurs aux divers lacs dont il est le propriétaire dans la région.

Au mois d'octobre 1947, les défendeurs qui désiraient transporter du bois dans la même localité, signèrent un contrat avec le demandeur, et furent autorisés à se servir de la route en payant $2.00 par mille pieds de bois trans-

(1) [1929] S.C.R. 29. (2) (1906) 37 Can. S.C.R. 657.

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porté, et $1.00 le mille pieds pour celui qui serait acheté par le demandeur. Les montants dus furent intégralement payés au printemps de 1948.

Cependant, durant le cours de l'année 1949, quand le contrat ci-dessus fut expiré, les défendeurs ont continué à se servir de la route pour transporter du bois de sciage et de pulpe, et ont refusé de payer au demandeur la valeur de l'usage de la route, ce qui a donné naissance à la présente action au montant de $1,642.13. C'est la prétention des défendeurs-intimés que le demandeur ne peut réussir, parce qu'il n'est pas propriétaire des terrains traversés par le chemin en question, que l'article 417 du *Code Civil* ne peut trouver son application, et que la doctrine de l'enrichissement sans cause, vu l'absence de certains éléments essentiels, ne peut déterminer le présent litige.

En première instance, l'action a été rejetée pour le motif qu'il appartient seul au Lieutenant-Gouverneur en Conseil, de fixer les taux de péage que devront payer les tiers à une personne qui exécute des travaux de voirie sur ses concessions forestières dans le domaine de la Couronne (S.R.Q. 1941, c. 93, art. 103); mais il y a là évidemment une erreur, car cette disposition de la loi ne s'applique que lorsqu'une personne exécute des ouvrages de voirie à travers *ses propres concessions forestières;* et dans le cas qui nous occupe, s'il est vrai que le chemin est en grande partie construit sur les terres de la Couronne, ce n'est pas à travers les concessions forestières du demandeur qui n'en a pas obtenues à cet endroit. La Cour d'Appel (1) n'a pas considéré ce motif, et devant cette Cour, les défendeurs ont déclaré ne pas l'invoquer.

En Cour d'Appel, M. le Juge St-Jacques conclut que les travaux ont été faits pour le bénéfice personnel du demandeur, et que la doctrine de l'enrichissement sans cause ne peut s'appliquer vu qu'il n'y a pas eu d'appauvrissement de sa part. MM. les Juges Bissonnette et Hyde concourent à peu près dans ces vues, tandis que M. le Juge Gagné croit plutôt que ce chemin a été construit pour le bénéfice de la Compagnie Price Brothers, et qu'en conséquence, le demandeur ne s'est pas appauvri par l'usage que les défendeurs en ont fait. M. le Juge en Chef Galipeault, qui a enregistré sa dissidence, et qui aurait maintenu la réclamation jusqu'à

(1) Q.R. [1951] K.B. 545.

concurrence de $1,220.13, a été d'opinion que l'action *de in rem verso* était bien fondée. Les Parties sont maintenant devant cette Cour après avoir obtenu une permission spéciale d'appeler.

Il importe en premier lieu de signaler qu'il ne fait pas de doute que le demandeur n'est pas propriétaire de l'assiette du chemin. Ce chemin, en effet, est bâti sur les terres de la Couronne pour la plupart non concédées, et traverse quelques lots de colons. Depuis de nombreuses années il existait, à partir de la route nationale jusqu'au Lac de Port aux Quilles, un petit sentier ou "portage" par où passaient les colons de même que les chasseurs et les pêcheurs. Sur cette distance de cinq milles, le demandeur a élargi cette route de 12 à 24 pieds, y a déposé du gravier et l'a ainsi rendue carrossable, permettant aux camions de transporter d'assez lourdes charges de bois. Sur une distance d'environ deux milles et demi, le demandeur a suivi le tracé de l'ancien sentier, et sur une distance égale, il a ouvert le chemin dans la forêt. Plus au nord, depuis le Lac Port aux Quilles jusqu'aux limites de la Compagnie Price Brothers, le chemin est entièrement neuf, et passe à travers la forêt qu'il a fallu défricher sur une longueur de sept milles. Le demandeur nous dit que quand il a fallu passer la route sur des lots concédés à des colons par le gouvernement provincial, il a obtenu le consentement de ces derniers.

Mais est-il nécessaire que le demandeur soit propriétaire de l'assiette du chemin pour réussir dans la présente action, et se faire payer une compensation par les défendeurs pour l'usage qu'ils en ont fait? La possession qu'il avait de cette lisière de terrain sur une distance de douze milles, d'une largeur de douze à vingt-quatre pieds, qu'il a améliorée au prix d'environ $40,000, est-elle suffisante pour lui conférer un droit de réclamer un loyer juste et raisonnable?

Il ne peut être contesté que le demandeur occupait ces terres par tolérance de la Couronne, et dans certains cas avec le consentement des colons qui avaient évidemment intérêt à ce que cette route fût construite.

Il est de règle que pour avoir une possession utile, cette possession ne peut être affectée de précarité. C'est-à-dire que pour posséder utilement, deux éléments essentiels doivent se rencontrer, l'un matériel appelé le corpus, et

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l'autre intentionnel appelé l'animus. On sait que le corpus c'est le fait d'avoir matériellement le bien en son pouvoir, et d'être à même d'accomplir sur lui des actes matériels de détention, d'usage ou de transformation. Ce corpus n'est pas constitué par des actes juridiques tels que le bail et la vente. L'animus au contraire est l'intention, la volonté chez le possesseur de soumettre une chose à l'exercice du droit auquel normalement correspondent les actes matériels d'usage et de transformation. (Dalloz, Nouveau Répertoire, Vol. 3, verbo Possession, section 1.) Cette possession, où se rencontrent ainsi le corpus et l'animus, se distingue donc clairement d'avec la détention ou la simple possession précaire, qui consiste à avoir un pouvoir de faits sur une chose *pour le compte du propriétaire,* soit avec la permission de celui-ci, soit en vertu d'une habilitation de la loi ou de la justice. Si le détenteur ou possesseur précaire a le corpus, il n'a sûrement pas la volonté de se comporter comme propriétaire. Ainsi, on a toujours considéré comme détenteurs précaires le fermier, le locataire, le titulaire d'un bail à complant, le créancier antichrésiste. C'est que ces détenteurs détiennent pour une autre personne, et leur possession implique nécessairement la reconnaissance du droit d'autrui. Ils ont contracté vis-à-vis le propriétaire une obligation de restitution à échéance plus ou moins éloignée. Ces personnes ont bien quelque objet en mains, mais en vertu d'un droit autre qu'un droit de propriété. Il en résultera par exemple que la loi leur refuse les actions possessoires. (Planiol & Ripert, Droit Civil, Les Biens, Vol. 3, page 203) (Ripert, Traité de Droit Civil, Vol. 1, page 952).

Il y aurait également de nombreuses considérations à examiner afin de déterminer si la précarité de la possession est entachée de nullité absolue, ou si elle n'est que relative; c'est-à-dire qu'elle ne serait inutile que vis-à-vis le propriétaire, mais le possesseur pourrait tirer profit de sa possession vis-à-vis les tiers. En ce dernier cas, le possesseur aurait droit aux fruits civils de l'objet détenu.

Mais il ne semble pas nécessaire de solutionner cette question, car que la possession de l'appelant soit précaire ou non, je crois que son appel doit être maintenu.

La doctrine et la jurisprudence en France ont apporté des adoucissements à la rigidité de la règle posée par certains auteurs qui veulent que la précarité de la possession

soit absolue vis-à-vis de tous. Elles considèrent qu'il existe des détenteurs dont la précarité n'a qu'un caractère relatif, comme la possession de ceux qui exercent un droit sur un bien du domaine public en vertu d'une concession révocable, et dont la possession n'est que le résultat d'actes de pure faculté ou de simple tolérance aux termes de l'article 2232 du *Code Napoléon* qui correspond à l'article 2196 de notre *Code Civil*. Cette précarité n'existe que vis-à-vis de l'autorité concédante ou du propriétaire qui laisse s'accomplir des actes de simple tolérance, mais ces possesseurs ont à l'égard de toutes autres personnes une possession véritable sur le fondement de laquelle ils peuvent, par exemple, intenter l'action en complainte. Ainsi, la Cour de Cassation a décidé (Dalloz, Jurisprudence Générale, 1889, page 67) que la précarité dont la possession d'un particulier est entachée vis-à-vis de l'État, ne s'oppose pas à ce que ce particulier puisse posséder *animo domini* à l'égard de toutes autres personnes. La même Cour en est également venue à la conclusion (Sirey, Recueil des lois et arrêts, 1855, page 507) que,

> Celui qui possède à titre précaire une chose non prescriptible, comme faisant partie du domaine public, et qui par conséquent ne peut avoir une action possessoire contre l'État qui troublerait cette possession, n'en a pas moins une action possessoire contre les tiers par lesquels il est troublé dans la possession *que l'État tolère ou ne conteste pas.*

Planiol & Ripert (Droit Civil, Les Biens, Vol. 3, page 203) s'expriment ainsi:

> Mais à côté de ces détenteurs dont la précarité est absolue, il en est d'autres dont la précarité n'a, aux yeux de la jurisprudence, qu'un caractère relatif. Elle considère comme tels: ceux qui exercent un droit sur un bien du domaine public en vertu d'une concession révocable, et ceux dont la possession n'est que le résultat d'actes de pure faculté ou de simple tolérance aux termes de l'article 2232 C.C. Elle décide que leur précarité n'existant qu'au regard de l'autorité concédante ou du propriétaire qui laisse s'accomplir les actes de simple tolérance, ils ont vis-à-vis de toutes autres personnes une possession véritable sur le fondement de laquelle ils peuvent intenter la complainte.

Fuzier-Herman (Code Civil Annoté, 1949, Vol. 7, Art. 2232, para. 7) enseigne que,

> La précarité de ces détenteurs n'existant qu'au regard du propriétaire qui laisse s'accomplir les actes de simple tolérance, ils ont, vis-à-vis de toutes autres personnes, une possession véritable sur le fondement de laquelle ils peuvent exercer l'action en complainte.

Cette jurisprudence a toujours été suivie en France. (Planiol & Ripert, Les Biens, Vol. 3, page 204) (Dalloz, Jurisprudence Générale, 1889, page 67).

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La raison de cette distinction me paraît évidente. On considère comme détenteurs précaires le fermier, le locataire, le créancier antichrésiste, etc., parce que ces personnes détiennent toujours pour une autre personne et doivent en vertu de leur titre nécessairement reconnaître le droit d'autrui. Ils ne possèdent pas *animo domini.* Ils ont bien le corpus mais ils n'ont pas l'animus. Leur titre même qui limite leurs droits les en empêche. Dans le cas où l'autorité concédante ou le propriétaire permet par tolérance la détention de son bien, il est clair que vis-à-vis de lui le possesseur n'a qu'un titre précaire, mais comme dans le cas que nous venons de voir, il ne possède pas pour autrui. Il possède véritablement pour lui-même, c'est-à-dire *animo domini.* Il a véritablement l'intention d'agir en maître, comme si la chose lui appartenait, *tanquam rem suam, cum animo sibi habendi.* Sa détention est accompagnée de la pensée ou de l'intention d'être propriétaire. C'est sûrement dans ce dessein qu'il a occupé ce terrain. (Beaudant, Droit Civil Français, 2e éd. Des Biens, Vol. 4, page 724.) Admettre la théorie contraire, ce serait conclure que le possesseur à titre précaire, qui possède *pour son propre compte* et non pour autrui, ne saurait exercer l'action en complainte contre l'auteur d'un trouble. Évidemment, le possesseur ne peut pas exercer d'action en complainte contre l'État ni le propriétaire qui le tolère, mais sa précarité n'est pas absolue et il peut, s'il est troublé dans sa possession, exercer contre les tiers les recours que la loi lui confère. (Dalloz, Jurisprudence Générale, 1889, page 67.)

Proudhon (Traité du domaine public, 2e éd. Vol. 3, page 325) après avoir exposé la loi française relativement à la précarité de la possession du lit de certaines rivières par les propriétaires riverains, explique que cette précarité n'existe que vis-à-vis l'État, mais non vis-à-vis les autres propriétaires. Il dit ce qui suit:

> 981. Mais, en considérant les propriétaires riverains comparativement les uns aux autres, et dans la discussion de leurs intérêts particuliers relatifs au droit d'irrigation que la loi leur accorde également, il n'y a plus aucune cause de précaire à opposer à l'un par l'autre; et ici revient l'application de la règle qui veut que le possesseur, même précaire, jouisse des actions du maître à l'égard de toutes personnes autres que celle dont il tient sa possession. La raison en est que personne ne doit être admis à se prévaloir des droits d'un tiers.

Le même auteur soumet d'intéressantes considérations sur la distinction qui doit être faite entre *le domaine public* et *le domaine de l'État*. Le domaine public ou d'administration ne comprendrait que les choses qui sont par les lois, asservies à l'usage de tous, et dont la propriété n'est à personne. Il embrasserait tous les fonds qui, sans appartenir proprietairement à personne, sont civilement consacrés au service de la société. Ces fonds sont asservis à l'usage du public, et c'est à la puissance publique qu'il incombe de protéger la jouissance que la société entière a le droit d'exercer sur eux. Ce n'est qu'un pouvoir d'administration dans l'intérêt de tous les membres de la société même individuellement pris, que l'État exerce sur le domaine public.

Au contraire, le domaine d'État ne s'appliquerait qu'aux choses qui sont communément productives d'un revenu, comme sont les *forêts nationales,* et autres biens dont le gouvernement perçoit les produits dans l'intérêt de la Couronne et du Trésor, et dont il jouit proprietairement comme un simple particulier jouit de ce qui lui appartient à l'exclusion de tous autres. Le domaine de l'État serait donc un véritable domaine de propriété appartenant au corps politique, et dont ce corps seul doit recueillir tous les émoluments, sans que les fonds qui le composent soient soumis à l'usage de tous les particuliers, comme quand il s'agit de fonds appartenant au domaine public. (Proudhon, Traité du domaine public, 2e éd. Vol. 1, pages 63, 238 et 244).

Cette distinction est évidemment inspirée par les dispositions de l'article 538 du *Code Napoléon,* auquel correspond presque textuellement l'article 400 de notre *Code Civil.* Cet article se lit ainsi:

> Art. 400. Les chemins et routes à la charge de l'État, les fleuves et rivières navigables et flottables et leurs rives, les rivages, lais et relais de la mer, les ports, les havres et les rades et généralement toutes les portions de territoires qui ne tombent pas dans le domaine privé, sont considérés comme des dépendances du domaine public.
>
> Il en est de même de tous lacs et des rivières et cours d'eau non navigables et flottables et de leurs rives bordant les terrains aliénés par l'État après le 9 février 1918.

On voit à la lecture de cet article que dans l'énumération des choses qui font partie du domaine public, le législateur n'a pas mentionné *les forêts* non concédées, et il semblerait que c'est parce qu'elles sont susceptibles d'être détenues

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propriétairement par l'État, contrairement aux routes qui sont civilement affectées au service public. S'il en est ainsi, comme je le crois, l'appelant pouvait sans doute *par tolérance gouvernementale,* obtenir à l'exclusion de tous autres, une possession utile de l'assiette sur laquelle il a construit sa route, et à laquelle l'État, propriétaire indiscutable, pouvait seul mettre un terme. Mignault (Vol. 2, page 456) et Langelier (Vol. 2, page 128) font cette même distinction entre le domaine public, et le domaine de l'État. Vide aussi Dalloz (Nouveau Répertoire, Vol. 2, verbis Domaine de l'État et Domaine Public).

En outre, dans le cas qui nous occupe, l'appelant, qui avait la possession de l'assiette du chemin, y a fait des améliorations substantielles pour un montant d'environ $40,000. Entre lui et le gouvernement provincial qui a toléré la possession de cette assiette de la route et nécessairement les constructions qui y ont été faites, il est intervenu un contrat *sui generis* en vertu duquel le propriétaire du sol a autorisé l'appelant à jouir des constructions. Il y a dans ce cas, comme dit Baudry-Lacantinerie (Biens, N° 372) création au profit du constructeur (*une sorte de droit de superficie*). Fuzier-Herman (Répertoire, verbo Superficie, N° 1) nous dit que le droit de superficie: consiste à avoir *la propriété des édifices ou plantations sur un terrain qui appartient à autrui.*

C'est d'ailleurs ce principe qui a été sanctionné par cette Cour dans la cause de *Tremblay* v. *Guay* (1). Il est en plus certain que le *superficiaire,* comme d'ailleurs l'usufruitier, l'emphytéote, qui exercent en leur nom un droit réel, ont le bénéfice de l'action possessoire. (Planiol & Ripert, Les Biens, Vol. 3, page 203.)

Je conclus donc que si la possession de l'appelant de l'assiette du chemin est entachée de précarité vis-à-vis l'autorité concédante, elle ne l'est pas vis-à-vis les tiers. La position de l'appelant est renforcie par le fait qu'à la connaissance de l'État, il a acquis *un droit de superficie* qui lui donne la propriété de la surface de la route qu'il a construite et que les tiers ne peuvent contester. On ne peut douter qu'il ne serait propriétaire d'une maison qu'il aurait érigée sur un sol appartenant à la Couronne. On ne peut davantage lui nier son droit à la propriété de la route

(1) [1929] S.C.R. 29.

qu'il a construite, avec la tolérance du propriétaire sur le sol d'autrui. Il restera à l'appelant à déterminer avec les propriétaires de l'assiette du chemin leurs droits et obligations respectifs, soit en vertu des articles 412 et 417 du *Code Civil,* ou en vertu d'autres textes qu'il est inutile d'examiner pour le moment. Ce qui s'est passé entre l'appelant et la Couronne ne peut intéresser les intimés, car il s'agit de *res inter alios acta.* L'appelant a droit au bénéfice de sa possession et de son droit de superficie, dont les fruits civils, qui dans le cas actuel sont les loyers qu'il réclame. (C.C. 449.)

La valeur de l'usage de cette route pour le transport du bois fait par les défendeurs, est évaluée par l'appelant à $1,642.13. Ce montant correspond à $1 la corde pour 748·44 cordes de bois de pulpe, et 386,847 pieds de bois de sciage, ce qui représente un total de $1,542.13, auquel il faut ajouter $100 pour une autre quantité de bois transportée d'un endroit moins éloigné. Cette valeur en 1948 a été admise, reconnue et payée par les intimés, et il n'y a pas lieu, je crois, de conclure qu'elle soit exagérée, car rien ne démontre que les conditions aient changé en 1949, et que la jouissance de cette route ait une valeur diminuée. Comme l'honorable Juge en chef Galipeault, cependant, vu le doute qui existe dans la preuve, je suis d'avis de réduire le montant réclamé à $1,220.13, c'est-à-dire d'enlever $422, montant de travaux de réparations que les défendeurs auraient eux-mêmes exécutés.

A cause de la conclusion à laquelle je suis arrivé, il est inutile de discuter les autres moyens qui ont été invoqués.

L'appel doit être maintenu jusqu'à concurrence de $1,220.13 avec intérêt depuis le 19 août 1950, date du jugement de la Cour Supérieure. L'appelant aura droit à ses frais devant toutes les cours.

Appeal allowed with costs.

Solicitor for the Appellant: *E. Gosselin.*

Solicitors for the Respondents: *Dorion, Dorion & Fortin.*

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**June 16

HAZEL McGONEGAL and THE TRUSTEES OF LEEDS and LANSDOWNE FRONT TOWNSHIP SCHOOL AREA, (DEFENDANTS) ... APPELLANTS;

AND

CHARLES GRAY by his next friend, WILLIS EDWIN GRAY and WILLIS EDWIN GRAY in his personal capacity and MILDRED GRAY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Schools—Liability of teacher and trustees supplying hot food to pupils—Public Authorities Protection—When attempting to light gasoline stove on teacher's instructions pupil injured—Action not commenced within six months—The Public Authorities Protection Act, R.S.O. 1937, c. 135, s. 11—The Public Schools Act, R.S.O. 1937, c. 357, ss. 15, 63, 89 and 103, as amended.

The appellant trustees by virtue of *The Public Schools Act* (Ont.) conducted a public school at which the respondent Charles Gray, a 12-year-old boy, was a pupil and the appellant McGonegal was a teacher. For the purpose of heating soup the boy was instructed by the teacher to light a gasoline stove, the property of the appellant trustees. In attempting to do so he was severely burned. In an action to recover damages for the injuries sustained the trustees at the trial, and the teacher on appeal, pleaded s. 11 of *The Public Authorities Protection Act*, R.S.O. 1937, c. 135, which provides that no action shall be brought against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty in respect of any alleged neglect unless commenced within six months next after the act or neglect complained of. The trial judge held both the teacher and the trustees liable and fixed damages for injuries to the infant Gray at $8,000 and the expenses incurred by his father at $1,208.75; adjudged that the plaintiffs recover against the defendants $9,208.75, and directed that $8,000 of that sum be paid into Court to the credit of the infant.

Held: That the injuries were suffered as a result of the teacher's act of negligence and since the act was committed by her in the course of her employment both appellants were liable unless s. 11 of *The Public Authorities Protection Act* applied.

Held: also, (Rinfret C.J., Kerwin and Estey JJ. dissenting) that s. 11 did not apply.

Per Taschereau, Rand and Cartwright JJ. The act which resulted in the injury was not one in the course of exercising any direct public purpose for the children: it had not yet reached any public aspect: it was an authorized act in a private aspect and therefore the Act did not apply. *Griffiths* v. *Smith* [1941] A.C. 170; *Bradford* v. *Myers* [1916] A.C. 242 and *Clarke* v. *St. Helen's Borough Council* 85 L.J.K.B. 17, referred to.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Estey, Locke and Cartwright JJ.

**See footnote p. 298.

Per: Locke J. The proper construction to be placed on the evidence was that the teacher intended to heat the soup for her own use and not for the children. She therefore was not performing or attempting to perform an act of the nature referred to in s. 11 and the section had no application.

Per: Rinfret C.J. and Kerwin J. (dissenting). While the teacher's illness prompted the attempt to light the stove, the soup was to be used also for some of the pupils, and the use of the stove supplied by the trustees for the purpose of heating soup furnished by them to be partaken of by pupils as well as the teacher brought the case within the decision in *Griffiths* v. *Smith, supra,* and the trustees, therefore fell within the protection of s. 11 of the Act. As by s. 103 of *The Public School Act,* the teacher's duty was not only to teach but also to give assiduous attention to the health and comfort of the pupils, she was a public authority and entitled to the same protection.

Per: Estey J. (dissenting). In the circumstances it could not be said that what was done by the trustees and teacher, acting in their respective capacities and supported by a grant from the government, was other than "an act done in pursuance or execution or intended execution of any statutory or other public duty or authority" with the meaning of s. 11 of the Act. The case upon its facts appeared to be an even stronger case in favour of the trustees and the teacher than *Griffiths* v. *Smith, supra,* and distinguishable from *Bradford Corporation* v. *Myers, supra.*

Held: further, that since the action was commenced before the 1949 amendment to the Supreme Court Act, R.S.C. 1927, c. 35, came into force, under s. 39 no appeal lay to this Court in respect of the sum of $1,208.75, leave not having been obtained from the Court of Appeal under s. 41. *Dorzek* v. *McColl Frontenac Oil Co.* [1933], S.C.R. 197.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing the defendants' appeal (Hogg J. dissenting as to the liability of the defendant trustees) from the judgment of Wells J. (2) in favour of the respondents.

G. W. Mason, K.C. and *C. M. Smith, K.C.* for the appellant trustees. The negligence alleged against the trustees in the Statement of Claim was that they had failed to see that the gasoline stove was kept in proper working order. There was no other allegation of negligence against them and there was no other allegation of negligence against the teacher. The case, therefore, upon which issue was joined was that made by para. 16 of the Statement of Claim, that "the burns to the infant plaintiff were caused as the result of the negligence, carelessness and breach of duty of the defendant trustees *not seeing to it that the said gasoline stove was kept in proper working order having*

(1) [1950] O.R. 512; 4 D.L.R. 395. (2) [1949] O.R. 749; 4 D.L.R. 344.

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regard to the use that was to be made of the said stove as part of the said equipment by the said trustees for the school area."

The negligence complained of must be the *causa causans* of the injuries sustained, and it is clear from all the evidence that the negligence alleged, that is to say, the condition of the stove was not the cause of the accident. There was also the admission of counsel for the plaintiff when he said. "The negligence was not in the operation of the stove. It was letting an 11-year-old boy fool with matches and gasoline." It is to be noted that no such negligence was contemplated when the writ was issued, nor is there any allegation of such negligence in the original pleadings, or in the pleadings as amended, and it is submitted that the defendants were only called upon at the trial to meet the negligence charged in the Statement of Claim. This was recognized by the trial judge and pointed out by him to the Plaintiff's counsel.

The Court should not of its own motion set up a cause of action not disclosed by the pleadings. *Andanoff* v. *Smith and Nadeff* (1). An amendment to set up such a case at this time would be barred by the limitations section of *The Public Authorities Act*. *Mabro* v. *Eagle Star* (2); *Schubert* v. *Sterlings Trust* (3).

It would also mean that the plaintiff must rely on the maxim *Respondeat Superior*, as now applied. This rule does not apply in the wrongful or negligent acts of those engaged in the public service. 7 C.E.D. 233; *Whitfield* v. *Le Despencer* (4); and inasmuch as Public School Trustees are public or quasi-municipal in character, it is the generally accepted rule that they are not liable for injuries resulting from negligence or failure to keep equipment in a proper manner, unless made so by statute. Corpus Juris Vol. 56, pp. 367, 528, 531. In any event the doctrine would only apply if the teacher was acting within her authority, or in the course of her employment. *Griggs* v. *Southside Hotel Ltd.* (5), and the action would have to be brought within six months. *The Public Authorities Protection Act* c. 132, s. 11. The duties of school trustees are

(1) [1935] O.W.N. 415 at 417.
(2) [1932] 1 K.B. 485 at 487.
(3) [1938] O.W.N. 133.
(4) 2 Cowp. 754.
(5) [1947] O.R. 674.

set out in *The Public School Act*, c. 357, s. 89. In the absence of a breach of their statutory duty they should not be held liable. *Scoffield* v. *North York* (1); *Koch* v. *Stone Farm School* (2); *Langham* v. *Governors of Wellingborough School and Fryer* (3); *Urquhart* v. *Ashburton* (4).

In *Davis* v. *London County Council* (5), it was held that the education authority was not liable for the negligence, if any, of persons performing operations on school children, provided they engaged competent professional persons to operate. See also *Wray* v. *Essex County Council* (6).

It has frequently been held that trustees are not liable if a reasonable standard of precaution is maintained. In the case at bar the trustees had done all the Public School Act required of them and therefore should not be held responsible for something which could not reasonably be foreseen. *Chilvers* v. *London County Council* (7); *Jones* v. *London County Council* (8).

There is a further and fundamental reason why the action cannot succeed. It was not commenced within the time provided by s. 1 of *The Public Authorities Protection Act*. *Levine* v. *Board of Education City of Toronto* (9); *Griffiths* v. *Smith* (10); *Greenwood* v. *Atherton* (11).

The case of *Bradford Corporation* v. *Myers* (12) applied by Wells J. is distinguished in *Griffiths* v. *Smith*, supra. There the House of Lords held that The Public Authorities Protection Act did not apply because the act of contracting to see the coke to the purchaser, and of supplying it was purely voluntary. The sale was effected by a private bargain, with no correlative public duty and the corporation was unprotected.

A. W. S. Greer, K.C. and *C. L. Dubbin, K.C.* for the appellant, McGonegal. The Court of Appeal erred in holding that the action against Hazel McGonegal was not barred by the provisions of s. 11 of *The Public Authorities Protection Act*. In giving instructions for the preparation of hot refreshments for the pupils she was doing an act in

(1) [1942] O.W.N. 458.
(2) [1940] 2 D.L.R. 603.
(3) [1932] 101 L.J.K.B. 513 at 515.
(4) [1921] N.Z.L.R. 164.
(5) (1941) 30 T.L.R. 275.
(6) [1936] 3 All E.R. 97.
(7) (1916) 80 J.P. 246.
(8) (1932) 96 J.P. 371, C.A.
(9) [1933] O.W.N. 152.
(10) [1941] 1 All E.R. 66.
(11) [1939] 1 K.B. 388 at 392.
(12) [1916] 1 A.C. 242.

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pursuance or execution or intended execution of a statutory duty and that being so, afforded the full protection of s. 11. It must be remembered that the section does not take away from the plaintiffs any causes for action for any alleged wrong but prevents the action being instituted, if not commenced within six months after the injury is alleged to have occurred. The Court of Appeal erred in holding that because no statute imposed a duty on the teacher to supply hot meals that this section was not applicable. It is submitted that a proper test is where the act done by her was one permitted to be done and incidental to and forming part of her general duties and that if this were applied the section would be applicable. *Nelson* v. *Cookson* (1); *Greenwell* v. *Howell* (2); *Freeborn* v. *Leeming* (3); *Venn* v. *Tedesco* (4); *Levine* v. *Board of Education of Toronto* (5).

In the alternative, the trial judge erred in holding the defendant teacher responsible on the allegation of negligence which was not pleaded against her. In the further alternative, the trial judge erred in failing to find that the infant plaintiff was guilty of contributory negligence. The fact that he was carrying out the instructions of his teacher does not relieve him of any responsibility for his own negligence. It must be remembered that he was a bright and intelligent boy and had been warned by his father not to touch the stove. *Yachuk* v. *Blais* (6).

R. A. Hughes, K.C. and *J. M. Kelly* for the respondents. The first question in issue is whether the defendant McGonegal in instructing the infant plaintiff to light the gasoline stove in the circumstances was acting "in pursuance of execution or intended execution of any statutory or other public duty or authority . . ." so as to bring her negligent conduct within the protection of *The Public Authorities Protection Act*. It is submitted that although she was acting within the course of her employment, she was not acting in pursuance or execution or intended execution of any statutory or other public duty or authority.

(1) [1939] 4 All E.R. 30.
(2) [1900] 1 Q.B. 535 at 539.
(3) [1926] 1 K.B. 160 at 165, 168.
(4) [1926] 2 K.B. 227 at 229.
(5) [1933] O.W.N. 152; 238.
(6) [1949] A.C. 386.

It was admitted in the pleadings of both defendants that she was the servant of the defendant trustees and it is clear from the evidence that they authorized her to serve hot food at noon hour during the winter months and would not disapprove of her doing so after the winter months even though she was using up supplies. It was left to her discretion and there was no obligation on her to serve hot food at the school at any time. In asking the infant plaintiff to light the gasoline stove for the purpose of heating some hot soup she was therefore clearly acting within the course of her employment, but not in the performance of some public duty or obligation or public authority so as to bring her conduct within the protection of the Public Authorities Protection Act. A servant of a public authority although acting in an official capacity under a power of the public authority, and acting within the course of employment is not protected by the Act if the alleged neglect or default occurs in the doing or not doing of some act voluntarily undertaken beyond the obligation, duty or authority imposed upon the public authority by statute. *Clarke* v. *St. Helen's Borough Council* (1); *Lyles* v. *Southend-on-Sea Corp.* (2).

The defendant trustees were under no duty under the Public Schools Act, R.S.O. 1937, or any other statute known to them, to have hot food provided for the pupils. Can it be said that the defendant McGonegal in preparing to provide the hot soup was acting in pursuance or execution of any statutory or other public duty or authority? This duty in so far as the teacher is concerned is set out in s. 103 of the Public Schools Act. The trial judge found that on any fair reading of the section it could not be said that the serving of hot foods to the pupils was part of the statutory duties of a school teacher and the Court of Appeal were in agreement. The finding was that it was not at any time part of the statutory duty. The evidence goes much further in establishing that on the day in question the defendant McGonegal was doing so for her own purposes, because she was ill and to deplete the supplies on hand. In so doing, although she was acting within the course of her employment, she could not be fairly said to be doing so in order to carry out her obligations as a

(1) [1916] 85 L.J.K.B. 17 at 21. (2) [1905] 2 K.B. 1 at 13.

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teacher under any statutory obligation to her pupils. *Bradford Corporation* v. *Myers* (1), approved in *Griffiths* v. *Smith* (2).

The supplying of hot food to the children was a purely voluntary act on both the part of the defendant trustees and the defendant McGonegal, and was something that went completely outside of the duties, in so far as the defendant trustees were concerned, of carrying on the school in conformance with the statute and, in so far as the defendant teacher was concerned, of carrying on her duties as a teacher in the school. It was not an act done as something incidental to, or part of, the process of carrying on the duties and authority under the Public Schools Act as a teacher. It was something that lay outside of that altogether. *McDowall* v. *Great Western Ry. Co.* (3); *Corby* v. *Foster* (4); *Yachuk* v. *Blais* (5); *Kelly* v. *Barton* (6); *Williams* v. *Eady* (7).

As to the second question in issue, whether or not the plaintiffs are entitled to rely upon the doctrine of *respondeat superior* in charging the defendant trustees with the negligence of the defendant McGonegal, both defendants admitted in the pleadings that she was the servant of the defendant trustees. The only question which arises in this regard is whether or not the plaintiffs are entitled to rely upon the doctrine in charging the trustees with her negligence due to the fact that the plaintiffs charged direct negligence against the trustees in para. 16 of the Statement of Claim. Hogg J. in his reasons for judgment states that the only foundation of any negligence on the part of the defendant trustees was that alleged in the Statement of Claim as direct negligence for their failure to properly maintain the equipment of the school and further that the plaintiffs did not at any time base their claim on the simple ground of the relationship between the trustees and the teacher of master and servant. It is submitted this finding is not justified, having in mind para. 6 of the Statement of Claim where it is alleged the defendant McGonegal was acting in the course of her employment.

(1) [1916] 1 A.C. 242.
(2) [1941] A.C. 170.
(3) [1903] 2 K.B. 331.
(4) (1913) 290 L.R. 83.
(5) [1949] A.C. 386.
(6) 26 O.R. 608.
(7) (1893) 10 L.T.R. 41.

The only reasonable inference to be attached to this material fact, as pleaded, was that if she were negligent while acting in the course of her employment then her employer would of necessity by conclusion of law be charged with that negligence. If some further allegation is necessary in order to charge the trustees with her negligence committed within the course of her employment, it is submitted that leave should be given to amend the Statement of Claim. Leave was given at the trial to the trustees to plead The Public Authorities Protection Act, and in the Court of Appeal, to the defendant McGonegal. The application of this statute is the prime issue in this appeal. *Zwicker* v. *Feindel* (1); *Steward* v. *North Metropolitan Tramways* (2).

Mason, K.C. replied.

The judgment of the Chief Justice and Kerwin J. was delivered by:

KERWIN J. (dissenting in part):—The appellants, The Trustees of Leeds and Lansdowne Front Township School Area conduct a public school in the Province of Ontario. The respondent, Charles Gray, then twelve years of age, was a pupil in the school on June 12, 1947, at which time the teacher was the appellant Mrs. Hazel McGonegal. Charles was burned severely when attempting to light a gasoline stove and there is now no question that the injuries were suffered as a result of the teacher's negligence.

Mr. Justice Hogg considered that the only claim of negligence against the trustees was that contained in paragraph 16 of the statement of claim:

> 16. The plaintiffs allege that the burns to the infant plaintiff were caused as the result of the negligence, carelessness and breach of duty of the defendant trustees not seeing to it that the said gasoline stove was kept in proper working order having regard to the use that was to be made of the said stove as part of the said equipment maintained by the said trustees for the said school area.

However, in paragraph 6, it is alleged that the teacher "acting in the course of her employment" instructed the infant to light the stove, paragraph 16 was not referred to on the argument before this Court and, notwithstanding what appears in the factum filed on behalf of the trustees,

(1) 29 Can. S.C.R. 516. (2) (1886) 16 Q.B.D. 556.

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counsel for all parties argued the case on the footing that if the doctrine of *respondeat superior* applied, the trustees were responsible for the teacher's negligence.

In any event, even if not formally admitted, there is really no doubt that both appellants are liable for the damages awarded by the trial judge unless absolved by s. 11 of *The Public Authorities Protection Act,* R.S.O. 1937, c. 135, which reads as follows:—

> 11. No action, prosecution or other proceeding shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

This action by Charles' father as next friend of the infant, for damages for the latter's injuries, and on his own behalf for expenses, was not commenced within six months after June 12, 1947.

In *Levine* v. *Board of Education of Toronto* (1), Sedgewick J. dismissed an action for damages alleged to have been sustained at a public school athletic meet, conducted by the Board, at Exhibition Park in Toronto. He considered that if the Board was of opinion that in the interests of the children games should be arranged, it would be a duty of the Board to do so but that, in any event, the games were authorized and, therefore, the Board was entitled to the protection of the Act. An appeal from that decision was dismissed by the Court of Appeal (2), but without any opinion being expressed as to applicability of the Act.

The Ontario section is in substance the same as s. 1 of the British Public Authorities Protection Act, 1893, which has been considered in numerous cases in England, Scotland and Ireland, all of which, to the end of January, 1934, will be found referred to in The Public Authorities Protection Act, 1893, by Mr. J. J. Sommerville. The House of Lords noticed some of them in *Bradford Corporation* v. *Myers* (3), where it was finally decided that the word "person" must be limited so as to apply only to public authorities. There, the Corporation had power to

(1) [1933] O.W.N. 152. (2) [1933] O.W.N. 238.
(3) [1916] 1 A.C. 242.

carry on a gas undertaking and was bound to supply gas to the inhabitants of the district. In addition, it had statutory authority (which it was not bound to exercise) to sell the coke produced in the manufacture of the gas. It did so and a cart load of coke, in the course of being delivered to a particular purchaser was negligently shot through the window. It was held that the section did not apply because the act of contracting to sell the coke to the purchaser and of supplying it was purely voluntary.

In *Griffiths* v. *Smith* (1), Viscount Simon states that in the Court of Appeal the Master of the Rolls had explained the *Bradford* decision by saying:

> What they were doing in supplying coke was not something incidental to, or part of, the process of carrying on the gas undertaking and supplying gas compulsorily to the inhabitants. It was something that lay outside that altogether.

In the *Griffiths* case it was held that the managers of an elementary school were acting in pursuance of a public duty or authority when they invited the parents of the pupils to attend an exhibition of work held in one of the school buildings. While attending the exhibition, a parent was injured by the collapse of a floor, which was undoubtedly dangerous. Although the managers had acted voluntarily in authorizing the invitations to the school, in the sense that the school could have been carried on without the exhibition, it was held that the true test was: Were the managers, in authorizing the invitations, exercising their function of managing the school? While they had a discretion to authorize it or not, they did in fact approve it and did so in the course of carrying out their statutory powers of managing the school, and there was no ground for saying that the invitations were issued for some extraneous purpose unconnected with the management of the school.

Applying these decisions to the circumstances of the present case, what do we find? The trustees were authorized by *The Public Schools Act*, R.S.O. 1937, as amended, and particularly s. 89, to see that the school was conducted according to *The Public Schools Act* and the regulations. There can be no doubt they are a public authority. For several years cans of soup and cocoa were supplied to the

(1) [1941] A.C. 170.

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school and paid for by the trustees or their predecessors. The trustees and their predecessors had authorized the holder of the teacher's position, from time to time, to serve hot soup and cocoa although no formal resolution to that effect could be found. The Ontario Department of Education repaid to the trustees fifty per cent of the cost of the soup and cocoa. The gasoline stove had been in the possession of the trustees and their predecessors and was listed as part of the school equipment.

The practice was to commence heating the soup or cocoa during the morning recess so that it would be ready at noon. While this occurred generally in the cold weather, the seasons in which it would be done was left to the teacher's discretion, particularly bearing in mind that there might be a small stock on hand as the school term was drawing to a close. On the day in question, June 12th, the teacher did not feel well. She asked the pupils if they wanted soup but no one held up his hand. However, when she said that she was going to have some, and it turned out to be celery soup, then four or five agreed to take it. Therefore, while it was the teacher's illness that prompted the attempt to light the stove, the soup was to be used also for some of the pupils. Although there was no obligation on the part of the trustees to furnish refreshments, I am of opinion that in doing so, and in taking steps to heat them, the trustees through the teacher, within the principle of the *Griffiths* case, were exercising their function of conducting the school.

It has been pointed out in the *Myers* case and the *Griffiths* case that the determination of whether a public authority comes under the Act depends upon an examination of all the circumstances. This is exemplified in the different views taken in *Clarke* v. *St. Helen's Borough Council* (1), and *Edwards* v. *Metropolitan Water Board* (2). While it is unnecessary to decide what would have been the result if the teacher had been the only one who was going to have the soup on June 12th, the use of the stove supplied by the trustees for the purpose of heating soup furnished by them, to be partaken of by pupils as well as the teacher, brings the case, in my view, within the decision in *Griffiths*, and the trustees, therefore, fall

(1) [1916] 85 L.J.K.B. 17. (2) [1922] 1 K.B. 291.

within the protection of s. 11 of the Public Authorities Protection Act. As by s. 103 of the Public Schools Act, the teacher's duty was not only to teach (para. (*a*)) but also to give assiduous attention to the health and comfort of the pupils (para. (*g*)), Mrs. McGonegal is a public authority and is entitled to the same protection.

The appeals should therefore be allowed but only in part. In his reasons for judgment, the trial judge fixed the damages for the injuries to the infant Charles Gray at $8,000 and the expenses incurred by the father Willis Edwin Gray at $1,208.75, but the formal judgment adjudged that the plaintiffs Charles Gray and Willis Edwin Gray recover against the defendants $9,208.75 for damages and directed that $8,000 of that sum be paid into Court by the appellants to the credit of the infant. The action was commenced before the 1949 amendment to the *Supreme Court Act* came into force and, under s. 39 of R.S.C. 1927, c. 35, no appeal lies to this Court in respect of the sum of $1,208.75 since no leave was obtained from the Court of Appeal under s. 41. A similar situation arose in *Dorzek* v. *McColl Frontenac Oil Co.* (1). There, by one judgment an infant plaintiff recovered from the defendant $1,875, which was ordered to be paid into Court; his father recovered $284.25 and his mother $46.87. The mere fact that in the present case there is one judgment for the total of the two sums with a direction that the larger be paid into Court to the credit of the infant does not distinguish it from the case cited.

The father is therefore entitled in his personal capacity to retain his judgment against both appellants for $1,208.75 and costs of the action less any he may have been paid, or is entitled to, under an order of the trial judge whereby, as a term of permitting the trustees to plead *The Public Authorities Protection Act,* they were ordered to pay forthwith the respondents' costs of the action up to and including the preparation for trial. In view of the result and because of the fact that the appellant Mrs. McGonegal pleaded the statute only as a result of leave given her in the Court of Appeal, the respondents are entitled to their costs in that Court as against her. Under the circumstances

(1) [1933] S.C.R. 197.

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there should be no costs in the Court of Appeal to or against the trustees. The appellants are entitled to their costs in this Court if demanded.

The judgment of Taschereau, Rand and Cartwright, JJ. was delivered by:—

RAND J.:—The finding of negligence made by Wells J. at trial was concurred in by the Court of Appeal and was not seriously challenged before us. There remains the question of the applicability of *The Public Authorities Protection Act*, c. 135, R.S.O. 1937.

The evidence is clear both from the testimony of two pupils called by the defence as well as that of the infant plaintiff and the defendant teacher herself, that the latter, who that morning was ill, asked "who wanted soup for dinner and nobody wanted it but herself." Nothing that might have happened afterwards can affect that fact, notwithstanding that several of the children announced they would have some of the soup too "if she were going to". The request or the direction thereupon given the young boy was for an act up to that moment for the purpose of the teacher and of the teacher only.

No regulation of the Department of Education nor any resolution of the School Board authorizing the giving of a course of warm food to the children was shown, and the authority rests upon oral instructions to the teacher from the trustees of the Board. But admittedly the Department has approved the practice over many years and has paid one-half of the expenses incurred. The predecessor Board purchased the stove and the gasoline can, and thereafter both that Board and its successor, the appellant, have borne the balance of the cost. It appears to be a general practice throughout the province, and as it concerns the health and comfort of the students, it would seem to be within the authority of the department, the board and the teachers to follow. At any rate, I would not presume that the moneys of the province have been improperly applied; and both defendants take the position that the practice was authorized by the school law. In the view I take of the case, however, I do not find that fact to be necessary to its determination.

That the teacher should be able to make use of the stove for the purpose of heating food for herself has likewise been assumed; and in the circumstances before us, I should say it was an incident of her employment: *Smith* v. *Martin and Kingston Corporation* (1).

The question, then, is whether the act as I have described it was "done in pursuance or execution or intended execution of any statutory or other public duty or authority" as provided by s. 11 of the statute.

Although the prior statutory background is somewhat different, the provisions of this section are substantially the same as those of the first paragraph of s. 1 of 56-57 Vict. c. 61 of the British Parliament, and the cases which have been decided by the English courts throw considerable light on the interpretation of this general language. Any difference based on the previous law would, I think, indicate a more restrictive interpretation of the Canadian Act. The question came before the House of Lords in *Bradford Corporation* v. *Myers* (2). In that case, a municipal corporation was authorized by statute to carry on the undertaking of a gas company. It was bound to sell gas to the inhabitants of the district and was empowered to sell the coke produced in the manufacture of the gas. In delivering a load of coke, there was negligence which broke a shop window and caused other damage, and in an action brought against the corporation, the Act was pleaded. It was held that the delivery of coke was not in the exercise of a public authority and that the Act afforded no defence. The decision drew the line of the public service in the supplying of gas to exclude the disposal of the coke and the latter was treated as having the aspect of a private as distinguished from a public act. It is pointed out by Buckmaster L.C. that the language of the section implies that some authorized acts of public authorities are not "public", although I do not take that to mean that under no circumstances could the entire authorized activities of a public authority be wholly of a public nature. Viscount Haldane used these words:—

> My Lords, in the case of such a restriction of ordinary rights, I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can

(1) [1911] 2 K.B. 775.

(1) [1916] 1 A.C. 242.

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be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority.

In *Clarke* v. *St. Helen's Borough Council* (1), the facts were these. The defendants were constituted by statute the water authority for their district. They owned a motor car used for general purposes and particularly for taking about officials employed by them. The car, driven by the chauffeur and carrying the water engineer and a treasury clerk, was taken to visit three pumping stations to enable the engineer to examine the works and the clerk to pay the wages of the persons there employed. After these duties had been finished and while the car was being driven back to the garage, the engineer having left but the clerk still being in it, the driver negligently injured the plaintiff. It was held that the act of returning was not one happening in the course of executing a public authority, and that the statute did not apply: it was an internal act in the exercise of authority conferred with an incidental aspect. Swinfen Eady L.J. at p. 22 says:—

> Such acts as that of this chauffeur in driving this car are merely incidental to the execution of the defendant's statutory duty. They were merely incidental or ancillary acts. It is said that it is difficult to draw the line. In many cases, no doubt, it is; but I see no difficulty here.

Phillimore L.J. put it thus:—

> A man engaged merely to drive a car where he is told to drive it, is not necessarily engaged in the execution of any statutory duty.

Pickford L.J.:—

> He was not performing, as the servant of the corporation, nor was the corporation performing through him, an act in execution of any statutory or public duty, but was simply performing an act for the convenience of the corporation.

In *Edwards* v. *Metropolitan Water Board* (2), the facts were somewhat similar. There the Water Board used lorries driven by steam or petrol to take stores to depots and to bring back receptacles emptied of their oil or other materials. This distribution of stores was necessary for the expeditious repair of the works generally. It was held that injury negligently inflicted in the course of a return journey of the lorry carrying empty casks and drums was an act in the execution of a public duty, and that the

(1) [1916] 85 L.J.K.B. 17. (2) [1922] 1 K.B. 291.

statute applied. The Court of Appeal, consisting of Bankes and Scrutton, L.JJ., Younger L.J. dissenting, took the view that the outward and the return journeys of the lorry were all one and that it was taken directly pursuant to the statute. Younger L.J., on the other hand, after quoting Lord Buckmaster in the *Myers'* case, that the statute "was not intended to cover every act which a local authority had power to perform" viewed the operation of the lorry as the fulfilment of a private contract rather than an act of public obligation or authority. On p. 309 he says:—

> Now if the accident had taken place on the outward journey, I should I think have held, although even then the case would in my judgment have been very near the line, that the respondents were entitled to the protection of the statute. But the second question is much more difficult, (i.e. the return journey)

and held the respondents not entitled to protection.

The question again came under the review of the House of Lords in *Griffiths* v. *Smith* (1). In that case, the managers of a non-provided public elementary school, a statutory body, issued invitations to the plaintiff to attend an exhibition on the school premises of work done by the pupils, one of whom was the plaintiff's son. While the display was in progress the floor of the room collapsed through negligence in maintaining it in proper condition. The House found the statutory body to be a public authority within the statute, that the display was in the course of its authority, that the default was in the course of exercising its public duty, and that the statute was a good defence. In his speech, Viscount Maugham refers to *Edwards* v. *Metropolitan Water Board, supra,* with apparent approval, and Lord Porter similarly mentions *Clarke* v. *St. Helen's Borough, supra.*

I have given the facts of these cases in some detail to indicate the strict application which the courts have from the outset made of this drastic enactment. The distinction made in *Myers* which confined the scope of the public service to those acts in direct performance of it, as contrasted with those of a private interest although incidental to the undertaking and authority as a whole, and in *Clarke* between primary and direct public acts and those which are subordinate or incidental to them, indicates the line of distinction for the purposes here.

(1) [1941] 170.

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The serving of these meals in a public aspect is confined to the pupils, even though such a private concern of the teacher's may be said to have a remote interest for school administration generally. Whether she could properly partake of the supplies furnished by the School Board does not appear; but it is undoubted that this new measure was introduced not as a benefit to her but for the children. But the act which resulted in the injury was not one in the course of executing any direct public purpose for the children: it had not yet reached any public aspect: it was a private act, under a private authority. If it had been stopped before the third match was lighted, and nothing more done, no criticism could have been raised against the teacher, because the pupils had already said "no" to her question. If soup for some of the pupils had been put on the stove to warm, or they had shared in it, that subsequent action would be distinguishable; and if, for instance, in the course of heating it or of carrying it from the stove, a child had been scalded, then, doubtless, the contention would be much stronger that that act was in the execution of a public authority.

For these reasons the appeal must be dismissed with costs.

ESTEY, J. (dissenting in part):—Charles Gray, a pupil twelve years of age at the Legge School, suffered a serious injury on June 12, 1947, when, at the request of his teacher, he attempted, during the morning recess, to light a gasoline stove. In this action his father, Willis Edwin Gray, as his next friend, recovered at trial a judgment for damages caused by said injuries to Charles Gray in the sum of $8,000, and for his personal expenses $1,208.75—a total judgment of $9,208.75 against both appellants, the teacher, Hazel McGonegal, and the trustees of the school. This judgment was affirmed on appeal. Mr. Justice Hogg, dissenting, was of the opinion that the appellant trustees, but not the appellant teacher, should succeed by virtue of s. 11 of *The Public Authorities Protection Act* (R.S.O. 1937, c. 135). Both appellants appeal to this Court.

The trustees, encouraged and assisted by a grant from the Provincial Government, provided equipment and supplies necessary to prepare hot soup and cocoa as a supplement to the pupils' noonday lunches. In 1946 the teacher commenced to supply them about December 1. With the advent of spring they were not provided every day, though it would appear from the evidence that the practice was more or less regularly followed up to June 12, the day in question.

The respondent, Willis Edwin Gray, was the janitor, but his son, Charles Gray, apparently did much of the daily work and was always asked by the teacher to prepare the fire at recess for the heating of the soup and cocoa. As to what happened on June 12, the teacher deposed:

> It was recess and the children were all out, and as I repeat, it was a chilly morning and I was ill. I had suggested soup and as it has been said, no hands were raised, but when I said that I would have some myself at least five children said we will have some too, if it is going to be soup. They thought it was going to be cocoa or vegetable soup, and it happened to be celery soup. Two children said they would like some, and another child said, "If you are going to, I will too", and four or five said they would care for soup when they saw the soup.

This is the only reference the teacher makes to her illness. She does not state that she mentioned it to the pupils and certainly no pupil called as a witness made reference to it. The pupils, so far as they deposed to the foregoing, corroborate the teacher and not one of them contradicts her upon this, though at least some of them do upon other parts of her evidence. The learned trial judge stated:

> On this occasion, it being late in the school year, the defendant, Hazel McGonegal, decided to use up her supplies of soup by heating them and distributing them among her pupils at lunch.

Whether motivated by a desire to exhaust the supplies, as the end of the term approached and warmer weather prevailed, or whether it was her illness that prompted her to propose the soup does not determine the issue. We are concerned with her conduct and, upon the evidence here adduced, it would appear that she followed her usual routine, with no suggestion that a portion for but one should be prepared, but rather that all of the pupils who desired might enjoy a share. It would, therefore, appear that the evidence supports the basis accepted by the learned

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trial judge that what the teacher was doing was within the scope of her employment and in this the learned judges in the Court of Appeal were of the same opinion. Bowlby J.A. states:

> I am in entire accord with the conclusion of the learned trial Judge and am also of the opinion that the negligence of the defendant McGonegal fell within the scope of her employment and that the defendant trustees are liable therefor.

This issue was raised upon the pleadings and I am in agreement with the conclusions of the learned judges that at all times relevant hereto the teacher was acting within the scope of her employment.

The learned trial judge found that the teacher was negligent in that she failed to properly supervise the using of the gasoline stove, more particularly when she ought to have observed the difficulty Charles Gray was experiencing in his endeavours to light it. I am in agreement with the learned judges in the Court of Appeal that the evidence fully supports the finding of the learned trial judge both that she was negligent and that her negligence caused the injury suffered by Charles Gray.

The appellants, however, claim that this action was not brought within a period of six months after the injury suffered by Charles Gray. This action was not commenced until May, 1948, and, therefore, not until after a period of approximately ten months had elapsed since Charles Gray suffered his injury. Their contention is that under s. 11 of the *Public Authorities Protection Act* they are protected from any claim arising out of this injury. S. 11 reads as follows:—(As to which see page 282).

The trustees are a statutory corporate body under s. 63 of the *Public Schools Act* (R.S.O. 1937, c. 357) and their position and duties as set forth in that act constitute them a public authority. The appellant teacher not only assumes public duties by virtue of her employment by the trustees, but also accepts the duties and responsibility imposed upon her by the *Public Schools Act*. In the circumstances it would seem that she also occupies a position such as to constitute her a public authority.

The foregoing s. 11 provides that "No action * * * shall lie or be instituted against any person * * * *" This same phrase "any person" is contained in the act in Great

Britain (Public Authorities Protection Act 1893, 56 & 57 Vict., c. 61, s. 1). In fact, s. 11 corresponds to, and is, in all material respects relevant hereto, to the same effect as s. 1 of the British Act. In referring to the latter, Lord Buckmaster pointed out that " 'any person' must be limited so as to apply only to public authorities." *Bradford Corporation* v. *Myers* (1). Viscount Simon, referring to this statement, said: "On this point the construction of the Act should be regarded as finally settled." *Griffiths* v. *Smith* (2). However this phrase may be finally construed in Canada, I think both the trustees and the teacher are included within the phrase "any person" within the meaning of s. 11.

Throughout the Act, various duties are imposed and powers provided in general terms. It was evidently the intention of the Legislature, in regard to many matters, that the trustees should exercise their discretion, not only as to what ought to be done, but also as to how that which was decided upon might be carried out. Though the regulations were not filed, there is, throughout, no suggestion that the trustees or teacher were exceeding their respective duties. In fact, the contention of the respondents is that the trustees and the teacher were acting in the discharge of their public duties, but, in providing the soup and hot cocoa, they were acting voluntarily rather than under any statutory obligation, their contention being that the provisions of *The Public Authorities Protection Act* apply only where there is a specific duty or obligation to be discharged by a person or body exercising a "statutory or other public duty or authority."

It is not essential that the duty or obligation be specifically stated. The trustees, in the discharge of their statutory or public duty of maintaining and conducting the school, had been encouraged by the Department of Education to accept the Government grant and to provide for the teacher the equipment and supplies. In all this they were exercising their discretion. They were not obligated to do so, but, in so far as they did, they were acting within the discharge of their statutory and public duty in relation to that school. In these circumstances it cannot be said that what was done by the trustees and

(1) [1916] 1 A.C. 242 at 247. (2) [1941] A.C. 170 at 177.

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teacher, acting in their respective capacities and supported by a grant from the Government, was other than "an act done in pursuance or execution or intended execution of any statutory or other public duty or authority," within the meaning of s. 11 of *The Public Authorities Protection Act.*

In *Greenwood* v. *Atherton* (1), a child aged 5, attending a school, was injured in the playground during recreation period. As a consequence, an action was brought against the managers and the teachers, but commenced more than six months after the injury was suffered. It was held that the provisions of the Public Authorities Protection Act were applicable and the action was accordingly dismissed. Lord Goddard, at p. 392, stated:

> These foundation managers are acting in pursuance of a public duty. It seems to me really quite unarguable to say that they are not a public authority and not acting in pursuance of a statutory duty, and, although it may be they could not be compelled to keep the school in existence, so long as they are in receipt of a grant from public funds I do not see how it can be said they are not public authorities, and for that reason I agree that this appeal must fail.

In *Griffiths* v. *Smith, supra,* the plaintiff, mother of a pupil attending the school, was among those invited by the headmaster, with the authority of the managers, to attend, upon the school premises in the evening and, therefore, after school hours, an exhibition of work done by the pupils. While in attendance she suffered an injury due to the negligence of the managers. She did not however, commence her action until long after the period permitted within the meaning of s. 1 of the Public Authorities Protection Act and, therefore, the managers claimed the benefit of the provisions of that section. It was held that they were a public authority and that, notwithstanding there was no specific authorization of such exhibitions in any relative statute, in authorizing the invitations they were exercising their functions of managing the school. It was, therefore, held that they were entitled to the protection of the provisions of the act. In the presentation of the case it was contended that the exhibition was a voluntary

(1) [1939] 1 K.B. 388.

undertaking, because not specifically authorized, and this was dealt with by their Lordships. Viscount Simon stated at p. 179:

> I entirely agree with this view, which has prevailed in both courts below. It would be within the discretion of the managers to decide whether they would approve such a display, or whether they would not.

Viscount Maugham described the finding of the trial judge that the exhibition was "for the purposes of a public elementary school" as a "crucial finding of fact," which had been concurred in by the Court of Appeal. At p. 185 he stated:

> * * * it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are "public duty or authority," and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation.

Their Lordships deal with and distinguish *Bradford Corporation* v. *Myers, supra.* Lord Maugham, at p. 183, states:

> This House held that the corporation was not entitled to rely upon the Act of 1893 as a defence to an action for negligence brought by a purchaser of coke from the corporation * * * The ground of the decision as given by Lord Buckmaster was that the negligence was not in performance of "the direct execution of a statute, or in the discharge of public duty, or the exercise of a public authority"; and he added that he meant "a duty owed to all the public alike or an authority exercised impartially with regard to all the public." An incidental power to trade with the public was not, he said, within this qualification.

The case at bar, upon its facts, appears to be an even stronger case in favour of the trustees and the teacher than *Griffiths* v. *Smith, supra,* and is quite distinguishable from *Bradford Corporation* v. *Myers, supra.* The trustees and the teacher, in providing the soup and cocoa, were not carrying on a trade or some effort incidental to, but not in the course of, maintaining and conducting the school. On the contrary they were providing that which had proved to be desirable in the interests of the health and welfare of the pupils and the Government had deemed it proper to assist and, therefore, encourage the trustees to

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supplement the pupils' lunch by the provision of heated cocoa and soup, or such similar preparations as might, from time to time, be decided upon.

The judgment in favour of Willis Edwin Gray for his own personal expenses consequent upon his son's injury amounted to $1,208.75 and that in his favour as next friend $8,000. These are separate and distinct judgments. That in favour of Willis Edwin Gray, in his own right, not exceeding $2,000, cannot be appealed to this Court without leave (*Supreme Court Act*, ss. 36 and 41 as amended 1949, c. 37, s. 2). In *Dorzek* v. *McColl Frontenac Oil Company, Limited* (1), judgments awarded in a similar action were all less than $2,000 although in the aggregate they exceeded that amount. It was held that in these circumstances none of the appellants, apart from leave, could appeal to this Court. In the absence of leave this Court has no jurisdiction to entertain an appeal against the judgment in favour of Willis Edwin Gray and, therefore, the judgment in his favour for $1,208.75 must stand.

The appeal must be allowed with respect to the claim of Willis Edwin Gray, suing in his capacity as next friend for Charles Gray, and the judgment varied accordingly. I agree with the disposition of costs made by my brother Kerwin.

LOCKE J.:—The appellant trustees were under s. 89 of the *Public Schools Act* (c. 357, R.S.O. 1937) charged, *inter alia*, with the duties of providing a teacher for the school in question and seeing that the school was conducted according to the Act and the regulations. The appellant McGonegal was the teacher provided and by s. 103 of the Act one of the duties imposed upon her was to give assiduous attention to the health and comfort of the pupils. It was apparently in accordance with these obligations that at the school in question, during the cold months of the year, cocoa and soup were supplied to the children at midday, part of the expense of this being borne by the school district and part by the Department of Education.

There are concurrent findings of fact as to the negligence of the appellant McGonegal. The appellant trustees as her employers are in law responsible for acts of negligence

(1) [1933] S.C.R. 197.

committed by her in the course of her employment. The question to be determined is whether s. 11 of the *Public Authorities Protection Act* (R.S.O. 1937, c. 135) is a defence to the action which was not commenced within six months of the date of the commission of the act complained of.

If in fact the teacher had intended to prepare a meal for the children, in accordance with the practice that had been followed during the previous winter on the instructions and with the approval of the trustees, I think s. 11 would bar the action. It is not, however, in the view that I take of this matter, necessary to decide the point.

The appellant McGonegal's account as to her reason for directing that the soup be heated is expressed thus:—

> It was recess and the children were all out, and as I repeat, it was a chilly morning and I was ill. I had suggested soup and as it has been said, no hands were raised, but when I said that I would have some myself at least five children said we will have some too, if it is going to be soup. They thought it was going to be cocoa or vegetable soup, and it happened to be celery soup. Two children said they would like some and another child said, "If you are going to, I will too", and four or five said they would care for soup when they saw the soup.

The infant plaintiff apparently did not hear the teacher's inquiry as to whether any of the children wanted to have soup. Joyce Galbraith, a fifteen year old girl, said:

> Mrs. McGonegal asked who all wanted soup for dinner, and nobody wanted it but herself.

and when cross-examined she said that the teacher had asked any of the pupils to put up their hands if they wanted to have soup and that no hands were raised, whereupon the teacher had said that she was going to have it and asked young Gray to light the stove. Later she said that she had opened a can of soup for the teacher and, questioned as to a statement she had made before the trial to some unnamed person regarding the matter, said that she had told her about "Mrs. McGonegal wanting soup and not us." A younger child, Wallace Berry aged nine, said that at recess time the teacher had asked who wanted soup and that nobody had put up their hand. The only other evidence as to the occurrence was that of Robert Groves, a boy of thirteen, who said that the teacher had told Gray she wanted some hot lunches and wanted

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to light the gas stove so that she could get some soup ready. This boy also said that there was some soup left in the cupboard and that he guessed "she (the teacher) was cleaning them up."

Wells J. by whom the action was tried did not deal with this exact point but, after stating that it was customary to serve hot food to the children, particularly during cold weather, said:—

> On this occasion, it being late in the school year, the defendant, Hazel McGonegal, decided to use up her supplies of soup by heating them and distributing them among her pupils at lunch.

In my opinion, the proper construction to be placed upon this evidence is that Mrs. McGonegal intended to heat some soup for her own use and not for the purpose of providing hot food for the children and that it was after the soup proposed to be used was produced and was found to be a kind that they liked that some of the children said they would have some of it. It seems to me to be clear from her evidence that it was the fact that it was a chilly morning and that she was feeling ill that caused her to decide to have the soup heated and that, having decided this, she instructed young Gray to light the stove. In heating food for her own use the teacher was not performing or attempting to perform an act of the nature referred to in s. 11 of the *Public Authorities Protection Act* and, in my opinion, the section has no application.

Of the judgment recovered by the respondent at the trial less than $2,000 was awarded to the father and as to this, for the reasons given by my brother Kerwin, I think we are without jurisdiction to entertain the appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant McGonegal: *A. W. S. Greer.*

Solicitor for the appellant Trustees: *C. M. Smith.*

Solicitor for the respondents: *W. M. Nickle.*

REPORTER'S NOTE: On May 26, 1952, a motion was made for an Order permitting the appellant trustees to submit further argument on the ground that the finding of the majority of the Court would exclude the principle of *respondeat superior* and that the appeal should therefore be allowed. K. G. Morden Q.C. for the motion, R. A. Hughes Q.C. for the

respondents and C. F. Scott for the appellant McGonegal. The motion was granted and a re-hearing ordered upon arguments to be submitted in writing. On June 16, 1952 the following judgment was delivered. "Upon motion a re-argument on certain points having been permitted the members of the Court see no reason to alter their respective opinions. The appellants, The Trustees of Leeds and Lansdowne Front Townships School Area, must pay the respondents the costs of the motion and of the argument. There will be no costs to or against the appellant Hazel McGonegal."

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STANLEY FLAHERTY (PLAINTIFF) .....APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) .. } RESPONDENT.

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*Mar. 4, 5
*Jun. 30

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Negligence—Jury trial—Conduct of trial—Submission of questions to jury piecemeal—Mistrial.

The appellant, a switchman employed in connection with a train movement in the respondent's yards at Saskatoon, suffered injury when attempting to enter the train after it had commenced to move. The appellant's claim was that the train had commenced to move without having received a signal from him and that this was a negligent act and was the proximate cause of his injury. A preliminary question as to whether the train had been started without such a signal having been given having been answered in the affirmative by the jury, the trial judge submitted a further question as to whether this was a negligent act and, if so, had it caused or contributed to the occurrence of the accident. The jury found for the appellant and awarded damages for which judgment was entered in his favour but the Court of Appeal directed a new trial on the ground that the conduct of the trial was unsatisfactory.

Held, Cartwright J. dissenting, that the appeal should be dismissed.

Per Rand, Kellock and Locke JJ.: The judge's charge when submitting the question as to whether the act complained of was negligent was made in terms which would tend to lead the jury to believe either that that question was the same as the preliminary question or that the trial judge had himself determined that it was a negligent act or that he was instructing them so to find. The conduct of the trial was in this respect unsatisfactory and the appeal should be dismissed.

Per Cartwright J. (dissenting): The course of putting one question to the jury and then permitting them to separate for the night before charging them as to the remaining questions is both unusual and undesirable, but the court was referred to no authority for the proposition that it is unlawful, and the decision in *Fanshaw* v. *Knowles* [1916] 2 K.B. 538 is to the contrary. As both parties had agreed to such course, the verdict should not be set aside on this ground since no miscarriage of justice had resulted. The charge to

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

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the jury was sufficient and contained no error of law. There was evidence on which it was open to the jury, acting reasonably, to answer the questions as they did and their answers should not be disturbed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) ordering a new trial.

W. G. Currie Q.C. for the appellant. Where the trial judge reasonably believes that the putting of the questions separately might lead to a saving of time and expense, he is justified in doing so. In England, by rule 431, that is expressly provided for. Such power in the court appears to be inherent and necessary. *Emma Silver Mine Co.* v. *Grant* (2). In the case of *Patterson* v. *Saskatchewan Creamery Co. Ltd.* (3), the Court of Appeal upheld the trial judge who had submitted further questions to the jury after he had found that the answers to the first questions submitted were not sufficiently explanatory. Rule 50 of the Rules of the Court of the Province of Saskatchewan purports to be based partly on rule 73 of the Ontario Rules, but appears to be wider. Under the Ontario Rule, it is held that the court may direct one or more issues of fact to be tried before the others: *Waller* v. *Independent Order of Foresters* (4).

While the trial judge could have directed the questions to be put separately without reference to counsel, he only took this course as a suggestion to counsel and with the full concurrence of counsel on both sides. A litigant is bound by the way he conducts his case at the trial: *C.P.R.* v. *Hanson* (5), *McDougall* v. *Knight* (6) and *Banbury* v. *Bank of Montreal* (7).

The submission of the one question did not have the effect of removing from the jury their right to consider the entire evidence and decide whether or not there were other findings of negligence which were warranted by the evidence such as contributory negligence.

The answers of the jury should be given the fullest possible effect: *Forbes* v. *Coca Cola Co.* (8).

(1) [1951] 4 W.W.R. (N.S.) 47.
(2) (1879) 11 Ch. D. 926.
(3) 14 S.L.R. 544.
(4) 5 O.W.R. 422.
(5) (1908) 40 Can. S.C.R. 196.
(6) (1889) 58 L.J.Q.B. 539.
(7) (1918) 87 L.J.K.B. 1168.
(8) [1942] S.C.R. 366.

The damages were not excessive and ought not to be disturbed: *Warren* v. *Grey Goose Stage Ltd.* (1).

M. A. McIntyre Q.C. and W. G. Boyd for the respondent. The cases referred by the appellant, on the question of putting the questions to the jury piecemeal, are not cases dealt by a jury but cases tried by a judge alone, and have therefore no relevancy. The dividing of questions is fatal as a matter of law. No case can be found to show that the court has not the competence to do so, but this seems to be a case where the trial judge should not have done it.

There is no evidence to support any finding of negligence against the respondent and in any event the evidence of contributory negligence on the part of the appellant is so strong that the jury must have failed to act in a judicial manner in answering the questions as it did and its verdict is contrary to law, evidence and the weight of evidence.

The trial judge failed to explain to the jury the proper meaning of contributory negligence and apportionment of damages.

The damages are in no way supported by the evidence.

The judgment of Rand, Kellock and Locke JJ. was delivered by

LOCKE J.:—The appellant is a switchman employed by the respondent company and claims damages for personal injuries sustained by him on the early morning of November 18, 1949, while working in the railway yards in Saskatoon. The action was tried before the Chief Justice of the Court of King's Bench and a jury and, in view of the manner in which the issues were presented to the jury, it is necessary to consider in some detail the issues which were raised by the pleadings and the evidence given at the hearing.

The appellant had gone on duty at midnight and as a member of a switching crew had come from the railway yards at Nutana upon a light switch engine with which it was intended to move some 15 or 16 cars from their position in the yards of the respondent adjoining the station to a "Y" some 2½ miles to the north to be turned. The equipment to be moved consisted of some 13 or 14 passenger cars, an express refrigeration car and a dining car, the latter

(1) [1938] S.C.R. 56.

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two being the last two cars at the southern end of the train, the diner with its vestibule at the northerly end being the last of the cars. The appellant had descended from the switch engine when it was at a point at the southerly end of the train and proceeded to a position in the vicinity of the last two cars: the engine proceeded northward and coupled on to the cars preparatory to proceeding north. According to the evidence of the appellant, he had gone to the east side of the dining car at which time two express men employed by the respondent were loading bread from a truck standing on the station platform on to the express car. While he was standing on the platform to the south of the truck, intending to signal with his lantern when the loading of the express car was completed, the train started to move whereupon he went to the rear of the dining car and turned the angle-cock which set the brakes and stopped the train.

While the evidence is not entirely clear, apparently the train had moved about half a car length to the north when it was thus brought to a stop, whereupon the express men moved their truck into position and continued to load the car. After they had completed the loading and had moved the truck away from the car, the train started again. According to the appellant, he had not given any signal to start. McMurchy, another switchman who was a member of the crew, said that he did not see any signal from the rear of the train and the engineer, Brown, also said that he had not seen such a signal but had started to move the train either on the order of, or on a signal from, the switch foreman who was standing on the east side of the train to the south of the engine. As opposed to this evidence, both the express men who were within a few feet of the place where Flaherty was standing said that he had given a signal with his lantern before the train moved the second time, and evidence to the same effect was given by the switch foreman who said that he had received a go ahead signal from the rear of the train and then instructed the engineer to start. There is also conflict between the evidence of the appellant and the two express men as to his position when the train commenced to move. According to the appellant, he was near the rear of the dining car. According to James Read, one of the express men who was

working inside the express car, Flaherty was just south of the door of the express car when he gave the signal with his lantern and was thus to the north of the north entrance to the dining car and waited for the dining car to come up to where he was standing before proceeding to enter. Edgar Lake, the other express man who was on the truck loading the bread on to the car, said that Flaherty was standing between the express truck and the north end of the diner and, after waving his lantern up and down, moved towards the diner and started to enter. In addition to the evidence given for the appellant as to the train having started the second time without any signal from him, a conductor employed by the respondent company, though not in connection with the movement in which the switching crew were engaged, said that in all train movements there is generally communication between members of the crew with the engineer by hand signals or lamps and expressed the opinion that the train should not have been started without such a signal from the appellant. It was in attempting to enter the north entrance to the diner that the appellant suffered the injuries complained of: across the entrance there was a cast iron bar some four feet above the level of the floor of the vestibule and which was shown to be standard equipment on such cars. Flaherty was aware that this was the case but, while there was sufficient light from the flood lights in the station to enable the express man Lake to read the labels on the goods they were loading, he, for some reason, failed to detect the presence of the bar and struck his face against it, breaking his glasses and causing injury to one of his eyes which necessitated its removal.

The statement of claim gave particulars of the alleged negligence which formed the basis of the action as follows:

> 9. The said accident and injuries sustained were due to the negligence of the defendant and its servants (other than the plaintiff) and particulars of the said negligence are as follows:—
>
> (*a*) In putting the said train in motion without a signal from the plaintiff so to do.
>
> (*b*) In putting the said train in motion without prior warning to the plaintiff.
>
> (*c*) In having the said cross-bar in the doorway of the said dining car at the time and place aforesaid.
>
> (*d*) In failing to warn the plaintiff of the presence of the said cross-bar.

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(e) In failing to signify the presence of the said cross-bar by lantern, light, luminous paint or other form of warning, in view of the dark conditions under which the said work was being carried out.

(f) In failing to provide the plaintiff with a safe place in which to carry out his work.

(g) In failing to furnish the plaintiff with safe conditions under which to carry out his work.

(h) In failing to furnish the plaintiff with a safe system with which to carry on his work.

At the conclusion of the evidence the learned trial judge stated that he had decided to put a preliminary question of fact to the jury which he said that he considered to be fundamental to the whole case, this being:

Did the defendant put the train in motion just prior to the accident without a signal from the plaintiff so to do?

Counsel for both parties agreed to this course and addressed the jury on the question. While the question propounded was merely whether the train had been started without a signal from the plaintiff and not as to whether to have done so would be a negligent act, the learned trial judge in addressing the jury, in advance of their consideration of the question, defined negligence and said that the respondent was liable for the negligence of its servants if injury resulted and that the burden of establishing negligence lay upon those that asserted it. This explanation would not appear to have been necessary at this stage of the matter in view of the form in which the question was to be put. While there may be some doubt as to whether the instructions given to the jury on the question of negligence led them to understand that they were to consider whether in the circumstances, assuming no signal had been given by the plaintiff, the defendant had been negligent, I think the concluding part of the instructions given would convey to them that their consideration was to be restricted to the exact question put since, after dealing with the matter of negligence, the learned trial judge said:

Now on this question that you have to decide, it is for you to decide as to what witnesses to believe. You have seen these witnesses, you have heard them give their story. And it is for you from that story to decide where the weight of the evidence is and to give your verdict accordingly, on this question, the particular question of *whether or not this train started without a signal from the plaintiff.*

which was followed by a review of the evidence pro and con.

When the jury returned, in answer to a question by the clerk of the Court as to whether at least ten of them had agreed on the answer to the question, the foreman said that the answer

> is a pretty unanimous "Yes", that the train was put in motion without a signal.

Following this, the learned trial judge announced that he had prepared a number of further questions which he proposed to submit to them. The first two of these were:

> 1. Having found that the train was put in motion without a signal from the plaintiff, was that an act of negligence on the part of the defendants and did it cause or contribute to the accident?
>
> 2. If the answer aforesaid is "Yes", then in what way did it cause or contribute to the accident?

Counsel for the appellant thereupon urged that further questions should be submitted dealing with the other counts of negligence pleaded but this application was refused, the learned trial judge saying that he would not have submitted the preliminary question to the jury, had he not been of opinion that all other questions were eliminated. Counsel for the respective parties thereupon addressed the jury. The judge's charge which followed contained the following passage:—

> Now then, as the plaintiff did not give the signal to start, then it seems to me it was unquestionably an act of negligence on the part of the foreman to give the signal and therefore negligence on the part of the company, because the company is responsible for the acts of any member of the crew; even if that particular member is working in co-operation with the plaintiff, the negligence of the servant is brought home to the company and the company is responsible in law.
>
> You are taking the law from me, and the first question that arises is the one that I first submitted to you: If you find this act of negligence on the part of the defendant company by virtue of the failure of the foreman to get a signal from the plaintiff, then did that act of negligence contribute in any way to the accident?

If by saying that "the first question that arises is the one that I first submitted to you" the learned trial judge intended to convey to the jury that the first of the questions then being submitted was the same as the preliminary question, this was clearly error. The questions as to whether the plaintiff had given a signal to start the train and whether to start without such a signal was a negligent act were entirely distinct matters, the second of which had not been submitted to the jury. If by this instruction the jury were led to believe that the questions were the same,

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having answered the preliminary question in the affirmative, to answer the first question then being submitted in the same manner would be merely perfunctory. If, on the other hand, they understood that the question as to whether such conduct would amount to negligence was still open, to instruct them that such conduct "was unquestionably an act of negligence" would unfailingly lead them to believe either that this question had been decided by the trial judge or that he was instructing them so to find.

In delivering the unanimous judgment of the Court of Appeal (1), directing a new trial, the learned Chief Justice of Saskatchewan has said that in the opinion of the Court the conduct of the trial was unsatisfactory, a conclusion with which I respectfully agree.

I would dismiss this appeal with costs.

Being of the opinion that in all the circumstances of this case there should be a new trial, I would dismiss the cross-appeal with costs.

ESTEY J.:—I agree that there should be a new trial and the appeal dismissed with costs.

CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Saskatchewan (1) setting aside the judgment of Brown C.J., whereby it was adjudged that the plaintiff should recover $24,289 damages, and directing a new trial. The respondent cross-appeals asking that the action be dismissed.

The facts, so far as they are relevant to the decision of this appeal, may be stated briefly. On the 18 November, 1949, the appellant was employed by the respondent as a switchman. At about one o'clock in the morning he was engaged in certain duties at the rear end of a stationary train in the Saskatoon yards of the respondent. The last car was a dining-car. There were no steps or other equipment at the rear end of this car by which the appellant could board it. At the front end of the car there was an iron ladder of two rungs by which access could be had to the vestibule. Across the doorway to this vestibule was an iron bar, its height from the ground being 8 feet 7 inches. The car immediately ahead of the dining-car was a refrigerator car and once it was closed there was no way of boarding

(1) [1951] 4 W.W.R. (N.S.) 47.

it. It was intended that when the loading of the refrigerator car was finished the appellant would signal with a lantern to the foreman, who was near the engine some six hundred feet to the north, and that the foreman would then instruct the engine-driver to start. The train was to be pulled about two miles for the purpose of being turned at a "Y". The appellant had duties to perform at the "Y". He intended to ride for this two miles in the coach immediately ahead of the refrigerator car, and did not intend to give the signal to start until he was ready to board the coach. The appellant asserted that the train started without his giving any signal and that although it was moving very slowly he boarded it hurriedly, getting on the front end of the dining-car instead of the coach. He got his feet safely on the rungs of the ladder but in pulling himself up to the platform or vestibule he struck his face on the iron-bar mentioned above. He was wearing glasses and unfortunately in the result he lost one of his eyes.

The main dispute of fact at the trial was as to whether or not the appellant had given the signal to start prior to the train starting. The foreman and other witnesses testified that he had. This fact was found by the jury in favour of the appellant, and there was evidence to support this finding.

The questions to the jury and their answers were as follows:—

1. Did defendant put the train in motion just prior to the accident without a signal from the plaintiff so to do?

Answer: Yes.

2. Having found that the train was put in motion without a signal from the plaintiff was that an act of negligence on the part of the defendants and did it cause or contribute to the accident?

Answer: Yes.

3. If the answer aforesaid is yes then in what way did it cause or contribute to the accident?

Answer: The defendant was negligent in putting the train in motion before the plaintiff gave a signal in that the action caused the plaintiff to move more quickly to board the train than would have been necessary for him (the plaintiff) to do so, had he (the plaintiff) given the signal for the train to move.

4. What damages if any do you allow?

Answer:

1. Special Damages	$ 289.00
2. General Damages	24,000.00

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5. Was the plaintiff guilty of any negligence that contributed to the accident?

Answer: No.

6. If so in what way did such negligence consist?

Answer:

7. What is the degree of negligence in which the plaintiff and defendants are respectively at fault?

Answer: Defendants 100 per cent.

Several grounds of negligence were alleged in the Statement of Claim but the learned Chief Justice ruled as a matter of law that there was no evidence to support any of them except the one found in favour of the appellant in the answers to questions 1 and 2. In regard to this allegation of negligence the position of the defendant was: (i) that the plaintiff did in fact give the signal to start; and (ii) that even if he did not do so the starting of the train was not a cause of his injuries as he had succeeded in getting safely on to the ladder leading up to the vestibule of the dining-car and his injury occurred when he was pulling himself up from the ladder at a time when any necessity for hurry had passed.

At the conclusion of the evidence the learned Chief Justice decided to put a preliminary question of fact to the jury as to whether or not the plaintiff had in fact given a signal and question 1, quoted above, was put accordingly. As the learned Chief Justice had already ruled out all other allegations of negligence it is obvious that if the jury answered this question in favour of the defendant it would have been the end of the case. This course was followed without objection from either counsel.

In charging the jury on this question the learned Chief Justice gave them some instruction as to the law of negligence and pointed out to them that, as it was alleged to be negligence on the part of the foreman that he started the train without a signal, the onus lay on the appellant to satisfy the jury that he had not in fact given a signal prior to the starting of the train. No objection to the charge on this first question was taken by counsel for the defendant.

The jury, after deliberating, answered this question in favour of the appellant. The learned Chief Justice then permitted them to separate for the night and in the morning charged them as to the remaining questions.

The Court of Appeal were of opinion that the conduct of the trial was unsatisfactory and that "the submission of the questions to the jury piecemeal cannot be supported." After quoting the first question put to the jury by the learned Chief Justice the reasons of the Court of Appeal proceed as follows:—

> In doing so he stated that the question should be answered in the first place as, "it is fundamental to the whole case." He also stated that the lack of a signal from the plaintiff was the first charge of negligence which had been alleged. The statement that the question of the signal was fundamental to the whole case indicated to the jury that this was the only matter of negligence which appeared in the case and the effect of the submission of the one question was to remove from the jury their right to consider the entire evidence and decide whether or not there were other findings of negligence which were warranted by the evidence. Moreover, the selection of the one question would create in the minds of the jury the impression that in the opinion of the trial judge, if the plaintiff had not given the signal, there was negligence on the part of the defendant which caused or contributed to the accident. It is pointed out that counsel for both parties agreed to the question being submitted—even so statements made by the trial judge in the presence of the jury and in his final address to the jury amounted to instructions that the starting of the train without a signal from the plaintiff was negligence. The jury was not given an opportunity after proper instruction to answer the question:
>
> "Q. Was there any negligence on the part of the defendant or its servants which caused or contributed to the accident?"
>
> The appeal should be allowed and a new trial ordered, the costs of the first trial to abide the event of the second. There will be no costs of the appeal.

The course of putting one question to the jury and then permitting them to separate for the night before charging them as to the remaining questions is, I think, with great respect, both unusual and undesirable, but we were referred to no authority for the proposition that it is unlawful, and the decision of the Court of Appeal in *Fanshaw* v. *Knowles* (1) is to the contrary. Before adopting this course the learned Chief Justice suggested it to counsel and, far from objecting, both counsel expressly agreed that it should be followed. Under these circumstances the verdict should not be set aside on this ground unless it were clear that a miscarriage of justice had resulted.

It is true that it was not strictly necessary that the learned Chief Justice should instruct the jury as to the law of negligence when they were dealing with the first

(1) [1916] 2 K.B. 538.

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question which was solely one of fact and I am in agreement with the Court of Appeal and with counsel for the respondent that the jury would understand from the charge that if the train was started without any signal from the appellant this was negligence; but I do not regard this as important, for the whole conduct of the trial indicates that the respondent did not seriously contend that if the foreman started the train without a signal his conduct in so doing was not negligent. The defence in this regard was that the appellant in fact gave the signal, but that if this fact was found against the defendant the foreman's act did not cause the plaintiff's injury. On the evidence the jury could not reasonably have found that to start the train without a signal was not negligent. The foreman himself in answering questions put to him by the learned Chief Justice expressly stated that he should always wait for a signal from the rear end before instructing the engineer to start, and that to do otherwise would be a mistake. This, I think, accounts for the fact that counsel for the defendant made no objection to the charge.

It appears to me that in his final charge the learned Chief Justice dealt correctly and adequately with every point upon which the defence relied and particularly that he made it perfectly clear to the jury that their finding that the foreman started the train without a signal did not fix the defendant with any liability unless they were satisfied that such conduct was a cause of the plaintiff's injury. The form of question 2 also indicates this. Without attempting to quote all that the learned Chief Justice said on this point, I refer to the following passage:—

. . . . It is not sufficient to find there was an act of negligence; you must find that act of negligence either caused or in some way contributed to the accident. The mere fact a signal has not been given does not necessarily mean the defendant company is liable here. The plaintiff says it did contribute to the accident; he says, "If I had given the signal I would have put myself in a position where I was sure of my footing, where I would not have been rushed and could get secure footing on the train and would not have to act under any emergency." The defendants say: "Well you didn't have to act under any emergency; this train started very slowly, you were in just as good a position to secure proper footing on the train and safeguard yourself as if you had given the signal." That is what the defendants contend. It is for you to say in the light of the evidence whether or not that is so. And if you say that the failure to give that signal was the cause or contributed to the accident, then you are asked to go on and say, in what did that consist; in what way did that contribute.

The instructions as to contributory negligence and the assessment of damages are sufficient and satisfactory. Indeed, if I may be allowed to say so, the final charge appears to me to put every aspect of the problem before the jury with admirable clarity and I am not surprised that neither counsel asked the learned Chief Justice to amend or add to it in any way.

It is next necessary to consider the submission of the respondent that on all the evidence the answers of the jury to questions 2 and 5 were perverse and should be set aside. After perusing the whole record I think there was evidence on which it was open to the jury, acting reasonably, to answer these questions as they did and that their answers should not be disturbed. It is unnecessary to repeat that the question for an appellate court is not whether it agrees with the conclusions reached but rather whether the jury, the constitutional tribunal of fact, acting reasonably and judicially, might have come to such conclusions.

There remains the submission that the damages awarded are excessive. At the date of the accident the appellant was twenty-two or twenty-three years of age. An operation was performed on the day of the accident in an attempt to save the eye but this proved unsuccessful and the eye had to be removed four weeks and two days later. During this period the appellant endured severe pain. The doctor who performed the operation stated that the loss of one eye usually results in extra strain on the remaining eye. The $24,000 awarded for general damages included $1,918.19 for lost wages. The amount awarded may appear large but the loss of an eye is a serious matter for a man in his early twenties, and I am quite unable to say that the amount is so large as to indicate that the jury failed to act reasonably and judicially in making the assessment.

For the above reasons I would allow the appeal and restore the judgment at the trial with costs throughout and I would dismiss the cross-appeal with costs.

Appeal and cross-appeal dismissed with costs; new trial ordered.

Solicitor for the appellant: *W. G. Currie.*

Solicitors for the respondent: *Borland & McIntyre.*

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*Feb. 19, 20
*May 12

ARVID SMITH (PETITIONER) .....APPELLANT;

AND

ELLEN SOFIA SMITH (RESPONDENT) ....RESPONDENT,

AND

JOHN SMEDMAN (Co-RESPONDENT) ..Co-RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Divorce—Evidence—British Columbia Divorce Proceedings—Standard of Proof of Adultery required—The Divorce and Matrimonial Causes Act 1857 (Imp.) c. 85 as amended by c. 108, R.S.B.C. 1948, c. 97—English Law Act R.S.B.C. 1948, c. 111.

Proceedings in divorce under the Divorce and Matrimonial Causes Act in British Columbia are civil and not criminal in their nature and the standard of proof of the commission of a marital offence, where no question affecting the legitimacy of offspring arises, is the same as in other civil actions. The rule as stated in *Cooper* v. *Slade* (1858) 6 H.L.C. 746 and in *Clark* v. *The King* (1921) 61 Can. S.C.R. 608 at 616, applies.

Mordaunt v. *Moncreiffe* (1874) L.R. 2 Sc. & Div. 374; *Branford* v. *Branford* (1879) L.R. 4 P. 72 at 73; *Redfern* v. *Redfern* (1891) p. 139 at 145 and *Doe dem Devine* v. *Wilson* (1855) 10 Moo. P.C. 502 at 532, referred to.

APPEAL by the petitioner from the judgment of the Court of Appeal for British Columbia (O'Halloran J. dissenting), dismissing an appeal from the trial judgment dismissing the petition.

I. Shulman for the appellant. The trial judge erred in that he failed to make findings of fact and credibility and in applying the case of *Stuart* v. *Stuart* (1). That case can have no application as it deals with the law in cases where inferences are required to be drawn from circumstantial evidence; and the evidence herein was direct evidence. That case holds that "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called." It is wrong. It follows *De Voin* v. *De Voin* (2), a unanimous decision based solely upon the dictum of Lord Merriman in *Churchman* v. *Churchman* (3). It is quoted three times and referred to a fourth in *Stuart* v. *Stuart,* leaving no doubt that the Court of Appeal in this case held that the criminal standard of proof is required in order to prove adultery in a matrimonial cause.

*PRESENT: Rinfret C.J., Kerwin, Taschereau, Rand, Locke, Cartwright and Fauteux JJ.

(1) [1948] 1 W.W.R. 669. (2) [1946] 2 W.W.R. 304.

(3) [1945] P. 44.

The words "evidence which clearly satisfies me beyond a reasonable doubt of the guilt of the respondent and co-respondent", used by the trial judge clearly imply, at least in this country, that he was applying the criminal standard of proof; *a fortiori* when these words are connected with and therefore explained by the reference to the onus required by *Stuart* v. *Stuart*.

It is wrong in law to require the criminal standard of proof in order to prove adultery in a matrimonial cause; that is, it is not correct to say that "The same strict standard of proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called."

(*a*) Adultery is not a crime. The criminal standard should not apply in a criminal proceeding.

(*b*) *A fortiori* the criminal standard should not apply on the grounds that it is a quasi-criminal offence.

(*c*) The word "satisfied" is used in the Act. It would have been easy to add the words "beyond all reasonable doubt" if that is what was in the "mind" of Parliament. There is no justification for adding such a distinctly qualifying phrase.

(*d*) The criminal standard of proof is neither required or justifiable as a matter of public policy to protect the interests of the State, society or the individual.

(*e*) The criminal rule was formulated out of the high regard which the law has for the liberty of the individual. The same is not called for in divorce suits where the court is concerned, not to punish anyone, but to give statutory relief from a marriage which has broken down.

(*f*) The authority of *Ginesi* v. *Ginesi* (1) upon which *Stuart* v. *Stuart* leans, in part, has been doubted in England.

(*g*) In Ontario and Saskatchewan, at least, of the Provinces in Canada, the civil standards has been clearly held to be sufficient: and this is the view preferred in Australia and in the United States *Briginshaw* v. *Briginshaw* (2).

(1) [1948] 1 All E.R. 373. (2) (1938) 60 C.L.R. 336.

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In order to determine the principles regulating the standard of proof in the divorce court, it is necessary to go to the provisions of the statute, which in this case is the *Marriage Act 1928*. S. 80 is as follows: "Upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged and also to inquire into any countercharge which may be made against the petitioner."

S. 86 "Subject to the provisions of this Act, the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for dissolution of marriage." The phrase "it shall be the duty of the court to satisfy itself, so far as it reasonably can" is also used in s. 81. The sections directly relevant are ss. 80 and 86. S. 80 is a governing section applying to all the facts alleged as grounds for a petition for divorce—adultery, desertion etc. So far from the legislature having used the phrase "satisfy itself beyond a reasonable doubt" or any similar phrase, the legislature has simply used the word "satisfy". It can be assumed that the legislature was aware of the difference between the civil standard of proof and the criminal standard of proof. It would not be a reasonable interpretation of s. 80 to hold that the words "satisfy itself" meant "satisfy iself beyond a reasonable doubt". But the actual phrase is not merely "satisfy itself" but "satisfy itself so far as it reasonably can". The addition of the words "so far as it reasonably can" strongly supports the view that the legislature did not intend the court to reach that degree of moral certainty which is required in the proof of a criminal charge. The words are apt and suitable for applying in the new jurisdiction the civil standard of proof, but they are not apt words of description for the criminal standard of proof. In s. 86 the words are "The court, if it is satisfied that the case of the petitioner is established, shall pronounce a degree nisi". These words, like those in s. 80, are applicable to all the grounds upon which a petition can be presented. If they require the criminal standard of proof in the case of adultery, they also require that standard of proof in the case of desertion—a proposition which has no authority to support it. The result is that the ordinary standard of proof in civil matters must be applied to the proof of adultery in divorce proceedings,

subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of adultery is established. *Dearman* v. *Dearman* (1); *Wright* v. *Wright* (2); *George* v. *George and Logie* (3).

P. Murphy for the respondent. The trial judge dismissed the petition on the basis that the petitioner had not discharged the onus of proof cast upon him by the decision in *Stuart* v. *Stuart* (4) i.e. that the petitioner had not laid before the trial judge evidence which satisfied him beyond a reasonable doubt. The Court of Appeal sustained the decision and dismissed the appeal. The Chief Justice interpreted the reasons of the trial judge to mean that because of the conflict of evidence the trial judge was unable to find as a fact that the petitioner had discharged the onus of proof upon him to prove the adultery alleged beyond a reasonable doubt and that in that sense the trial judge had properly relied upon *Stuart* v. *Stuart*. The Chief Justice further stated that he could not say that the conclusion of fact of the trial judge based as it was upon the evidence before him and the advantage of the view he had and the demeanor of the witnesses, in a word the surrounding circumstances, was so clearly erroneous that the Court of Appeal should interfere. Mr. Justice Robertson concurred. Mr. Justice O'Halloran dissented in part holding that *Stuart* v. *Stuart* did not apply except in cases where the adultery was to be inferred from the circumstances, and would have directed a new trial so that the trial judge could make proper judicial findings on credibility which he found were lacking.

In *De Voin* v. *De Voin* (5) the Court of Appeal followed the law as laid down in *Churchman* v. *Churchman* (6) by Lord Merriman P. who said "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called". The same Court had occasion to review this aspect of the

(1) (1908) 7 C.L.R. 549.
(2) (1948) 77 C.L.R. 191.
(3) [1951] 1 D.L.R. 278.
(4) [1948] 1 W.W.R. 669.
(5) [1946] 2 W.W.R. 304.
(6) [1945] P. 44.

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law in *Stuart* v. *Stuart* where a number of authorities bearing on the issue were considered—*Loveden* v. *Loveden* (1); *Allen* v. *Allen and Bell* (2); *FitzRandolph* v. *FitzRandolph* (3); *L.* v. *L. and K.* (4); *Churchman* v. *Churchman, supra; Ginesi* v. *Ginesi* (5).

In *Davis* v. *Davis* (6) the principle in *Churchman* v. *Churchman* seems to be adopted by the Court of Appeal in England.

In *Fairman* v. *Fairman* (7) Lord Merriman giving judgment for himself and Ormerod J. stated that in *Ginesi* v. *Ginesi* (5) the Court of Appeal unreservedly approved the observation made by him in *Churchman* v. *Churchman* in relation to a charge of adultery, including as Wrottesley L.J. expressly said, connivance, while leaving open the question whether the current generality of the observation applied to other matrimonial offences. Here again, insofar as adultery is concerned, that principle is laid down as the standard of proof required. It must be noted that this was a case where direct evidence of adultery was involved. This case seems to be in harmony with the decision of the Court of Appeal, at bar, to the extent that in applying the principles, no distinction is to be drawn, whether or not the evidence of adultery is direct or circumstantial.

The latest decision on the point is *Preston-Jones* v. *Preston-Jones* (8) in which the House of Lords seemed to accept and enunciate the principle that where it was sought to prove adultery the law demanded that the same be established beyond all reasonable doubt. In *Gower* v. *Gower* (9) Denning L.J. by way of obiter dicta seems to cast some doubt on the principles set out in the *Ginesi* case. Ontario formerly adopted the standard laid down in *Churchman* v. *Churchman; DeFalco* v. *DeFalco* (10); *Jones* v. *Jones* (11). In *Robertson* v. *Robertson* (12) the view of Hogg J.A. seemed to be that adultery could not be regarded as criminal or quasi-criminal, but that a high standard of proof is required in divorce cases. In *George* v. *George* (13),

(1) (1810) 161 E.R. at 648, 649.
(2) [1894] P. 248.
(3) (1918) 41 D.L.R. 739.
(4) [1922] 1 W.W.R. 224 at 227.
(5) [1947] 2 All E.R. 438.
(6) [1950] 1 All E.R. 376.
(7) [1949] 1 All E.R. 938.
(8) [1951] 1 All E.R. 124.
(9) [1950] 1 All E.R. 804.
(10) [1950] 3 D.L.R. 770.
(11) [1948] O.R. 22.
(12) [1951] 1 D.L.R. 498.
(13) [1950] O.R. 787.

Roach J.A. giving judgment for the Court, reviewed all the authorities and said "the standard of proof is not that imposed upon the Crown in a criminal prosecution, but is the standard required in a civil action only. The judicial mind must be 'satisfied' that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal —be it judge or jury—acting with care and caution, to the fair and reasonable conclusion that the act was committed." In *Bruce* v. *Bruce* (1) the Court of Appeal in Ontario decided that where adultery was to be inferred from circumstances, it was not correct to say that the circumstances adduced in evidence not only must be consistent with the commission of the act of adultery, but must be inconsistent with any other rational conclusion.

It is submitted, therefore that the test applied by the trial judge that the allegations of adultery should be proved beyond a reasonable doubt was not misdirection, but that he directed himself properly in accordance with the law that is in effect in Canada, and that the appeal should therefore be dismissed.

I. Shulman in reply.

The judgment of the Chief Justice, Kerwin, Taschereau, Locke and Fauteux, JJ. was delivered by:—

LOCKE J.:—This is an appeal by the petitioner in a divorce action from a judgment of the Court of Appeal for *British Columbia* (2), dismissing his appeal from the judgment of Wilson J. which dismissed his petition: O'Halloran J.A. dissented and would have directed a new trial.

By the petition the appellant asserted that his wife had at various times committed adultery with the co-respondent and claimed a dissolution. These allegations were put in issue by the pleadings filed by the respondent and the co-respondent. It is sufficient to say of the evidence adduced at the trial that there was, what must be exceedingly rare in actions of this nature, direct evidence of the

(1) [1947] O.R. 688. (2) [1951] 4 D.L.R. 593.

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commission of the marital offence given by the petitioner and another eye witness and in addition evidence of other circumstances from which adultery might have been inferred. The direct evidence was denied by the respondent and the co-respondent as was the fact that they had at any of the times complained of been guilty of adultery.

In dismissing the petition Mr. Justice Wilson said that the petitioner had not brought forward evidence which satisfied him beyond reasonable doubt of the guilt of the respondent and co-respondent and, considering himself to be bound by the decision of the Court of Appeal of British Columbia in *Stuart* v. *Stuart* (1), the action failed.

In the Court of Appeal the Chief Justice of British Columbia, with whom Mr. Justice Robertson agreed, considered that, in view of the reasons delivered by the learned trial judge, the matter was governed by the decision in *Stuart's* case. Mr. Justice O'Halloran was of the opinion that the decision in that case did not apply where there was, as in the present case, direct evidence of the commission of the marital offence, while in *Stuart's* case and an earlier case of *De Voin* v. *De Voin* (2), where the Court had arrived at the same conclusion on a point of law, the evidence was circumstantial.

By the *English Law Act* (R.S.B.C. 1948, c. 111) the civil and criminal laws of England, as the same existed on the 19th day of November 1858 and so far as the same are not from local circumstances inapplicable, are in force in the Province of British Columbia, save to the extent that such laws shall be held to have been modified or altered by legislation having the force of law in the province or in any former colony comprised within the geographical limits thereof. The statute conferring jurisdiction upon the Supreme Court of British Columbia in divorce and matrimonial causes is The Divorce and Matrimonial Causes Act 1857 (Imp.) (20-21 Vict. c. 85) as amended by 21-22 Vict. c. 108 and it was under the terms of that statute that the proceedings in the present action were taken. The latter statute provides that in all suits and proceedings other than proceedings to dissolve any marriage the court should proceed and act and give relief on principles and

(1) [1948] 1 W.W.R. 669.

(2) [1946] 2 W.W.R. 304.

rules which, in the opinion of the court, should be, as nearly as may be, conformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief, subject, however, to the provisions of the Act and rules or orders made under it. The ecclesiastical courts, while empowered to grant divorce *à mensâ et thoro* were without jurisdiction to dissolve a marriage, relief which could in England be obtained only by an Act of Parliament. The Act of 1857 declared, *inter alia,* that it should be lawful for any husband to present a petition for the dissolution of the marriage on the ground that his wife had since the celebration thereof been guilty of adultery and provided that:—

> In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved.

The question to be determined is whether, in order to find that the case of the petitioner has been proven, the court must be satisfied beyond a reasonable doubt that adultery has been committed, or whether, as in the case of other civil proceedings, the Court may act on what Willes J. described in *Cooper* v. *Slade* (1), as the "preponderance of probability" or, as expressed by Duff J. (as he then was) in *Clark* v. *The King* (2), "on such a preponderance of evidence as to shew that the conclusion the party seeks to establish is substantially the most probable of the possible view of the facts."

The decision of the Court of Appeal in *De Voin* v. *De Voin supra,* adopted as an accurate statement of the law a passage from the judgment of Lord Merriman P. speaking for the Court in *Churchman* v. *Churchman* (3), reading:—

> The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called.

(1) (1858) 6 H.L.C. 746. (2) (1921) 61 Can. S.C.R. 608 at 616.
(3) [1945] P. 44 at 51.

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In the interval between this decision and that in *Stuart's* case a divisional court in England had adopted and followed Lord Merriman's statement of the law in the case of *Ginesi* v. *Ginesi* (1), a judgment later affirmed by the Court of Appeal (2).

While in *Allen* v. *Allen* (3), Lopes L.J., delivering the judgment of the Court of Appeal in a case where the evidence was circumstantial, had said in part (p. 252):—

> A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated.

I have been unable to find any decision either in England or in Canada where, prior to the judgment in *Churchman's* case, it has been said that the standard of proof required in the case of a matrimonial offence was that required in criminal cases, this irrespective of the nature of the matrimonial offence or whether the evidence was circumstantial or direct.

It is of importance to note that the point which Lord Merriman was considering in *Churchman's* case was as to whether there was evidence of connivance between the parties to the action and that, in so far as his statement of the law related to or could be related to other matrimonial offences such as adultery, it was simply *obiter*. The passage referred to must be read with its context: after discussing the question as to whether the burden of proof in relation to connivance had been shifted by some recent statutory enactments in England, Lord Merriman said (p. 51):—

> But it is not necessary to express any final opinion on the question where the burden of proof lay under the earlier Acts or on the reasons for the change in the wording. Assuming that the present Act deliberately imposes a new burden on the petitioner this cannot in our opinion mean that there is now a presumption of law that he has been guilty of connivance. The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called. Connivance implies that the husband has been accessory to the very offence on which his petition is founded, or at the least has corruptly acquiesced in its commission, and the presumption of law has always been against connivance.

(1) [1947] 2 All E.R. 438. (2) [1948] P. 179.
(3) [1894] P. 248.

While support for the view that some higher degree of proof was necessary on the issue of connivance might have been found in the judgment of Dr. Lushington in *Turton* v. *Turton* (1), in my humble opinion the application of the principle to the marital offence of adultery is not supported by authority.

The appeal in *Ginesi* v. *Ginesi* was first heard before a divisional court consisting of Hodson and Barnard, JJ. The trial had been before the Bradford justices and the proceedings are not reported. A separation order obtained by the wife by reason of her husband's wilful neglect to maintain her was discharged on the ground that she had committed adultery. After saying that the justices had apparently not been alive to the standard of proof requisite in a case of that class, Hodson J. said in part (p. 438):—

> It is a matter of history that in matrimonial cases, adultery having been described as a quasi-criminal offence, the standard of proof is a high one, and if authority is required it is to be found in the language used by Lord Merriman, P., in *Churchman* v. *Churchman*.

and quoted the statement which had been adopted in the *De Voin* and *Stuart* cases: he then proceeded to say that the error made by the justices was in thinking that the standard of proof required was that in an ordinary civil case where merely the "preponderance of evidence, or even the balance of probability" might be applied. Barnard, J. agreed that this was error. On the appeal to the Court of Appeal, counsel for the husband apparently conceded the correctness of the rule as stated by Lord Merriman, as applied to the charge of adultery. Tucker, L.J., however, considered some of the early authorities such as *Rix* v. *Rix* (2); *Williams* v. *Williams* (3) and *Loveden* v. *Loveden* (4), which I will refer to later, and certain remarks of Lord Buckmaster and Lord Atkin in *Ross* v. *Ross* (5), and decided that Hodson J. was correct in saying that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence. Wrottesley L.J. agreed that the rule applied to cases of adultery, leaving it to other occasions to decide whether it was equally applicable to other matrimonial offences "in addition, of course, to

(1) (1830) 3 Hag. Ecc. 339.
(2) (1777) 3 Hag. Ecc. 74.
(3) (1798) 1 Hag. Con. 299.
(4) (1810) 2 Hag. Con. 1, 3.
(5) [1930] A.C. 17.

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connivance, the offence which Lord Merriman P. must have had in mind in *Churchman* v. *Churchman.*" Vaisey J. expressed his complete agreement with the other members of the Court and said (p. 186):—

> The close similarity of the offence of adultery to acts which are properly to be described as criminal today is beyond question.

In *Fairman* v. *Fairman* (1), Lord Merriman, P., dealing with a case where the offence charged was adultery, after noting that what he had said in *Churchman's* case had been adopted and followed in the Divisional Court and in the Court of Appeal in *Ginesi's* case, said that he would like to add that he had always directed himself and directed juries that adultery is a quasi-criminal offence and that, therefore, the same principles should be applied as in the case of criminal offences properly so called but that, in relation to offences such as desertion, cruelty or wilful neglect to provide reasonable maintenance, he had never charged that the same strictness applied.

In *Preston-Jones v. Preston-Jones* (2), an action for divorce which would result, if successful, in bastardising a child, the judgment of the Court of Appeal in *Ginesi* v. *Ginesi* was referred to by Lord Morton and Lord MacDermott. Certain statements made in other judgments delivered in the matter are also to be noted. Lord Simonds who did not refer to Ginesi's case said in part (p. 127):—

> A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardise the child. That is a matter in which from time out of mind strict proof has been required. That does not mean, however, that a degree of proof is demanded such as in a scientific inquiry would justify the conclusion that such and such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt.

and referred to *Head* v. *Head* (3). Lord Oaksey, after referring to the nature of the proceedings, said (p. 133):—

> In such circumstances the law, as I understand it, has always been that the onus on the husband in a divorce petition for adultery is as heavy as the onus which rests on the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable doubt, but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle on which this rule of proof depends is that it is better that many criminals should be acquitted than that one

(1) [1949] 1 All E.R. 938.
(2) [1951] 1 All E.R. 124.
(3) (1823) Turn. & R. 138; 37 E.R. 1049.

innocent person should be convicted. The onus in such a case as the present, however, is founded, not solely on such considerations, but on the interest of the child and the interest of the State in matters of legitimacy since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child: see *Russell* v. *Russell* (1).

Lord Morton said that (p. 135):—

> In *Ginesi* v. *Ginesi* (2) the Court of Appeal, after a survey of the authorities, held that a petitioner must prove adultery "beyond reasonable doubt." In my view, the burden of proof is certainly no heavier than this, and counsel for the husband did not contend that it was any lighter.

Lord MacDermott, after saying that for the wife it was contended that as the finding of adultery would in effect bastardise the child and that it was conceded that the adultery alleged had to be proved beyond reasonable doubt, expressed views which, it appears to me, went beyond the issues involved in the appeal. Section 4 of the Matrimonial Causes Act 1937 requires the Court, on hearing of a petition for divorce, to pronounce a decree if "satisfied on the evidence" that the cause for the petition has been proved. Lord MacDermott, after referring to a passage in the judgment of Viscount Birkenhead, L.C. in *Gaskill* v. *Gaskill* (3), a case involving legitimacy, where it was said that there should be a decree only if the court comes to the conclusion that it was impossible that the petitioner should be the father of the child, and stating his disagreement with that view said (p. 138):—

> The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Sir William Scott described in *Loveden* v. *Loveden* (4) as "the guarded discretion of a reasonable and just man," but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required. Such, in my opinion, is the standard required by the statute. If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be "satisfied" within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child.

While the subject Lord MacDermott was considering was the nature of the proof required in proceedings involving legitimacy, the latter part of the passage quoted goes

(1) [1924] A.C. 687.
(2) [1947] 2 All E.R. 438; [1948] 1 All E.R. 373.
(3) [1921] P. 425.
(4) (1810) 161 E.R. 648.

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beyond such an issue and that he intended to do so appears from what follows. The succeeding paragraph reads (p. 138):—

> On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied," in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt* v. *Moncreiffe* (1), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

The decisive point is the meaning to be assigned to the language of section 15 and 16 of the Act as it appears in c. 97, R.S.B.C. 1948. The law as thus declared has not been modified or altered by any legislation of the nature referred to in section 2 of the English Law Act. Proceedings under the Act are civil and not criminal in their nature. By the Evidence Act (c. 113, R.S.B.C. 1948), the Legislature has dealt generally with the matter of evidence in all proceedings respecting which it has jurisdiction. Section 8 provides that no plaintiff in any action for breach of promise of marriage shall recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise: section 11 provides that in claims against the heirs, executors, administrators or assigns of a deceased person, the plaintiff shall not obtain a verdict on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. Subsection 2 of section 8 provides that, notwithstanding any rule to the contrary, a husband or wife may in any proceeding in any court give evidence that he or she did not have sexual intercourse with the other party to the marriage at any time or within any

(1) (1874) L.R. 2 Sc. & Div. 374.

period of time before or during the marriage. Sections 27 to 50 prescribe the manner in which various matters may be proven. The Act contains nothing to differentiate the nature of the proof required or permitted in divorce as distinguished from other civil proceedings. Divorce rules regulating the procedure in the Supreme Court of British Columbia in divorce proceedings have been adopted and the matter with which we are concerned is not dealt with.

In *Mordaunt* v. *Moncreiffe* (1), where proceedings for divorce were taken under the Act of 1857, Lord Chelmsford said in part (p. 384):—

> In confining our attention strictly and exclusively to the Act, it becomes unnecessary to consider (as some of the learned judges have done) whether proceedings for a divorce are of a civil, or criminal, or quasi-criminal nature. No aid to its construction can be obtained by determining the exact character of the proceedings, nor from analogies derived from considerations applicable to cases of these different descriptions respectively. It is only necessary to bear in mind that the Act gives a right not previously existing to obtain the dissolution of marriage for adultery, by the decree of a newly-created Court of Law, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised.

Since, however, some of the decisions in England, above mentioned, refer to cases decided prior to 1857 as an aid to the interpretation of the Act, it may be helpful to determine the principle upon which the ecclesiastical courts proceeded in granting decrees *à mensâ et thoro*. In *Rix* v. *Rix* (2), where a decree was sought by reason of the wife's adultery, Sir George Hay said that if the fact was proved either directly, or presumptively (which was the general case), the court was bound to grant its sentence and said (p. 74):—

> Ocular proof is seldom expected; but the proof should be strict, satisfactory and conclusive.

In *Williams* v. *Williams* (3), Sir William Scott, afterwards Lord Stowell, said (pp. 299, 300):—

> It is undoubtedly true, that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the Court, that the criminal act has been committed.

(1) (1874) L.R. 2 Sc. & Div. 374. (2) (1777) 3 Hag. Ecc. 74.
(3) (1798) 1 Hag. Con. 299.

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and that the Court (p. 303):—

must recollect that more is necessary, and * * * * must be convinced, in its legal judgment, that the woman has transgressed not only the bounds of delicacy, but also of duty.

In *Loveden* v. *Loveden* (1), referred to in the judgment of Tucker L.J. on the appeal in *Ginesi's* case and by Lord MacDermott in the case of *Preston-Jones,* Sir William Scott employed the language so constantly referred to on the subject (pp. 2, 3):—

It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books: at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations—neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.

In *Turton* v. *Turton* (2), where the wife sought a separation on the ground of the husband's adultery and there were pleas of condonation and it was argued further that there had been connivance, Doctor Lushington (p. 351) said that as connivance necessarily involves criminality on the part of the individual who connives and as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be "the more grave and conclusive." In *Grant* v. *Grant* (3), in the Court of Arches, Sir H. Jenner said (p. 57):—

The principle applicable to cases of this description, where there is no direct and positive evidence of an act of adultery, at any particular time or place, is laid down in a variety of cases, to which it is not necessary for the Court to advert. It is not necessary to prove an act

(1) (1810) 2 Hag. Con. 1. (2) (1830) 3 Hag. Ecc. 339.
(3) (1838) 2 Curt. 16.

of adultery at any one particular time or place; but the Court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other.

A note to the report of this case in 163 E.R. at p. 340 says that the judgment was affirmed by the Judicial Committee of the Privy Council on February 24, 1840, but I have been unable to find any other report of this.

In Shelford's work on the Law of Marriage and Divorce published in 1841, after referring to the fact that adultery can hardly be proved by any direct means, the learned author adopts the language employed by Lord Stowell in *Williams* v. *Williams* (*supra*) and *Loveden* v. *Loveden* (*supra*) as stating the general rule applicable as to proof of the fact. In Ernst on Marriage and Divorce published in 1879, the language of Lord Stowell in *Loveden's* case as to the general rule is adopted as stating the law that was applied in the ecclesiastical courts.

Lord Merriman did not refer to any authority in *Churchman's* case in support of the proposition that the same strict proof is required in the case of a matrimonial offence as is required in prosecutions for criminal offences. The reason for his conclusion, however, appears from what he subsequently said in *Fairman's* case (1). It does not appear from the reports that his attention was drawn to what had been said on this subject in the House of Lords in *Mordaunt* v. *Moncreiffe* above referred to, or by Sir James Hannen in *Branford v. Branford* (2), or by Lord Lindley in *Redfern* v. *Redfern* (3). In *Mordaunt* v. *Moncreiffe,* the action was for a divorce under the provisions of the Act of 1857. Owing to the insanity of the wife, the respondent in the action, the court, on insanity being found, appointed a guardian ad litem and suspended the proceedings; the husband appealed to the House of Lords insisting that her insanity ought not to bar the investigation of the charge of adultery brought against her. The House of Lords took the opinion of five of the judges: of these, Keating, J. was of the opinion that the proceedings in the Divorce Court were criminal in their nature and, therefore, could not be proceeded with: Lord Chief Baron Kelly, however, with whom Denman, J. and

(1) [1949] 1 All E.R. 938 at 939. (2) (1878) L.R. 4 P. 72 at 73.
(3) (1891) P. 139 at 145.

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Pollock, B. agreed said in dealing with the contention that the suit was analogous to a criminal proceeding, (p. 381):—

> I am not aware of any species of suit or action known to the law, of which the incidents are to be determined by its analogy to criminal or civil proceedings. This proceeding is either a criminal prosecution or a civil suit. If a criminal prosecution, it can neither be instituted nor carried on while the accused is lunatic. If it be a civil suit, lunacy is no bar.

and, after considering the same sections of the statute as those with which we are concerned in the present matter, expressed the view that the court was obligated, if satisfied that adultery had been committed, to grant the decree. Lord Chelmsford, having said, as above noted, that the rights of the parties must be determined by interpreting the statute, said that, while great stress has been laid on the argument upon the judgments of Sir Cresswell Cresswell in the case of *Bawden* v. *Bawden* (1), and of Lord Penzance in *Mordaunt's* case and on the fact that these learned judges were particularly conversant with the procedure of the Divorce Court, since the question was simply one of statutory construction this gave them no peculiar advantage. Lord Hatherley, who agreed with Lord Chemsford that the appeal must be allowed, dealt with the argument that the suit was in the nature of a criminal proceeding and said in part (p. 393):—

> Much has been said, both in the Court below and before your Lordships, as to the analogy of the suit for a divorce to a criminal proceeding, and it has been inferred, that inasmuch as every step in the proceedings against a criminal is arrested by his or her becoming lunatic, so by parity of reasoning lunacy should bar all procedure against a Respondent in a divorce case. But the procedure in divorce is not a criminal procedure. It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place. The divorce bills in Parliament were not bills of pains and penalties. They proceeded on the ground of relieving the petitioner for the bill from his unhappy position, that of indissoluble union with one who had herself, as far as was in her power, broken the marriage tie. The remedy applied was simply dissolution of the tie. No ordinary Divorce Act punished the adulterous party personally, or inflicted any pecuniary penalty. They usually, indeed, debarred the woman of dower and thirds, but that consequentially, because she ceased to be the wife; and, on the same grounds, they usually required the husband to give up his marital rights in the wife's property. The new Court was instituted to administer the same relief in the same manner.

(1) (1862) 2 Sw. & Tr. 417.

In *Branford* v. *Branford*, Sir James Hannen referred to the judgment in *Mordaunt* v. *Moncrieffe*, saying in part (p. 73):—

> I think the point taken by the Queen's proctor is concluded by the decision in the House of Lords that proceedings of this kind are not criminal, and if not criminal then they must be civil, for there cannot be quasi-civil or quasi-criminal cases.

In *Redfern* v. *Redfern*, Lindley L.J., after referring to the decision in the House of Lords, said that (p. 145):—

> The cases there cited shew clearly that no indictment lies at common law for adultery: see 2 Salk., p. 552; neither is there any statute making it punishable.

In *Fairman's* case Lord Merriman's expression is that adultery is a "quasi-criminal" offence. It is true that in many of the proceedings before the ecclesiastical courts reference is made to the "crime" of adultery, this, I must assume to be, due to the fact that adultery was an ecclesiastical offence but, as pointed out by Lindley L.J., it was not an offence at common law and it was not a criminal offence in England and is not in the Province of British Columbia. The principle stated by Lord Merriman and adopted by the Court of Appeal in *Ginesi's* case, while accepted as correctly stating the law in British Columbia and in Manitoba in the case of *Battersby* v. *Battersby* (1), was rejected by the Court of Appeal of Ontario in *George* v. *George* (2). In that case Roach, J. pointed out that in *Gower* v. *Gower* (3), Denning L.J. said that he did not think that the Court of Appeal was irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge to be proved beyond all reasonable doubt, and indicated his own doubts that *Ginesi* v. *Ginesi* had been correctly decided, pointing out that the question had not been fully argued since counsel had conceded that the standard of proof of adultery was the same as in a criminal case and, further, that the decision in *Mordaunt* v. *Moncrieffe* had not been cited. In *Briginshaw* v. *Briginshaw* (4), the High Court of Australia in a proceeding for the dissolution of marriage where the statute giving jurisdiction required the Court "to satisfy itself, so far as it reasonably can, as to the facts alleged" and to pronounce a decree *nisi*

(1) [1948] 2 W.W.R. 623.
(2) [1950] O.R. 787.
(3) [1950] 1 All E.R. 804.
(4) (1938) 60 C.L.R. 336.

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if "it is satisfied that the case of the petitioner is established," held that the standard of proof was not that of proof beyond reasonable doubt which obtains in respect of issues to be proved by the prosecution in criminal proceedings. The matter was again dealt with by that Court in *Wright* v. *Wright* (1), where the Court considered the decision of the Court of Appeal in *Ginesi* v. *Ginesi* and declined to follow it, preferring their own decision in *Briginshaw's* case.

If the statement of Lord Merriman adopted by the Court of Appeal was intended as a statement of the law of England, as it was at the time the Divorce and Matrimonial Causes Act of 1857 was enacted, in my opinion, it is not supported by authority. If it was intended as the proper construction to be placed upon the requirement of the statute that the court shall "be satisfied on the evidence that the case of the petitioner has been proved," I think it is inaccurate and should not be followed. In *Doe D. Devine* v. *Wilson* (2), Sir John Patteson, delivering the judgment of the Judicial Committee in an appeal from New South Wales, where in civil proceedings the genuineness of a deed was question, said that while it had been the practice to direct the jury in criminal cases that if they have a reasonable doubt the accused is to have the benefit of that doubt, whether on motives of public policy or from tenderness to life and liberty, or from any other reason, but that none of these reasons apply to a civil case.

The question we are to determine in the present matter is restricted to the standard of proof required in divorce proceedings in British Columbia, where the issue is as to whether adultery has been committed. No question affecting the legitimacy of offspring arises. The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the court is not "satisfied" in any civil action of the plaintiff's right to recover, the action should fail. The rule as stated in *Cooper* v. *Slade* is, in my opinion, applicable.

I would allow this appeal, set aside the judgments of the Court of Appeal and of Wilson, J. except to the extent that they award costs to the respondent and direct that

(1) [1948] 77 C.L.R. 191. (2) (1865) 10 Moo. P.C. 501 at 532.

there be a new trial. The appellant should have his costs in this Court and in the Court of Appeal as against the co-respondent. There should be no costs as between the petitioner and the respondent of the proceedings in this Court. The costs of the first trial as between the petitioner and the co-respondent and the costs of all parties of the new trial to be in the discretion of the trial judge before whom the same is heard.

RAND J.:—I agree with the reasoning and conclusion of my brother Locke that in an action for divorce on the ground of adultery the standard of proof is that required in a civil proceeding and I have only one observation to add. There is not, in civil cases, as in criminal prosecutions, a precise formula of such a standard; proof "beyond a reasonable doubt", itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation. But I should say that the analysis of persuasion made by Dixon J. in the High Court of Australia, in part quoted by my brother Cartwright, is of value to judges as illuminating what is implicit in the workings of the mind in reaching findings of fact. No formula of direction is here involved; instructions to juries are left exactly where they were; but it is at all times desirable to have these elusive processes progressively made more explicit.

CARTWRIGHT J.:—I agree with the conclusion of my brother Locke that in divorce proceedings in British Columbia the standard of proof in determining the issue whether adultery has been committed is the standard required in civil actions only.

It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be

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so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

I would like to adopt the following passage from the judgment of Dixon J. in *Briginshaw* v. *Briginshaw* (1):—

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

and the following from the judgment of Roach J.A. in *George* v. *George and Logie* (2):—

> The judicial mind must be "satisfied" that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal—be it judge or jury—acting with care and caution, to the fair and reasonable conclusion that the act was committed.

There is, I think, no difference between the law of British Columbia and that of Ontario in this matter.

In my opinion the tribunal of fact deciding an issue of adultery in a proceeding for divorce should be instructed in the sense of the above quoted passages, not because the standard of proof required differs from that in other civil actions but because the consideration entering into the formation of judgment which Dixon J. describes by the

(1) (1938) 60 C.L.R. 336. (2) [1951] 1 D.L.R. 278.

words "the gravity of the consequences flowing from a particular finding" assumes great importance in such a case.

I would dispose of the appeal as proposed by my brother Locke.

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Appeal allowed and new trial directed.

Solicitors for the Petitioner: *Shulman, Fouks & Tupper.*

Solicitor for the Co-Respondent: *A. E. Branca.*

Solicitor for the Respondent: *H. P. Wyness.*

AMANDA BENSON .....APPLICANT;

AND

EDWARD GORDON HARRISON .....RESPONDENT.

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*Jun. 4

*Jun. 10

Motion for leave to appeal in forma pauperis.

Appeal—Forma pauperis—Standard of means required under rule 142 of the Supreme Court of Canada.

In determining whether a person, on an application for leave to appeal to this Court in forma pauperis, is not worth $500 as required by rule 142 of the Supreme Court, the matter should be approached, not as an inquiry whether the person has actually $500 worth of property, but whether in the ordinary business judgment, it can be said that he is good for $500. Since this is an ameliorating rule, in weighing the considerations too delicate weights should not be used.

Kydd v. *The Watch Committee of Liverpool,* 24 T.L.R. 257 referred to.

MOTION by the applicant before Mr. Justice Rand in Chambers for leave to appeal in forma pauperis.

J. M. Coyne for the motion.

G. Perley Robertson contra.

RAND J.:—This is an application for leave to appeal in forma pauperis. Rule 142 requires the application to be accompanied by an affidavit that the applicant is not worth $500 "in the world" excepting his wearing apparel and his interest in the subject matter of the intended appeal. The applicant here was examined on her affidavit to that effect.

From the examination it appears that she is a widow with a son ten years old. She is in receipt of a war pension for herself of $100 a month, and for the boy of $40 a month

*PRESENT: Rand J. in Chambers.

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until he reaches 16 years of age. There are a few pieces of furniture, but nothing of any value. Living in Winnipeg, she rents four rooms at $30 a month. In February she was able to borrow $200 for clothes and to pay debts which she is now repaying in monthly instalments of $16. She owes about $200 in addition to that.

On these facts the question is whether she has shown that she is not worth $500. In determining that question, the matter should, I think, be approached, not as an inquiry whether the person has actually $500 worth of property, but whether, in the ordinary business judgment, it can be said that he is good for $500. That was the view taken by Buckley L.J. in *Kydd* v. *The Watch Committee of Liverpool* (1).

Can this applicant, then, be said to be "good" for $500? In answering that question, it cannot be overlooked that this is an ameliorating rule, and in weighing the considerations too delicate weights should not be used. In the best view I can give the matter, I think she has shown that she is not worth the amount fixed. Leave is therefore given.

The appeal will be allowed by serving notice of appeal within fifteen days from the taking out of this order.

Leave granted.

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(1) 24 T.L.R. 257.

HENRY MALANIK .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Apr. 22, 23
*May 12.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Murder—Drunkenness as defence—Capacity to form intent —Proper directions—Word "proved" should not be used in charge.

In a case where drunkenness is set up as a defence to a charge of murder, the trial judge should not use the word "proved", as taken from the third proposition formulated in *Beard's* case ([1920] A.C. 479 at 502), as Lord Birkenhead was not there dealing with the question of the burden of proof. The right direction in such cases appears at page 334 in *Mac Askill* v. *The King* ([1931] S.C.R. 330).

The charge, in the present case, which included the use of that word would be improper if it were not for the clear directions from the trial judge that the accused was entitled to the benefit of any reasonable doubt as to his capacity to form the necessary intent.

Director of Public Prosecutions v. *Beard* [1920] A.C. 479; *Mac Askill* v. *The King* [1931] S.C.R. 330; *The King* v. *Hughes* [1942] S.C.R. 517 and *Latour* v. *The King* [1951] S.C.R. 19 referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the conviction of the appellant on a charge of murder.

J. L. Crawford for the appellant. The defence of gross intoxication was not fairly presented to the jury and the evidence of drunkenness was unduly minimized. The decisions show that the trial judge must present the defence of the accused adequately and fairly to the jury, together with the evidence in support thereof. His presentation must insure the jury's appreciating (*a*) the nature and value of the evidence bearing upon the defence and (*b*) the full significance of the evidence as related to the essential questions of fact upon which guilt depends. Above all, the evidence in support of a defence must be presented to the jury as carefully as the case for the prosecution.

The trial judge neglected to tell the jury the limited purpose and use of evidence of character and criminal record which may have prejudiced the appellant. He should have instructed the jury that this evidence could only go towards the credibility of his testimony in the witness stand and was not proof of the charge against him.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

(1) 101 Can. C.C. 182.

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The trial judge misdirected the jury on the defence of drunkenness as affecting the capacity of the appellant to form the necessary intention to constitute murder. The jury should have been instructed that in order to find the accused guilty of murder they must (*a*) be sure beyond a reasonable doubt that the accused had the necessary capacity to be able to intend to commit murder; (*b*) that the crown had proved beyond a reasonable doubt that at the time the accused fired the gun, he intended to kill the deceased, or that he intended to inflict bodily injury which was known to the accused at the time he fired the shot to be likely to cause death and that the accused was reckless as to whether or not death ensued. *MacAskill* v. *The King* (1).

The trial judge erred in instructing the jury that the accused was presumed to intend the natural consequences of his act when in fact the presumption had been rebutted and no longer had any probative value against positive evidence of intoxication.

The trial judge erred in instructing the jury that a proved incapacity on the part of the accused to form the necessary intention was necessary in order that the jury would be able to find the accused guilty of manslaughter.

The trial judge erred in instructing the jury to the effect that an amnesic condition of the accused was necessary to find the appellant guilty of manslaughter.

W. J. Johnston for the respondent. The defence of gross intoxication was fairly presented and the evidence of drunkenness was not minimized. The trial judge dealt at length with that defence.

The reference to "a proved incapacity of forming the specific intent" was taken from the *Beard's* case (2), and it is quoted, adopted and followed by this Court in the *MacAskill* case (*supra*) and in *Latour* v. *The King* (3). The statement, itself, places no onus on the defence of proving incapacity and even if it could be said, that standing alone, without explanation, it might conceivably be so construed, the jury in the present case could not possibly have been under any such misapprehension. The trial judge made the statement only once in the whole course of his very

(1) [1931] S.C.R. 330.
(2) [1920] A.C. 479.
(3) [1951] S.C.R. 19.

long charge and followed it immediately by pointing out that "if on any point whatever, you have a reasonable doubt, that doubt must be resolved in favour of the accused".

In his charge the trial judge referred to the question of amnesia on three occasions but he did so only in so far as it was necessary in order to place before the jury a clear picture of the defence put forward by the appellant in his evidence. This question of amnesia was raised by the accused's evidence as part of his defence.

As to the ground of dissent stating that the intention to shoot does not necessarily import capacity to commit murder and to so instruct the jury was misdirection, it is submitted that the jury could not but appreciate and understand that the question for their consideration was: Did the accused have the capacity to form an intent to kill or the capacity to form an intent to do grievous bodily injury together with the capacity to know that death would be likely to ensue therefrom.

The jury were instructed in clear and unequivocal terms that they were not trying the accused on his relationship with the Kafkas but solely on the charge of murder and that in considering the truthfulness of the accused's evidence they could have regard for the evasiveness of his answers with respect to the Kafkas situation. It is true that the trial judge did not, in express words, instruct the jury that the accused's record could not be considered by them for any other purpose than in judging his truthfulness, but having dealt with it solely on the issue of credibility and in view of the comparative insignificant nature of the conviction, the omission to do so was not such an error as would mislead the jury.

On the evidence presented at the trial any reasonable jury would be entitled to find that the accused fired the gun and that prior to the shooting he had consumed a considerable quantity of liquor. The only question of substance that remained for consideration was the effect of the alleged intoxication of the accused on his capacity to form the intent necessary to the crime of murder, and there was ample evidence from which any jury could find that there was no reasonable doubt as to the accused's capacity to have that intent.

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The instruction that a man is presumed to intend the natural consequences of his act was normal and proper. The appellant, however, contends that it should not have been given in view of the evidence of intoxication which might have negatived the accused's capacity to have the intent therein referred to. It is submitted on behalf of the respondent that the trial judge effectively guarded against any such error by immediately instructing the jury that the presumption would cease to apply in the event that there was any reasonable doubt as to the accused's capacity or, to put it another way, that the presumption applied only if they first found capacity in the accused beyond all reasonable doubt.

While there may have been some minor defects in the charge, none of them were of such a nature as could be regarded as having worked undue hardship or prejudice upon the accused. The verdict was reasonable and no miscarriage of justice occurred. *Schmidt* v. *The King* (1).

The judgment of the Court was delivered by:—

KERWIN J.:—The appellant's conviction of having murdered Detective Sergeant Sims in Winnipeg was set aside by the Court of Appeal for Manitoba on the ground of misdirection and non-direction but, on the new trial ordered by that Court, he was again convicted. An appeal from that conviction to the Court of Appeal (2) was dismissed, Adamson J.A. dissenting, and, upon the six grounds of dissent taken by the latter, the appellant now asks this Court to set aside the conviction for murder and substitute one for manslaughter.

Sims died as a result of a shot fired by the appellant from the latter's own shot-gun. This was not denied and the main defence was that of drunkenness. The sixth ground of dissent is:—

> 6. In view of the cogent evidence of drinking and intoxication, no reasonable jury properly instructed could find that there was not a reasonable doubt as to the mental capacity of the accused to have the intent necessary to the crime of murder.

In view of the result at which we have arrived, we are not concerned with this ground if it means merely that the dissenting judge would not only have set aside the con-

(1) [1945] S.C.R. 438. (2) 101 Can. C.C. 182.

viction but would have directed a verdict of manslaughter to be entered. If, however, it means that there was nothing to go to the jury upon which they could find the appellant guilty of murder, we are satisfied that there was such evidence. It need not be detailed as it appears sufficiently in the reasons for judgment of Coyne J.A.

The other five grounds of dissent are:—

1. The defence of gross intoxication was not fairly presented and the evidence of drunkenness was unduly minimized.

2. It was misdirection to require a "proved incapacity of forming the specific intent". This cast an improper onus on the accused.

3. The suggestion that something approaching amnesia was necessary to reduce the offence to manslaughter was misdirection.

4. Intention to shoot does not necessarily import capacity to commit murder and to so instruct the jury was misdirection.

5. The neglect to tell the jury the limited purpose and use of evidence of character and criminal record may have been prejudicial.

In connection with the first four, it will be recalled that this was a second trial granted because of certain objections to the charge to the jury on the first trial. The matters to be considered were, therefore, present to the minds of all concerned and not least to the learned Chief Justice of the King's Bench presiding at the new trial. In his charge he not only dealt with the defences put forward on behalf of the accused but also with others that he considered might possibly be open on the evidence. That, indeed, as has been pointed out on many occasions, was his duty. Throughout his charge he made it plain to the jury many times that the accused was entitled to the benefit of any reasonable doubt they might have as to whether the Crown had proved all the elements necessary to constitute the crime of murder. In addition to this, at the request of counsel for the accused, he recalled the jury and practically his last words to them were: "If in your considerations you come to any point whatever where you have a reasonable doubt on that point, it must be resolved in favour of the accused."

As to dissent No. 1, in dealing with the evidence of drunkenness, the trial judge drew to the jury's attention everything that counsel was able to point out to us had been said in evidence, with the one exception that while the trial judge mentioned the evidence of Dr. Burland at the time of the admission of the accused to the hospital, he

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did not refer specifically to what Dr. Burland said as to the accused's condition about five hours later. With this exception, everything relied upon by the accused in order to show his drunkenness at the time of the occurrence was specifically mentioned by the trial judge. The real complaint of the accused seems to be that the trial judge did not endorse all that had been said upon the question of drunkenness but we have no doubt that the defence was fairly presented and that the evidence of drunkenness was not minimized.

Dissent No. 2 refers to the passage in the charge where the trial judge stated to the jury:—

> Evidence of drunkenness falling short of a proved incapacity of forming the specific intent necessary to constitute the crime and merely establishing that the accused's mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.

This is taken from the third proposition formulated by Lord Birkenhead in *Director of Public Prosecutions* v. *Beard* (1). The specific objection is to the word "proved". *Beard's* Case is referred to in *MacAskill* v. *The King* (2), *The King* v. *Hughes* (3) and *Latour* v. *The King* (4). While it is quite true that section 260(*d*) of the *Criminal Code* was added in 1947 as a result of the decision in the *Hughes* case, the point upon which reference is now made to that decision is of importance in considering the present appeal. It was there pointed out that in *Beard's* Case it was proved that there was a violent struggle in which the accused overpowered the child and stifled her cries by putting his hand over her mouth and pressing his thumb upon her throat, the acts which, in her weakened state resulting from the struggle, killed her. This, the House of Lords held, was murder, although the accused had no intention of causing death. There was no question that the act which caused the suffocation, the act of the prisoner in placing his hand on the mouth of the victim, was his voluntary act. In the *MacAskill* case it was pointed out at page 334 that the right direction in cases involving subsection (*b*) of section 259 of the *Code* is that evidence of drunkenness rendering the accused incapable of the state

(1) [1920] A.C. 479.
(2) [1931] S.C.R. 330.
(3) [1942] S.C.R. 517.
(4) [1951] S.C.R. 19.

of mind defined by that subsection may be taken into account with the other facts of the case for the purpose of determining whether or not in fact the accused had the intent necessary to bring the case within that subsection; but that the existence of drunkenness not involving such incapacity is not a defence. In such cases that has the effect of altering the words "a proved" in proposition 3 in *Beard's* case to "an existing" or some similar expression. In fact, Lord Birkenhead in proposition No. 3 was not dealing with the question of burden of proof. Notwithstanding that it was used in the present case, there is no doubt the learned Chief Justice was not directing the jury on a question of onus and that that is so is made abundantly clear by those parts of his charge that precede and follow the extract given above. It is not a question of there being a defect in the charge but of the charge as a whole being proper and being delivered in such a form that the jury could not possibly misunderstand that the onus throughout remained upon the Crown. Lord Birkenhead's third proposition is also set out in the *Latour* case at page 29 but at that point the question of onus was not being specifically dealt with. In order to avoid any misunderstanding, we think it proper to state unequivocally that a trial judge should not use the word "proved" in his charge in any case where drunkenness is set up as a defence to a charge of murder. Such a charge would be improper in the absence of clear directions, such as exist in the present case, that the accused is entitled to the benefit of any reasonable doubt as to the capacity of the accused to form the necessary intent.

As to dissent No. 3, Adamson J.A. suggested that the charge indicated that something approaching paralysis of the mind was required before the absence of capacity to form the necessary intention can be found. We must say that we are unable to discover any such indication.

Dissent No. 4 is that at two stages of his charge the trial judge directed the jury that capacity to intend to shoot was sufficient to constitute an intention to commit murder. The first quotation made by the dissenting judge is as follows:—

> Gentlemen, it is on that evidence that you have to come to the conclusion as to whether the accused at the time he fired that gun at Sims was capable of forming an intent to shoot the man who was in front of him. Remember that it didn't have to be Sims. He didn't have

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to know Sims. The question is, Was he capable of forming an intent to shoot the human being in front of him when he fired that shot? There is no question of motive in this case. Was he capable of forming an intent to shoot Sims, not Sims as Sims, not Sims as Detective Sims, but Sims as the human being that was standing before him in that room at the time he fired? If you come to the conclusion that he wasn't, then he is guilty of manslaughter.

However, this must be read in connection with what immediately follows:—

If you come to the conclusion that he was capable of forming that intent, that he intended to shoot that human being in front of him, then he is guilty of murder, subject to provocation or self-defence, and I will deal with those very briefly afterwards. If, on the other hand, you have to go further: If you find that he had an intent but if you decide that being capable of forming an intent his intent wasn't to kill the man, you must ask yourselves, Being capable of forming an intent, was his intent to do grievous bodily harm to that man, knowing and being capable of knowing that what he did was likely to result in death and being reckless as to whether death ensued or not?

The second quotation reads—

What you have to decide on this question of drunkenness is, Was the accused in such a state of drunkenness that he was unable to form an intent to shoot that gun that night, that is, to commit the crime with which he is charged? But if in your consideration of that question you have any reasonable doubt, that is, for instance, if in considering the evidence of the accused you feel that it might be true, that you have the impression in your minds that it might be true, then that would raise a reasonable doubt in your minds. Always, the benefit of the reasonable doubt must be given to the accused.

Again, there must be added to that what immediately follows:—

But if you come to the conclusion, after studying all the evidence, that there was a capacity to form the intention to fire that shot at that human being, then you ask yourselves, first of all, When he fired it did he intend to kill? If he did, the matter stops there. But if when he fired it he didn't intend to kill but intended only to do grievous bodily harm, then did he also have the capacity to know that death would be likely to ensue from that grievous bodily harm and was reckless.

Upon reading the whole of the charge, and particularly what followed each of the quotations appearing in the dissenting judgment, it is made abundantly clear that the trial judge was not giving any such direction as was suggested.

The only remaining ground of dissent is No. 5. The jury were instructed that they were not trying the appellant on his relationship with the Kafkas but only on the charge of murder, *and that in considering the truthfulness of the*

appellant's evidence, they could have regard to the evasiveness of his admissions with respect to the Kafkas situation. The trial judge made but one reference to a previous conviction of the appellant of firing a gun in the City of Winnipeg, and then only in connection with the latter's credibility. The evidence of the appellant's character and of the previous conviction was thus referred to only on the question of credibility.

The appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Munson & Crawford.*

Solicitor for the respondent: *Hon. C. Rhodes Smith.*

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*Jun. 4
*Jun. 30

GORDON E. THOMAS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Corroboration—Rape—Complaint—Evidence.

The appellant, charged with rape, admitted that he had had intercourse with the complainant, but swore that it had been with her consent, which she denied saying that she had only submitted to it in fear of bodily harm. His conviction was upheld by the Court of Appeal for Ontario.

Held: There should be a new trial; since the jury had not been properly instructed on the question of corroboration and as to the limited use that may be made of the evidence of complaint, it was impossible to say that if it had been properly instructed it would necessarily have convicted the appellant.

Held: The corroboration to be sought was of the complainant's testimony that she did not consent but only submitted in fear of bodily harm. In a case of this sort, when there is any evidence on which a jury could find corroboration, the jury should be directed as to what is necessary to constitute corroboration and it is then for the jury to say whether corroborative inferences should be drawn. It was not, in the present case, made plain to the jury (i) that corroboration could be found only in evidence independent of the testimony of the complainant and of such a character that it tended to show that her story on the vital question of consent was true, and (ii) that facts, though independently established, could not amount to corroboration if, in the view of the jury, they were equally consistent with the truth as with the falsity of her story on this point.

Held: It was not made clear to the jury that in a case where a sexual offence is charged, evidence of the making of a complaint is not corroborative of the testimony of the complainant. Where corroboration is required either by statute or under the rule of practice at common law, the corroborative evidence must be shown to possess the essential quality of independence. It must be made plain to the jury that the witness whose testimony requires corroboration can not corroborate herself. (*Rex* v. *Auger* 64 O.L.R. 181 and *Rex* v. *Calhoun* [1949] O.R. 180 ought not to be followed on that point).

Held: There was failure to instruct the jury of the limited use that may be made of the evidence of the complaint and to warn them against treating the complaint as evidence of the facts complained of.

The King v. *Baskerville* [1916] 2 K.B. 658; *The Queen* v. *Lillyman* (1896) 2 Q.B. 167; *Rex* v. *Evans* 18 C.A.R. 123; *Rex* v. *Coulthread* 24 C.A.R. and *Rex* v. *Whitehead* [1929] 1 K.B. 99 referred to.

APPEAL from the judgment of the Court of Appeal for Ontario (1) upholding the conviction of the appellant on a charge of rape.

*PRESENT: Kerwin, Taschereau, Kellock, Locke and Cartwright JJ.

(1) 100 Can. C.C. 112.

A. E. Maloney for the appellant. On the first question, it is a fatal error to fail to define corroboration to a jury in a case of this nature since there is a danger that the jury might well have regarded some item of evidence as being corroborative which is not capable of being such in law: *Rex* v. *Zielinski* (1), *Rex* v. *Yott* (2) and *Rex* v. *Hong Suey* (3).

In connection with some of the matters which the jury might have regarded as corroborative but which are not capable of being so in law, the following cases are referred to: *Rex* v. *Hubin* (4), *Rex* v. *Yates* (5), *Rex* v. *Gemmill* (6).

It is no answer to this contention to say that there is otherwise in the record ample evidence capable of corroborating the evidence of the complainant, because the jury might well have failed to regard it as such and might not have seen fit to act upon it: *Rex* v. *Ross* (7), *Rex* v. *Hubin* (*supra*).

On the second question, it is submitted that due to the failure to define corroboration, it might well be that the jury may have regarded the complaint to the husband as being corroboration of her testimony. A complaint made in a sexual case is not capable in law of being corroboration, which term is defined in *Rex* v. *Baskerville* (8). It is not corroboration because it lacks the essential quality of independence. It must serve to confirm not only that a crime has been committed but also the identity of the accused as the person who committed it. Independent means that it must emanate from some source other than the complainant or the witness whose testimony requires corroboration. Thus in a case of rape where the defence is consent, the offender's admission that he had carnal connection is sufficient corroboration of the complainant's testimony identifying the accused as the person with whom she had relations. However, it then becomes necessary to search the record for independent evidence to corroborate her testimony of non-consent. The following cases are

(1) 34 C.A.R. 193.
(2) 85 Can. C.C. 19.
(3) 96 Can. C.C. 346.
(4) 48 Can. C.C. 179.
(5) 85 Can. C.C. 334.
(6) 43 Can. C.C. 360.
(7) 18 C.A.R. 141.
(8) 12 C.A.R. 81.

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referred to: *Rex* v. *Evans* (1), *Rex* v. *Coulthread* (2), *Rex* v. *Whitehead* (3), *Rex* v. *Osborne* (4), *Reg.* v. *Lillyman* (5) and *Rex* v. *Lovell* (6).

Because of the completely inadequate directions on the third question, it may well be that the jury wrongly thought that they could regard the complaint as evidence of the truth of the facts it contained: *Reg.* v. *Lillyman* (*supra*), *Rex* v. *Osborne* (*supra*) and *Rex* v. *Hill* (7).

W. B. Common Q.C. for the respondent. The failure of the trial judge to define corroboration could have had no practical result. The term as understood by laymen is self-explanatory. Reference by the judge to all the circumstances in the evidence, which in law were corroboration of non-consent, had the same effect as if he had in fact defined the term. In the light of the evidence and the manner in which the evidence of non-consent was left to the jury, it cannot be said, that, had the term been exhaustively defined the jury could not have reached the same conclusion: *Rex* v. *Coulthread* (2) and *Rex* v. *Zielenski* (8).

It is a well established principle of law that in cases involving a charge of rape, the evidence of complaint is not evidence of the facts complained of, nor as being a part of the *res gestae,* but as evidence of the consistency of the conduct of the complainant with the story told by her in the witness box, and that what was done, was done without her consent. It has been said that evidence of a complaint is corroboration of the credibility of the complainant and where consent is an issue it is corroborative of her evidence that she did not consent: *Rex* v. *Osborne* (4). It must be noted that nowhere does the trial judge categorically instruct the jury that the evidence of complaint is to be treated by them as corroboration of her story, or even as to her non-consent; furthermore, no proper inference can be drawn from the charge that the complaint can be treated by the jury as corroboration of all the evidence of the complainant. If, however, it might

(1) 18 C.A.R. 123.
(2) 24 C.A.R. 44.
(3) [1929] 1 K.B. 99.
(4) [1905] 1 K.B. 551.
(5) (1896) 2 Q.B. 167.
(6) 17 C.A.R. 168.
(7) 49 Can. C.C. 161.
(8) 34 C.A.R. 193.

be inferred that the judge had left it to the jury that the complaint could be treated as corroboration of her evidence and as to her non-consent, it was only in a limited sense that the term was so used.

The term "corroboration" as defined in *Rex* v. *Baskerville* (1) has not necessarily the same implications when used in connection with the effect of the evidence of a complaint in cases of rape. In cases requiring corroboration by statute or common law, the term implies that not only was there evidence tending to prove that the crime was committed, but in addition, that it was committed by the accused or that the accused was a party to its commission. In the wide sense of the term, corroboration connotes an aspect or quality of independence, but where the term is used in relation that the complaint is in corroboration of the complainant's testimony, it simply means that the complaint not only shows a consistency of conduct, but it may confirm her evidence as to non-consent. The quality of independence, of course, cannot be established, and consequently it is in this limited sense that the evidence of complaint by its very nature confirms or corroborates the credibility of the complainant and her evidence as to non-consent.

When the term in this sense is used it means that the complaint adds an additional quality to the character of the complainant's evidence, and consequently her evidence is more worthy of credit than if her testimony stood alone. In this sense the complaint is corroboration.

In *The Queen* v. *Lillyman* (2), it was put that the test is whether according to the principles of the exception, her having made the complaint tends to corroborate testimony given by the child at the trial.

In our Courts it has been held that it is not misdirection to the jury in a rape case to tell them that the complaint may be taken as evidence negativing consent and in corroboration of its absence: *Rex* v. *Calhoun* (3) and *Rex* v. *Auger* (4).

(1) 12 C.A.R. 81.
(2) (1896) 2 Q.B. 167.
(3) 93 Can. C.C. 289.
(4) 64 O.L.R. 181.

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In *Rex* v. *Coulthread* (1), the term was used in its widest sense, and left the impression with the jury that the complaint was independent testimony that not only that the offence had been committed but that the accused had committed it. No such language is to be found in the case at bar.

It is conceded that the trial judge omitted to instruct the jury on the limited use that could be made of the complaint and that the complaint should not be regarded as proof of the facts it contained, but what he did say could not be interpreted that they were to take it as conclusive evidence that the offence had been commited by the accused or that there was non-consent. The language can only be interpreted as conveying that a complaint in proper circumstances gives "greater probability" to her evidence or corroborates or confirms her credibility as to non-consent. However, on this ground, had the jury been properly instructed, they could have reached no other conclusion. *Rex* v. *Coulthread* (*supra*).

Furthermore, on the facts as disclosed by the evidence, and on the charge taken as a whole, there has been no substantial wrong or miscarriage of justice.

The judgment of the Court was delivered by:—

CARTWRIGHT J.—This is an appeal from a judgment of the Court of Appeal for Ontario (2) dismissing an appeal from the conviction of the appellant before Treleaven J. and a jury on a charge of rape.

The appeal is brought pursuant to an order of my brother Kellock granting leave to appeal on the following questions of law:—

1. The Court of Appeal erred in failing to find that the learned trial judge had erred in failing to define corroboration to the jury.

2. The Court of Appeal erred in failing to find that the complaint made by the complainant in this case as in any sexual case is not capable as a matter of law of being corroborative of the complainant's testimony because it lacks the essential quality of independence.

3. The Court of Appeal erred in failing to find that the learned trial judge had erred in failing to instruct the jury of the limited use that could be made of the evidence of the complaint made by complainant to her husband and particularly he erred in failing to instruct the jury that the complaint must not under any circumstances be regarded by them as proof of the truth of the facts it contained.

(1) 24 C.A.R. 44. (2) 100 Can. C.C. 112.

The following summary of the evidence is taken with some modifications and additions from the reasons for judgment of Roach J.A. who delivered the unanimous judgment of the Court of Appeal (1).

The appellant is unmarried and twenty-one years of age. The complainant is a married woman, thirty-five years of age, living with her husband and three children in the city of Hamilton.

In the evening of Tuesday, October 24, 1950, the complainant, accompanied by a woman friend, attended a theatre in downtown Hamilton. After the show they went to a cocktail lounge, where they had something to eat and the complainant had two drinks of whiskey. After leaving the cocktail lounge about 12.45 o'clock, the friend boarded a bus to go home and the complainant waited on the street corner for a bus that would take her to her home. The appellant, driving his father's car, came to the corner and, seeing the complainant, stopped and beckoned to her and suggested he would drive her home. The complainant at first demurred but shortly accepted the invitation and entered the car. The appellant drove her to the front of her home, where he stopped. According to the complainant, she sought to leave the car promptly but the appellant suggested there was no hurry, grabbed her by the wrist and set the car in motion. As the car rounded the nearby corner, she screamed, leaned over and blew the horn with her free hand, and then grabbed the steering wheel. In the scuffle, the car went up over a neighbour's lawn. The appellant straightened it out onto the highway and drove at a considerable speed along a course that finally led to a lonesome section on the Hamilton Mountain. During the journey, according to the complainant, she protested that she wanted to go home and she started to cry. The appellant told her to stop crying and sit still. The car was travelling at such a speed that she was afraid to jump out.

The complainant testified that when the appellant finally stopped the car, she said that she was going to get out and attempted to open the door. Thereupon the appellant grabbed her and pulled her toward him. According to her, she pulled his hair and bit his face, and he then

(1) 100 Can. C.C. 112.

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swore at her and said "I'll fix you", grabbed her by the throat with one hand and started to choke her. She pleaded with him, and finally he released his grasp upon her throat and made it plain that he intended to have sexual intercourse with her. By that time she was terrified and yielded in fear of further violence saying to him "I guess I have no choice".

When the act was completed the appellant drove her home, stopping the car at her request at a well-lighted intersection two and a half blocks from her house. The complainant stated that when he stopped the car, or shortly before he stopped it, he turned out the lights but this the appellant denied. As she left the car, she attempted to get the number of the license but succeeded in getting only some of the digits in it.

When the complainant entered her home her husband, although in bed, was still awake. The husband testified, that the complainant was sobbing, her hair was disarrayed, her dress was askew, there were two small scratches on her chest and her throat was very red from ear to ear. He asked her "What is the trouble?" to which she replied "I have just got myself in a jam". He then said "What has happened?" to which she replied "A young chap picked me up and brought me home and he then started up in his car quick and took me out in the outskirts of the city and I have been raped."

The appellant, in his evidence, admitted that the complainant had grabbed the steering wheel of the car as he was first leaving her home. He admitted that when they arrived at the lonely spot on the mountainside, he made it plain that he desired to have sexual intercourse with her. He testified that at first she faintly demurred and he possibly used some bad language toward her, but that she finally agreed and that the act took place with her full consent and co-operation. He denied using either threats or violence.

There was some conflict of evidence as to what conversation occurred between the time when the complainant said "I guess I have no choice" and the completion of the act of intercourse. She admits having said to the appellant "You seem to have a lot of experience". He deposed that he had asked her whether he should use a contraceptive

and that she said "No". The complainant was called in reply and asked whether any conversation such as that last mentioned took place. Her reply was "No, I don't recall any".

On Wednesday, October 25, according to the complainant's husband, instead of communicating with the police, he started out himself to try to locate the car, part of the license number and the description of which his wife had given him. He was unsuccessful.

On Thursday, October 26, the husband and wife were in downtown Hamilton together, shortly after the noon hour, and, by coincidence, the wife saw the appellant on the street and pointed him out to her husband. Together they approached the appellant. Some conversation took place between the husband and the appellant, during which the latter denied ever having seen the complainant. The appellant stated, among other things, that Police Constable Larson could account for his whereabouts on the Tuesday night, and the husband and wife and the appellant started for the police station. On the way, a police cruiser, in which were Police Constable Larson and another officer, drove along and stopped, and the husband entered into a discussion with them that resulted finally in the three of them getting into the cruiser with the police constables to go to a parking lot where the appellant said his father usually parked his car. In the parking lot, the complainant identified a car as being the one in which she had been driven and the appellant admitted it was the one he was driving on the night in question.

The appellant was then taken in custody to the police station. There, after a caution was administered to him, he made a statement in which he stated where he had been and what he had been doing from about 3.00 o'clock on the afternoon of Tuesday, October 24, until he went to bed at his home shortly after midnight. This statement contained no reference to his meeting with the complainant or being in her company. It was reduced to writing and signed by the appellant.

After about two hours further interrogation by the police, which further interrogation, according to the evidence of the police constables, was prompted by the fact that they did not believe what the appellant had said in his

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first statement, the appellant made another statement in which he did account for his meeting with the complainant on the street corner, their drive, first to the front of her home, and later to the lonely spot where he had sexual intercourse with her with her consent. Both these statements were admitted in evidence at the trial. I, of course, express no opinion as to whether or not they would be admissible at a new trial as that question is not before us.

In August 1949 the complainant had undergone a hysterectomy. She had recovered her normal health but testified that she could not become pregnant.

From the above recital it at once becomes obvious that the appellant had carnal knowledge of the complainant at the time and place alleged by the Crown and that the only substantial question before the jury was whether this was done either without her consent or with consent which had been extorted by threats or fear of bodily harm.

The only portion of the charge of the learned trial judge which is relevant to any of the three points before us is as follows:—

> There are two other principles of law applicable to a case of this kind which I must mention to you. One is that it is dangerous to convict in a case of this kind on the uncorroborated evidence of the complainant. Now, when I say it is dangerous, that is what I mean. If you are satisfied of the truth of the story of the complainant, and do not believe the story of the accused, you may, notwithstanding corroboration or lack of it, make your finding accordingly; but for a long time it has been considered dangerous to convict on uncorroborated evidence. Of course, I am not saying that in this case there is not corroboration, and I will mention what is brought forward here as corroboration in a moment when I come to deal with the evidence. There is corroboration as to the identity of the accused, because he admits the carnal knowledge; there is no difficulty there; but on the question of corroboration as to whether there was consent or not, there is evidence—it is for you to say what weight you give to it, and if you believe it—the redness of the neck, the scratches on the chest, the dishevelled condition of the clothes, the sobbing of the wife when she got home, the mark or marks on her wrist—depending, of course, gentlemen, on what you believe about it, but there is evidence which if you believe it to be true I would think you might accept as corroboration of her story.
>
> One other thing: It is the duty of a woman who has been sexually attacked, raped or attempted rape, to complain of the offence at the first reasonable opportunity. Unless it is the first reasonable opportunity, probably the evidence would not be admitted at all as a matter of law, but here, if you accept the evidence, the complainant as soon as she got home told her husband that she had been raped, and he saw the marks on her neck and chest and I think at that time her wrist. But there is

the evidence which is before you for consideration as to whether she complained at the first reasonable opportunity or not. The weight to be attached to it, gentlemen, is for you.

It will be convenient to deal with the grounds of appeal in the order set out above.

As to the first point, it is a well settled rule of practice at common law that in cases of rape while the jury may convict on the uncorroborated evidence of the prosecutrix the judge must warn them that it is dangerous to do so and may in his discretion advise them not to do so. In the case at bar no exception is taken to the manner in which the learned trial judge warned the jury of this danger. What is complained of is his failure to explain to them what is meant by the term corroboration. In my opinion this ground is well taken. I do not think it necessary to refer to authorities other than the classic statement of the Court of Criminal Appeal in *The King* v. *Baskerville* (1):

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, "implicates the accused", compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

This decision has been repeatedly approved and acted upon by this Court. See, for example, *Hubin* v. *The King* (2), particularly at page 444 and *MacDonald* v. *The King* (3).

(1) (1916) 2 K.B. 658 at 667. (2) [1927] S.C.R. 442.
(3) [1947] S.C.R. 90 at 96, 97.

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In the case at bar there was no question as to whether if a crime was committed it was committed by the appellant. The question was whether or not a crime had been committed at all. The corroboration to be sought was of the complainant's testimony that she did not consent to the act of intercourse but only submitted to it in fear of bodily harm.

As there is to be a new trial I do not think it desirable to discuss the evidence with a view to attempting to make a list of those items in which it would have been open to a properly instructed jury to find corroboration. The judge who presides at the new trial will be dealing with the evidence then given and in my opinion should do so unhampered by anything that has been said in the courts below with regard to any particular item of evidence given at the first trial. It is the duty of the judge in a case of this sort, when there is any evidence on which a jury could find corroboration, to direct the jury as to what is necessary to constitute corroboration and it is then for the jury to say whether corroborative inferences should be drawn. In the case at bar to enable the jury to deal with this question it was essential that it be made plain to them (i) that corroboration could be found only in evidence independent of the testimony of the complainant and of such a character that it tended to show that her story on the vital question of consent was true, and (ii) that facts, though independently established, could not amount to corroboration if, in the view of the jury, they were equally consistent with the truth as with the falsity of her story on this point. These matters were not explained to the jury.

I do not understand the reasons of Roach J.A. as differing from the view that the jury should have been so instructed. The learned Justice of Appeal was however of opinion that the omissions in the charge in this regard were overcome by what the learned trial judge said to the jury, in the passage from his charge quoted above, by way of illustration of what might in the case at bar amount to corroboration. With respect, I am unable to agree. I am not satisfied that the jury would understand, for example, that the evidence of the complaint must not be regarded as

corroboration, and I find nothing in what was said which would bring home to them that evidence to be corroborative must possess the essential quality of independence.

As to the second point, while I do not understand the learned trial judge to have intended to charge the jury that they might treat the evidence of the complaint as corroborative of the complainant's testimony, I think it was not made clear to them that they must not so regard it. I am of opinion that in cases where a sexual offence is charged, evidence of the making of a complaint is not corroborative of the testimony of the complainant in the sense in which the term corroborative is used in the passage from *The King* v. *Baskerville* quoted above. The ground upon which evidence of the making of a complaint is admitted and the limited purpose for which such evidence can be legitimately used are clearly stated in *The Queen* v. *Lillyman* (1). I refer particularly to the following passage at page 177:—

. . . . The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it?

In his reasons Roach J.A. quotes the following passage from *Rex* v. *Osborne* (2):

. . . . Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent.

This passage is correctly explained by Hewart L.C.J. speaking for the Court of Criminal Appeal in *Rex* v. *Lovell* (3), as follows:—

. . . . It is quite true, if one looks at particular passages in the judgment in *Osborne*, it might seem, as far as mere words are concerned, as if the judgment went beyond the judgment in *Lillyman*. But that is probably

(1) (1896) 2 Q.B. 167. (2) [1905] 1 K.B. 551 at 561.
(3) (1923) 17 C.A.R. 163 at 168.

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not the correct view. When, for example, the words are used, as they are at page 561 of the report, "corroborative of the complainant's credibility", nothing more is really meant than what is spoken of in *Lillyman* in the words: "The consistency of the conduct of the prosecutrix with the story told by her in the witness box."

It is to be observed that in *Rex* v. *Osborne* (*supra*) the question whether the evidence of complaint was capable of being treated as corroboration of the complainant's testimony did not arise and was not decided. As appears at page 553 of the report the chairman had told the jury that the only corroboration of the girl's story was the statement of the prisoner at the police station.

If and in so far as the judgment of Middleton J.A. in *Rex* v. *Auger* (1), and particularly at page 184, decides that evidence of a complaint is corroborative of the complainant's testimony in the sense in which the word is used in *The King* v. *Baskerville* or that evidence which would not serve as corroboration in a case where corroboration is required by statute might do so in cases falling within the rule of practice at common law, it is at variance with the judgment in Baskerville and ought not to be followed.

I venture to think that the difficulty in reconciling the statements in some of the decisions arises from the fact that, in common parlance, the word "corroborate" has not a single or precise meaning. Since the decision in *Baskerville,* and its approval and adoption in this Court referred to above, it is no longer open to doubt that before evidence can be properly described as corroborative in cases where corroboration is required either by statute or under the rule of practice at common law it must be shewn to possess the essential quality of independence. It must be made plain to the jury that the witness whose testimony requires corroboration can not corroborate herself. I do not think it necessary to multiply authorities and will refer only to the following:—In *Rex* v. *Evans* (2), Hewart L.C.J. speaking for the Court of Criminal Appeal said:—

> It has been pointed out again and again in these cases that evidence of a complaint by the prosecutrix is not corroboration of her evidence against the prisoner. It entirely lacks the essential quality of coming from an independent quarter.

(1) 64 O.L.R. 181.

(2) (1924) 18 C.A.R. 123 at 124.

In *Rex* v. *Coulthread* (1), Avory J., with the concurrence of Lord Hewart C.J. and Branson J., said at page 48:—

. . . . Undoubtedly that statement that the things which were said in the morning might be treated as corroboration of the boy's story is in direct conflict with the view of this Court, expressed in more than one case, that a complaint of this sort, though it may be evidence of the consistency of the complainant's story is not corroboration in the proper sense in which that word is understood in cases of this kind.

In *Rex* v. *Whitehead* (2), Lord Hewart C.J., delivering the judgment of the Court, said at page 102:—

. . . . Any such inference as to what the girl had told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself; it was merely the girl's story at second hand. In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated.

Rex v. *Whitehead* was accepted as correctly stating the law in this regard in the judgment of Bowlby J.A. in *Rex* v. *LeBrun* (3). The other members of the Court of Appeal, Roach and Hogg, JJ.A., agreed with Bowlby J.A. If and in so far as the judgment of the Court of Appeal for Ontario in *Rex* v. *Calhoun* (4) expresses the view that evidence of a complaint may be treated as corroboration of the testimony of the complainant within the meaning of the term corroboration as explained in *The King* v. *Baskerville* it must be regarded as over-ruled. I do not mean by this to suggest that the actual result reached in that case was wrong.

As to the third point I am of opinion that the learned trial judge erred in failing to charge the jury as to the limited use that could be made of the evidence of the complaint. The importance of so doing and of warning the jury against treating the complaint as evidence of the facts complained of has been stressed in many cases. I will refer only to the following passage in *Regina* v. *Lillyman* (*supra*) at page 178:—

It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury they would naturally so treat it. But it never could be legally so left; and we think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated.

(1) (1933) 24 C.A.R. 44.
(2) [1929] 1 K.B. 99.
(3) [1951] O.R. 387 at 399.
(4) [1949] O.R. 180.

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In conclusion it is necessary to consider the submission of counsel for the respondent that even if we should find that there was error in law as to any or all of the grounds of appeal argued before us we should apply the provisions of section 1014(2) of the *Criminal Code* and dismiss the appeal. After a perusal of the complete record I find myself quite unable to say that a reasonable jury after being properly directed would necessarily have convicted the appellant.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal allowed; new trial directed.

Solicitors for the appellant: *Edmonds & Maloney.*

Solicitor for the respondent: *W. B. Common.*

THE WORKMEN'S COMPENSATION BOARD ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY CO. .....

AND

MARILYN ANN NOELL ..... RESPONDENTS.

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*April 28, 29, 30

*June 30

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

Workmen's Compensation—Accident—Waitress injured diving in hotel swimming pool during off-duty hours—Whether accident arose out of and in the course of employment—Application for compensation filed by employer on behalf of infant employee and others interested within limitation period; ratified by infant on attaining majority—Whether application filed in time—Whether any person interested entitled to adjudication by Workmen's Compensation Board—Workmen's Compensation Act, 1932 (N.B.) c. 36, ss. 12, 16, 33, 41.

The respondent Noell, a 19-year-old student, was employed by the respondent, the Canadian Pacific Ry. Co., for the summer of 1949 as a waitress at the company's hotel at St. Andrews, N.B. In common with other students similarly employed she was permitted the use of a private bathing beach owned by the hotel. When not on duty, she was free to leave the premises and go where she pleased. Following the serving of breakfast on June 23, 1949, she was told she would not be required until 5 p.m. While so excused she proceeded to the private bathing beach for a swim and in diving from a float struck bottom and suffered serious and permanent injuries.

The accident was reported to the Workmen's Compensation Board by the C.P.R. in October, 1949, and on June 22, 1950, it submitted a further report, together with an application for an adjudication, binding on all interested parties including N, that the accident was one covered by the Workmen's Compensation Act (1). The Board ruled that it was unable to consider the report submitted as being a claim made by N. and would take no action to deal with it as such. On Jan. 2, 1951, N. in a communication to the Board setting out that she was then of age, purported to adopt as a claim for compensation the application made by the C.P.R. except as to any differences there might be in the answers made in that application and the one now enclosed with her letter. N.'s application was disallowed whereupon the C.P.R., pursuant to s. 35 of the Act, appealed to the Supreme Court of New Brunswick, Appeal Division, on the ground that the Board's decision involved the following questions of law:

1. Whether the accident to said Marilyn Noell on June 23, 1949, arose out of and in the course of her employment within the scope of the said chapter.
2. Whether an application for compensation was filed in time.
3. Whether any person interested in the adjudication and determination of the question whether an accident has arisen out of and in the

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

(1) 1932 (N.B.) c. 36.

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course of an employment within the scope of the said chapter, is entitled at any time to an adjudication and determination by the said Board.

The appeal was heard by Harrison, Hughes and Bridges, JJ. who answered the questions as follows:

Question (1) Yes (Bridges J.—No.)

Question (2) Yes.

Question (3) No answer.

On appeal to this Court:

Held: The appeal should be allowed and the questions answered as follows:

Question (1): No.

Question (2): No (Cartwright J. No answer.)

Question (3): Yes.

Decision of the Supreme Court of New Brunswick, Appeal Division, 28 M.P.R. 270, reversed.

APPEAL from the judgment of the New Brunswick Supreme Court, Appeal Division (1), allowing an appeal from certain decisions of the Workmen's Compensation Board.

J. J. F. Winslow Q.C. and *E. N. McKelvey* for the appellant. As to Q. 1, the judgment of the majority of the Appeal Division proceeds on a wrong principle: the Court failed to examine the question as to whether Miss Noell's employment had been interrupted before the accident. The question involves the application of s. 7 of the Act. Her work required her to serve in the hotel proper as a waitress at the regular meal hours. Although her employment was not that of a "domestic", it was in a sense continuous in that she worked, ate and slept on her employer's premises. The permission given her on the date of the accident to take time off constituted an interruption in her employment. While there is no direct finding by Harrison J., the effect of his reasons for judgment is that there was no interruption in her employment. The decided cases do not support such a finding. *Philbin* v. *Hayes* (2); *Davidson* v. *M'Robb* (3); *L. & Y. Ry.* v. *Highley* (4); *St. Helen's Colliery* v. *Hewitson* (5); *Parker* v. *Black Rock* (6). *Davidson* v. *M'Robb* and *St. Helen's Colliery* v. *Hewitson* are the leading English cases on the point at issue. The two latter cases are referred to with approval in *McKenzie* v. *G.T.P. Ry. Co.* (7) by Mignault J. The true position

(1) 28 M.P.R. 270; [1952] 1 D.L.R. 426.
(2) [1918] 87 L.J.K.B. 779.
(3) [(1918] A.C. 304 at 314.
(4) [1917] A.C. 352 at 372.
(5) [1924] A.C. 59.
(6) [1915] A.C. 725.
(7) [1926] S.C.R. 178 at 185.

is that at the time of the accident, she was merely a licensee making use of a privilege granted her by her employer but in no way connected with the work she was employed to do. The courts have held that an accident occurring in such circumstances does not arise out of and in the course of the workman's employment. *Whitfield* v. *Lambert* (1); *Standen* v. *Smith* (2); *Stringer* v. *O'Keeffe* (3).

The cases relied upon by counsel for the C.P.R. and applied by Harrison J. in the judgment of the Court below are *Codling* v. *Ridley* (4) and *Knight* v. *Howard* (5). In the former case, a domestic servant was held to be acting in the course of her employment; the second held that the accident arose out of and in the course of the applicant's employment. The *Knight* case purports to follow the *Armstrong Whitworth* case (6) and therefore does not in any way weaken the authority of the cases referred to above and the principle of those cases is still applicable. After citing *Codling* v. *Ridley* and other cases Harrison J. makes this finding: "Recreation on the hotel premises in off-duty hours was a natural incident of Miss Noell's employment * * * *" but as pointed out by Bridges J. "It is difficult * * * * to see how swimming at Katy's Cove was a natural incident to waiting on tables * * * *" The question to be decided is not so much whether Miss Noell is entitled to the benefit of the Act but rather whether the C.P.R. can obtain the protection of the Act. Harrison J. erred in attaching too great significance to the element of locus. The *Davidson* case *supra; Betts and Gallant* v. *The Workmen's Compensation Board* (7); *Davies* v. *Rhymney Iron Co.* (8). The question of the locus of the accident is entirely irrevelant because the true question is whether the continuity of Miss Noell's employment was broken before the accident.

As to Q. 2—Whether an application for compensation was filed in time—The rights of employer and employee provided by the Act are statutory and an injured workman in order to have the benefits of the Act is required to file

(1) [1915] 84 L.J.K.B. 1378.
(2) (1927) B.W.C.C. 305.
(3) [1936] 70 I.L.T. 110.
(4) (1933) 26 B.W.C.C. 3.
(5) [1938] 4 All E.R. 667.
(6) [1920] A.C. 757; 13 B.W.C.C. 68.
(7) [1934] S.C.R. 107.
(8) (1900) 16 T.L.R. 329.

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his application within the time limited therein. The Board has no power to award compensation unless the requirements of the Act are carried out.

S. 16 provides that no compensation shall be payable "unless application for such compensation is made within one year after the occurrence of the injury". The expression "application for compensation" appears in no section of the Act other than s. 41(1) which states that a workman "shall file with the Board an application for such compensation." It is clear, on the words of the statute, that the application under s. 41(1) can only be made by the workman and to be valid must be made within the one year period limited by s. 16. No such application was filed by Miss Noell within the time limited. The C.P.R. filed a report within a year after the accident but this was not an "application for compensation" at all. The report filed by the C.P.R. purportedly on behalf of Miss Noell was without her authority because through her solicitor she wholly repudiated that any such authority existed. On Jan. 2, 1951, more than a year after the accident, Miss Noell filed with the Board what purports to be an application for compensation, and by a letter of the same date purported to adopt as her own the application previously made by the C.P.R. There is a rule of English law, that ratification by a principal of an agent's prior unauthorized act does not relate back to the unauthorized act if the ratification takes place after a time limit within which the unauthorized act could be done by the principal. *Lord Audley* v. *Pollard* (1); *Margaret Podger's case* (2); *Right dem. Fisher et al* v. *Cuthell* (3); *Doe dem. Mann* v. *Walters* (4); *Bird* v. *Brown* (5) followed in *Dibbins* v. *Dibbins* (6). The true principle to be derived from the cases cited is that stated by Parke B. in *Bird* v. *Brown*. Although in those cases it can be said that the facts were that a *jus tertii* had intervened, the decisions of the courts were not based on the mere existence of this *jus tertii* but on broader principles. It is not sufficient as Harrison J. did, to base analogies on the similarity of facts, but rather on the applicability of the principles of law upon which analogous

(1) (1597) 78 E.R. 806.
(2) (1613) 77 E.R. 883.
(3) (1804) 102 E.R. 1158.
(4) (1830) 109 E.R. 583.
(5) (1850) 154 E.R. 1433.
(6) [1896] 2 Ch. 348.

cases were decided. *Lyell* v. *Kennedy* (1) is not relevant, the House of Lords found no period of limitation and that judgment expressly approves the decisions in *Lord Audley* v. *Pollard* and *Bird* v. *Brown*. If it be considered that the intervention of a *jus tertii* is necessary to the application of the case, there is such a right in the case at bar. Because of s. 16 the Board is entitled to consider that a case is closed after the expiration of one year from the accident. Other employers in the same class are entitled to assume that their liability to assessment will depend on applications made within the year.

As to Q. 3, the Workmen's Compensation Board is a creature of statute and the rights, powers and remedies relevant to it are regulated by statute. Although as stated by Barry C.J. in *Fleck* v. *Workmen's Compensation Board* (2), the Act should receive a "broad and liberal construction", there can be no right to adjudication by an interested party unless such right is given by the Act. There is no provision in the Act allowing an application for adjudication as contemplated by Q. 3. The jurisdiction conferred by ss. 30(1) and 33(1) can only be exercised when a case is properly brought before the Board under s. 41. *Dominion Canners Ltd.* v. *Constanza* (3) was decided under s. 15(2) of the Ontario Workmen's Compensation Act, the New Brunswick Act contains no such section, and the case does not apply to the case at bar.

C. F. H. Carson Q.C. and *Allan Findlay* for the respondent, the C.P.R. The majority of the judges of the Appeal Division were right in holding that the accident arose out of and in the course of the employment. The unanimous judgment was right in holding that the application was filed in time. The unanimous judgment was right in holding that Q. 3 need not be answered. If, however, this Court should take the view on the second issue that the application was not filed in time, it is submitted that question should be answered to the effect that the respondent company was nevertheless entitled to an adjudication by the Board as to whether the accident arose out of and in the course of the employment.

(1) [1899] 14 A.C. 437. (2) 8 M.P.R. 33.
(3) [1923] S.C.R. 46.

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As to Q. 1, Miss Noell's employment was continuous in nature. It was similar to that of a domestic servant living in the employer's house. As to the distinction between intermittent and continuous employment see 34 Hals. p. 832 para. 1162. Miss Noell at the time of the accident was in the course of her employment. So long as an employee engaged in continuous employment (e.g. a domestic servant living on her employer's premises) remains on her employer's premises she is acting in the course of her employment, provided of course, she is not doing something prohibited by her employer or otherwise doing something unreasonable. *Davidson* v. *M'Robb* (1). The continuity of her employment had not been interrupted at the time of the accident. It was not her day off. Though she no doubt had the right that day to leave the premises if she chose to do so, the fact remains that she was on the premises when the accident occurred, and was doing something which had not been prohibited. Indeed she was engaged in an activity (bathing) that was contemplated and permitted by her employer.

The accident having occurred in the course of the employment and having taken place on the employer's premises at a spot which turned out to be dangerous, it follows that the accident arose out of such employment. *Lawrence* v. *George Mathews Ltd.* (2); *Brooker* v. *Borthwick & Sons Ltd.* (3); *Knight* v. *Howard Wall Ltd.* (4). The risk to which she was exposed was a so-called "locality risk". *Lawrence* v. *George Mathews Ltd.*, *supra* at p. 19; *Brooker* v. *Borthwick & Sons Ltd.*, *supra* at p. 677. A "locality risk" is to be distinguished from a risk created by the employee. *Codling* v. *Ridley* (5). Since the risk was not one created by the employee but was a "locality risk", the question does not turn upon whether the swimming was in the performance of a duty as in *Codling* v. *Ridley*. The accident arose out of and in the course of an employment within the scope of the provisions of the Act and the appeal in respect of this question should be dismissed.

(1) [1918] A.C. 304 at 314.
(2) [1929] 1 K.B. 2 at 19 and 23.
(3) [1933] A.C. 669 at 676, 677.
(4) [1938] 4 All E.R. 667 at 672.
(5) (1933) 26 B.W.C.C. 3.

The cases cited by the appellant re an accident "arising out of" are to be distinguished viz. the *Codling* case; the *Brice* case; *Lancashire & Yorkshire Ry.* v. *Highley* (1); *McKenzie* v. *G.T.R.* (2). As to the appellant's argument that the bathing was not incidental or ancillary to her employment. If it was not unreasonable it is covered by *Knight* v. *Howard Wall Ltd.* (3). If it was incidental, it was incidental to her employment. We do not have to meet the high test of "necessarily" incidental as in *Betts and Gallant* v. *Workmen's Compensation Board* (4).

As to Q. 2. The application for compensation made by the appellant company on June 22, 1950, which purported to be on behalf of all interested persons including Miss Noell was effectively ratified by her in her letter to the Board dated Jan. 2, 1951. The injury occurred on June 23, 1949. The application as made within one year after the occurrence of the injury and so was not barred by s. 16. Although the subsequent ratification by Miss Noell did not take place within one year of the occurrence of the injury, its effect was to constitute the relation of principal and agent between Miss Noell and the respondent company because the ratification took place within a reasonable time and because no *jus tertii* arose before the ratification. 1 Hals. pp. 228, 229 and 234. *Lyell* v. *Kennedy* (5). Therefore the Court below was right in answering "Yes" to the 2nd question.

As to Q. 3. The Appeal Division was right in holding that it need not be answered. If, however, this court should take the view on the second issue that the application was not filed in time, Q. 3 should be answered to the effect that the respondent company was nevertheless entitled to an adjudication by the Board as to whether the accident arose out of and in the course of the employment of the respondent Noell.

In view of the provisions of ss. 12, 33(1); 33(2), it would appear that when a workman is injured in an accident arising out of and in the course of his employment, his right of action at common law is taken away. It would also appear that the question of whether his accident arose

(1) [1917] A.C. 352.
(2) [1926] S.C.R. 178.
(3) [1938] 4 All E.R. 667.
(4) [1934] S.C.R. 107.
(5) (1887) 14 App. Cas. 437 at 462.

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out of and in the course of his employment must be determined by the Board, subject in New Brunswick to an appeal under s. 35, and that the jurisdiction of the courts to determine such question is ousted accordingly. *Dominion Canners Ltd.* v. *Costanza* (1). Although no procedure is prescribed in the Act for an application being made by the employer for an adjudication and determination of the question whether an accident arose out of and in the course of employment, the right of an employer to make such an application must be implied. Ss. 16, 24, 30(1), 35(3) and 41(1) and (4).

O. F. Howe Q.C. for the respondent Noell, stated that an action had been taken in 1950 in the Ontario court by the father of Miss Noell, a minor, and while he found himself before this court in the role of respondent, he had not filed a factum and preferred to take no part in the argument.

APPEAL from a decision of the Supreme Court of New Brunswick, Appeal Division (2) allowing an appeal from a decision of the Workmen's Compensation Board disallowing compensation to Marilyn Ann Noell.

The judgment of Rand, Kellock, Estey and Locke JJ. was delivered by:

RAND J.:—The facts in this controversy are not complicated. The respondent, Miss Noell, then a young woman in her 20th year and attending college, was engaged as a waitress in the hotel of the company at St. Andrews, New Brunswick, for the summer season of 1949 at the rate of $35 a month. In that capacity she was to perform such work as the company might "appoint". She was, "if receiving * * * meals on the company's premises" to take them in any place and within the hours stipulated by the manager; and if receiving sleeping accommodation, to accept such as might be assigned to her. She was to report for duty punctually and not to be off duty without permission from the head of the department. She was not to make use of the public spaces in the hotel nor its grounds used by guests nor any other place designated by the manager except when on duty and then only when so required. She was to maintain her personal state and appearance as prescribed in writing for waitresses, including regulation

(1) [1923] S.C.R. 46. (2) 28 M.P.R. 270; [1951] 1 D.L.R. 426.

dress for breakfast, luncheon and dinner. These terms were embodied in a standard form of agreement which, although expressed to be applicable to different capacities, is clearly limited to employment in or about a hotel.

Notwithstanding the clause dealing with public places, she was given oral permission to use a jetty and three floats for swimming, two golf courses and the tennis courts; for the golf, she was charged a fee of $5; the jetty, floats and tennis courts were free. In all these, she was expected to respect the prior privileges of the guests.

She presented herself for duty on June 4 and on June 23 the accident occurred which gives rise to this litigation. During that period she received both meals and sleeping accommodation on the hotel premises. The hotel is a well known summer resort, and its attractions, including those mentioned, are contained within a continuous area.

The swimming place, about half a mile from the hotel, is the mouth of a small stream flowing into Passamaquoddy Bay across the entrance of which is the line of the company's railway. In a sluiceway in the railway embankment the company has installed gates and what is so enclosed is a substantial body of water. The depth is controlled by operation of the gates, and the practice is to empty the basin every few days and refill it with fresh water from the sea. At a point near the shore, what is called the jetty has been built, which consists of a three sided rectangular boom adjoining a retaining wall enclosing a space of shallow water for children. Along the top of the boom is a walkway. Some distance outside are three swimming floats, one of which has diving stands. The jetty, by its nature, was beyond that part of the premises on which the work of a waitress would be carried out.

The ordinary hours for breakfast were from 7:00 to 10:00, for lunch from 11:00 or 11:30 to 2:00, and dinner from 6:30, before which waitresses would have their own dinner. Between these meals, certainly unless otherwise ordered, and during any other time off, they were free to go where or do as they pleased, even beyond the limits of St. Andrews. Under the regular schedule, each would have one day off in every seven. During the hours off, except conceivably in an emergency, they could not be recalled to the service.

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On the morning of June 23, at the conclusion of breakfast, she was told that she would not be required again until dinner, and she was then free for her own purposes. About 1:00 o'clock she went to the jetty intending to swim out to a float, a thing she had already done a dozen times or so before. From an outer corner of the jetty she dived into the water. The water was muddy and at the point of the dive only between two and three feet in depth. She struck bottom and suffered grave and permanent injuries. The question raised in the appeal is whether that act of diving was an act "arising out of and in the course of" her employment.

These words have produced a bewildering vagueness in interpretation and conflict in judicial application since they were first introduced into the Compensation Act of England. The comment of Fitzgibbon J. in *Stringer* v. *O'Keeffe,* (1) on what he characterizes as the "mass of conflicting and irreconcilable decision" and his quotation of the "despairing cry" of Lord Wrenbury in *Armstrong* v. *Redford* (2) that he had "long abandoned the hope of deciding any case upon the words 'out of and in the course of' upon grounds satisfactory to myself or convincing to others" are by no means unfair. Particularly is that so in activities which are not related directly to the work; and as that is the case here we are free to approach the question from the standpoint of the broad conceptions underlying the legislation. As Viscount Haldane observed in *Davidson* v. *M'Robb* (3):—

> My lords, the Workmen's Compensation Act, 1906, appears on the face of it intended to afford a simple and speedy method of claiming compensation in the cases to which it relates * * * But around the principle which Parliament laid down in this language there is already spreading itself in Courts of Justice an atmosphere of legal subtlety which bids fair to defeat the obvious purpose of the Legislature * * * But I feel that, while in the interpretations we who are the judges put on the words used we are bound to follow our previous decisions when they form really binding precedents, we ought, in applying the statute to particular facts, to direct our efforts rather to giving effect to broad principles with freedom in applying them to individual circumstances than to searching for guidance from mere apparent analogies with the particular facts of previous cases, analogies which rarely embody the full truth.

(1) (1936) 70 Ir. L.T. 110. (2) [1920] A.C. 757.
(3) [1918] A.C. 304 at 316.

It is obvious that the basic purpose of the statute was to protect employees against the risks to which by reason of their employment, in the sense of their job, they were exposed: injury so resulting was recognized as part of the wear, tear and breakage of the work being done which the business, as part of its expense, ought to bear. The legislation was instigated by the impact of the casualty product of modern industry on the individual employee. The solution, then, must, basically, have regard to those risks.

The employee has, of course, his own field of activity which at some point meets that of his employment; and it is now settled that the risks extend not only to those met while he is actually in the performance of the work of the employer, but also while he is entering upon that work and departing from it.

Ordinarily the place of the risks is the employer's premises, including means of approach and departure; but it may be elsewhere as in the case of a truck driver. On the other hand, while he is going or returning from work, on public streets, he is obviously moving in his own sphere and at his own risk.

It is when he is on the employer's premises, however, and is not at the moment actually furthering the employer's work or interest, that difficult questions may arise. The true interpretation of the statutory language seems to be indicated by the illustration of simple cases. If a workman at his bench straightens himself up for a momentary rest, certainly the course of his employment remains unbroken; the employment contemplates such cessations as part of itself. If he is permitted to eat a lunch while still at the bench or in the shop and he is injured, say, by an explosion of a boiler, he is equally then within the course of employment. A domestic servant, who, by her engagement, lives as a member of the household, is conceived to be on duty at all times while on the premises notwithstanding that she is not actually doing work, but, just as clearly, she is not so when she is in town shopping for herself. These examples illustrate the difference between what has been called intermittent service and intermittent cessations not of the course of employment but of its labour: they illustrate also the difference between the currency and the course of employment.

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Mr. Carson has argued that the claim is to be determined on the footing that the relation of the young woman to the entire premises was analogous to that of the domestic servant, and that consequently her mere presence on them is sufficient for the attribution to her of being in the course of her employment. I cannot agree that the facts bring her within that category. In no sense was she a member of a household. She had specified hours within which her time was her own, during which she was under no such kind or degree of responsibility. She was obliged to live in the hotel, no doubt, but there was no continuing duty to act unless recalled to the service. The contention so based must then be rejected: but I do not understand that the main argument depends entirely on the existence of that analogy.

Since the accident did not arise in the course of the actual work as a waitress, nor of entering upon nor departing from it, to be within the statute her act must be found to be what has been called an incident of the work. I have already given examples of what I consider to be incidents of that nature and the fallacy, in my opinion, of the argument addressed to us, lies in this: it treats all privileges accorded an employee by reason of the employment, exercisable on the employer's premises, as incidents of the work the employee is to perform. The privilege of swimming from the jetty was conferred on the young woman as a member of the staff; so was that of golfing and of tennis: it might have been of shooting in an adjoining wood, or of travelling under a pass on the railway of the company: but from that fact it did not follow that those activities were incidents of her work.

These collateral advantages are not, either in their nature or by the intention of the contract, such incidents: they might be described as incidents of the contract but that is an entirely different thing; and whatever might be the view taken in any case within the area of her work, a personal act done beyond it is, *prima facie*, an act within the range of her own responsibility. In other words, to bring the act within the statute, the employee must be where she is either in carrying out a duty or under the

coercion of the contract or in an exercise of conduct that is intimately involved, as an incident, with action in those two spheres.

This is illustrated in the following cases. In *Philbin* v. *Hayes* (1) a labourer had permission to put up a sleeping hut on the works of his employer which a wind blew down, seriously injuring him. He was to be provided with the hut at a small sum a day. His hours of work were from 7:00 a.m. to 5:30 p.m. and he was paid by the hour. The Court of Appeal held that the accident did not arise in the course of the employment. In *Gaskell* v. *St. Helen's Colliery Co.* (2) a miner was injured while taking a bath on premises owned by the employer but leased to trustees of both the employer and workmen for the purpose of maintaining the baths. The employees were instructed that they must use the baths after each shift, but they were not subject to dismissal for not doing so. The same court held, assuming an order had been given, which was not, however, a term of the contract, that the taking of the bath did not arise in the course of the employment. Finally, in *Stringer* v. *O'Keeffe*, (*supra*), decided in the Supreme Court of the Irish Free State, the workman was a general farm hand with no fixed hours of work who could be called upon at any time for duty. He received ten shillings a week with a house free of rent, certain supplies and the right to get firewood for his own use. While cutting trees in his own time on the employer's land, a bough fell upon him, causing injuries from which he died. It was held that he was not injured in the course of his employment.

The young woman, as part of her duty and of the obligation of her engagement, was to serve meals and live in the hotel. There is no more attachment or bond between the privilege of swimming at the jetty and that conduct than the privilege of travelling free on the trains of the company: the one is no more, in its nature or origin, incidental to the work than the other: both are severed from it.

(1) [1918] 87 L.J.K.B. 779. (2) (1934) 27 B.W.C.C. 32.

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The second question passed on by the Appeal Division dealt with the interpretation of s. 16 of the Act which reads:—

> 16. No compensation shall be payable under this part in respect of any injury, unless application for such compensation is made within one year after the occurrence of the injury, or in case of death within six months from the time of death.

The application here was made one day before the expiration of the year by the company purporting to act on behalf of the young woman as well as of itself. Some weeks later the employee, through her solicitor, repudiated it. Still later, when she became of age, she purported to ratify it and the court held unanimously that the right was thereby preserved.

Considering the section apart from authority, it would seem to me to be beyond controversy that unless, at the expiration of the year, it could then be said that there was before the Board an application, nothing done afterwards could avail the employee.

There is no dispute that, as a general proposition, ratification of an act of purported agency must take place at a time when the act itself could be done by the principal. This is the rule of *Bird* v. *Brown* (1), in which Parke B. states it that the doctrine of ratification

> must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies.

But it is said that this rule, followed in *Dibbins* v. *Dibbins* (2), requires, in order to defeat ratification, the existence of a *jus tertii* and that none arose here. It was said that the qualification is warranted by *Lyell* v. *Kennedy* (3). In that case it was clearly stated that if a person professedly received money in trust for another, the limitation period was inapplicable. As the Earl of Selbourne in his speech observed:—

> These propositions appear to me to assume the main question, as to the statute running during the continuance of the self-constituted agency between the true owner and the person taking upon himself to act as agent. I find nothing to support them in the Statute of Limitations itself; and I do not think them well founded in principle.

(1) (1850) 154 E.R. 1433. (2) [1896] 2 Ch. 348.
(3) (1887) 14 A.C. 437 at 462.

At the most, the qualification was assumed, not applied, and as well it was assumed that the agent could be a third person.

Even accepting the supposed qualification, I am unable to understand any difficulty in its application to this case. Certainly at the expiration of a year the right of the Board, in relation to the fund, came into existence. That fund is the object of the Board's administration and protection, and I should say that under the statute it was bound, as a duty, to see that it was dealt with strictly within the statutory requirements. We do not need to go behind the fund to the contributors who likewise are vitally interested in the manner of administration. How could the Board possibly justify using its own judgment or discretion on such a matter?

A third question was raised going to the right of the company to apply to the Board to determine whether the accident did or did not come within the statute. This was not answered by the court in appeal, but it is pressed upon us as being one which the Board itself is anxious to have settled, and I see no reason why this Court should not accede.

I interpret s. 16 as requiring the application for compensation to be made by the employee. That seems to me to be confirmed by s. 41:—

> 41. When a workman or dependent is entitled to compensation under this Part he shall file with the Board an application for such compensation
> * * * *

Then s. 33 deals with the jurisdiction of the Board. It declares that, except as provided in s. 35 which provides for appeals,

> The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court.

By ss. (2) (*j*) this includes the finding whether an accident has arisen out of and in the course of an employment. By ss. (4) the decisions of the Board shall be upon

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the real merits and justice of the case, and it shall not be bound to follow strict legal precedent.

By s. 12 the provisions of Part I, under which the right to compensation arises, shall be in lieu of all claims and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for, or by reason of any accident in respect of which compensation is payable under this Part.

The question under consideration becomes important when, without any application for compensation, an action is brought against the employer for damages. By the statute of Ontario this situation is expressly met, but there is nothing in the Act under consideration which directly contemplates it.

S. 12 must, I think, be interpreted to declare that if a right to compensation arises under Part I, then every right of action is taken away. To construe the word "payable" as meaning that the right to compensation has been established could be made to effect a virtual repeal of the statute in every case in which there was negligence on the part of the employer.

It is arguable that in an action the question is whether the right has been abrogated, but that is merely the complementary aspect of the right to compensation. Where the statute so expressly provides that the Board shall have the exclusive jurisdiction to determine the existence of the latter, it reveals the policy that would be broken into by permitting the question of right or no right under the statute to be declared by a court. The right of appeal from the Board gives ample protection to the desirability of judicial determination of such a question as one of law, and certainly such a determination would be an answer to an action.

Although the matter is not free from doubt, I think the exclusive jurisdiction conferred by s. 33 implies that the question is to be determined by the Board for all purposes and for the benefit of any person having an interest in it. The company here, then, was entitled, as it endeavoured to do, to raise that question before the Board and to have it decided.

I would, therefore, allow the appeal and answer the questions in the following manner:—

1. No.
2. No.
3. Yes.

CARTWRIGHT J.:—As to questions 1 and 3 I agree with the reasons and conclusions of my brother Rand, but in my view no answer should be made to question 2.

The Court of Appeal having answered question 1 in the affirmative it became necessary that they should deal with the second question but since in answering the first question we have decided that the accident to Miss Noell did not arise out of and in the course of her employment within *The Workmen's Compensation Act* it becomes unnecessary for us to deal with question 2 and in my view anything that we might say about it would be said *obiter*.

In answering the question we would not be called upon to decide generally as to the construction of s. 16 of *The Workmen's Compensation Act* but only whether under the facts of this case which are unusual and not likely to arise again, Miss Noell, had she been otherwise entitled to compensation under the Act, ceased to be so entitled because of her alleged failure to comply with the provisions of s. 16.

In dealing with this question the Court of Appeal does not make reference to the alleged repudiation on behalf of Miss Noell of the application for compensation which had been made to the Board on June 22, 1950. The reason for this may well be that, as we were informed by counsel, Miss Noell did not, herself, direct or authorize the sending of the letter of repudiation. On this assumption the facts with which the Court of Appeal had to deal were as follows. Miss Noell suffered very serious injuries under circumstances which it was suggested brought her within the provisions of *The Workmen's Compensation Act*. She was at the time of the accident a minor and was still a minor at the expiration of the year within which, under s. 16, application for compensation must be made. Within the year an application in writing was made for compensation which was expressly stated to be made on her behalf and was signed not by an irresponsible stranger but by her employer. If what has been referred to as "the letter of

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repudiation" be ignored, as was done by the Court of Appeal, there is nothing in the record to show that Miss Noell did not authorize or request the making of this application insofar as it was possible for her to do so in view of the fact that she was under age and so gravely injured that it may be she was not able to attend to any business. Her first act in reference to the matter which appears in the record after her coming of age was an adoption of the notice as her own and a further step looking to the adjudication of her claim by the Board.

Under these circumstances it may be that the onus of showing that the application made within the year was not authorized by Miss Noell rested upon those who were so asserting. It may be observed in passing that s. 16 is expressed in the passive voice and does not expressly require the application for compensation to be made by the claimant.

I am not prepared to hold on the assumed state of facts set out above, which appears to me to have been that assumed by the Court of Appeal, that if Miss Noell had been otherwise entitled to compensation her claim would have been defeated by reason of the manner in which application was made but I express no final opinion on the point as in my view it is neither necessary nor desirable that we should deal with it.

I would dispose of the appeal as proposed by my brother Rand except that I would make no answer to question 2.

Appeal allowed.

Solicitors for the appellant: *Ritchie, McKelvey & MacKay.*

Solicitors for the respondent, the C.P.R.: *Inches & Hazen.*

Solicitors for the respondent, Noell: *Howe & McKenna.*

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

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*Feb. 21, 22
*Jun. 16

AND

WAIN-TOWN GAS AND OIL COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Sale of franchise to supply natural gas—Price fixed on percentage of future gross sales of gas—Payments described as royalties—Whether payments are income within s. 3(1) (f) of the Income War Tax Act, R.S.C. 1927, c. 97.

The respondent company assigned to another company its franchise to supply the consumers in a certain municipality with natural gas. The rights conferred by the franchise were granted for a period of ten years from 1938 with the option of renewal, indefinitely, for further periods of like duration. The consideration for the assignment was that the respondent was to be paid monthly "by way of royalty" a percentage of the gross sales of gas. The Minister assessed these monthly payments as taxable income for the years 1944 and 1945 under s. 3(1) (*f*) of the *Income War Tax Act,* R.S.C. 1927, c. 97 and amendments. The assessment was set aside by the Exchequer Court of Canada.

Held (Locke J. dissenting), that the appeal should be allowed and the assessment restored since the payments were income within s. 3(1) (*f*) of the *Income War Tax Act.*

Held: In a business sense in Canada, the word "royalty" covers the payments made here and was so looked upon by the respondent when making its tax returns. Even if they were not received as royalties, they fall within the expression "other like periodical receipts". They depend upon the use of the franchise (which is property). It is not the production of natural gas upon which depend the payments as it is only under the powers conferred by the franchise that natural gas may be supplied and conducted to the consumers thereof. Finally, receipts, so dependent, are income by virtue of s. 3(1) (*f*), even though they are payable on account either of the use or sale of the franchise.

Per Locke J. (dissenting): In its ordinary meaning, the word "royalty" does not describe, or extend to, a payment such as was stipulated for in this case, where the payment is made as part of the purchase price of the outright sale of personal property transferred without reservation. As the words "other like periodical receipts" refer to those of an income or revenue, as distinguished from a capital nature, they do not cover these payments, which were instalments on account of the purchase price of the franchise and of a capital nature such as were dealt with in *Wilder* v. *Minister of National Revenue* [1952] 1 S.C.R. 123.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Locke JJ.

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MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

APPEAL from the judgment of the Exchequer Court of Canada (1), Angers J., reversing the decision of the Minister of National Revenue and holding that the payments stipulated in the agreement were not taxable income.

J. R. Tolmie and F. J. Cross for the appellant. The receipts here in question fall within the words of subparagraph (*f*) and are "annual profits or gains from any other source" within subsection (1) of section 3. They are "rents, royalties, annuities or other like periodical receipts". They depend upon the production or use of any real or personal property. The whole of the receipts are profit or gain by definition whether or not they may be said to represent, in whole or in part, a return of capital.

The receipts are income receipts and were properly included in the computation of the respondent's annual net profit or gain in the two years in question. To say that these receipts are part of the consideration for the transfer of property is not conclusive as to their character as capital or income receipts. They were not instalments of purchase price but income receipts. The respondent's capital, namely, its franchise and exclusive marketing contract, entirely disappeared and in its place it was to receive an income calculated as a percentage of the gross selling price of gas sold under the franchise. Whether they are to be treated as capital or income is to be determined upon a careful analysis of the circumstances in each particular case. The circumstances in this case taken together clearly indicate that the respondent's capital simply disappeared and substituted for it was an income dependent upon the volume of business conducted in the exclusive market. There is no evidence that any part of the sums received by the respondent under the agreement represented a return to it of its capital.

H. W. Riley Q.C. for the respondent. The transaction between the respondent and the Franco was a capital transaction. It was a sale by the respondent of a capital asset, the purchase price being payable in instalments, which were capital receipts in the hands of the respondent.

(1) [1951] Ex. C.R. 1.

The payments are not included in the terms "rents, royalties, annuities or other like periodical receipts" since there is no reversionary interest left in the respondent.

The payments do not depend upon the use or production of the franchise but depend upon the amount of gas sold by Franco, and the respondent is in no way, directly or indirectly, an owner of said gas.

The franchise is not the kind or type of real or personal property specified and enumerated in the section.

The concluding portion of the sub-paragraph has therefore no application.

The judgment of the Chief Justice, Kerwin and Taschereau, JJ. was delivered by:—

KERWIN J.:—We are called upon to decide whether the respondent, Wain-Town Gas and Oil Company, Limited, is liable to assessment for income tax and excess profits tax in the years 1944 and 1945, and the particular question is whether an item of $1,965.02 should be included in the respondent's revenue receipts for 1944 as "net royalties" and an item of $4,181.45 should be included in its revenue receipts for the year 1945 as "royalties and sales". These items were in fact so inserted under those names by the respondent in its tax returns for the respective years but because of certain claimed expenditures a loss was shown. When these expenditures were disallowed by the Department, a profit appeared in each year, upon which the assessments in question were made, and the respondent thereupon appealed to the Minister—not with respect to the disallowed expenditures but with reference to the "net royalties" and "royalties and sales".

These moneys were received by the respondent from Franco Public Service Limited in pursuance of an assignment dated January 6, 1940, from the respondent to Franco of a certain franchise. This franchise had been secured by the respondent from the Town of Vermilion in 1938 for the purpose of supplying and conducting natural gas to consumers in the municipality. It conferred upon the respondent the right to put down, repair, etc., and operate gas lines and related structures and equipment in the town's streets, squares, etc., and other public places, and also the exclusive right to sell natural gas within the town

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Kerwin J.

limits. These rights were granted for a period of ten years with the option of renewal for a further period of ten years and a similar option at the expiration of each succeeding ten year period. Provision was made whereby the town could under certain conditions and at the end of any ten year period purchase the respondent's rights under the agreement and its property used in connection therewith. The respondent undertook to continue drilling a well, which at the time of the granting of the franchise was in process of drilling, and to drill other wells as required to provide and maintain a suitable supply of gas for the town so long as such operations were economically sound. In the event of the respondent failing to comply with its covenants, or in the event of its failing to secure a suitable supply of natural gas within twelve months of the date the franchise became operative and binding on the parties, the town might, by written notice, require the Company to remedy such default or secure such suitable supply of natural gas, and upon the respondent's failure to remedy such default or secure such a suitable supply of natural gas within six months of the date of service of such notice, the town might by resolution of its council terminate the contract.

The respondent drilled only one well, failed to obtain a supply of natural gas and was without funds to continue further drilling operations. So far as appears, no gas lines or other structures were put down by the respondent. It was under these circumstances that by the assignment of January 6, 1940, the respondent, with the consent of the town, assigned the franchise agreement to Franco. By this assignment, Franco covenanted to carry out the terms of the franchise agreement and to indemnify and save harmless the respondent from all liability for breach, non-performance or misfeasance in respect of any of the provisions thereof as against the town or otherwise. Paragraphs 4 and 5 provide:—

4. In consideration of this assignment Franco doth hereby covenant and agree with Wain-Town to pay to Wain-Town by way of royalty, from the proceeds of all sales of natural gas under the said franchise, the following percentages of the actual gross sales of gas reckoned at consumers' prices, less consumers' discounts:

(*a*) During the first three years, six and a quarter per cent (6¼%);

(*b*) During the next 7 years, eight and one-third per cent (8⅓%);

(c) Thereafter during the currency of this agreement, and of the said franchise twelve and one-half per cent (12½%).

5. It is further agreed that the following provisions shall apply:

(a) All royalties shall be deposited to the credit of Wain-Town in the Vermilion Branch of the Canadian Bank of Commerce or in such other institution as Wain-Town may designate from time to time not later than the 15th of month covering sales for the preceding month.

(b) An authorized representative of Wain-Town shall be permitted to inspect the books, records, meters, etc., pertaining to the sale of gas.

(c) In the event of the town exercising its right to purchase the gas utility during or at the end of either the ten (10) year term of the franchise or during or at the end of the first renewal period of ten (10) years then in such event Franco covenants and agrees to pay to Wain-Town twenty-five per cent (25%) of the net proceeds of such sale; such net proceeds to be computed after all debts of Franco have been paid.

In pursuance of paragraph 4, the above mentioned sums of $1,965.02 and $4,181.45 were paid by Franco to the respondent in 1944 and 1945 respectively. The appellant claims that these payments fall within clause (*f*) of subsection 1 of section 3 of the *Income War Tax Act* as amended down to and including the year 1945. Speaking generally, it is undoubted that Parliament intended to tax under the Act income as distinct from capital: *Wilder* v. *Minister of National Revenue* (1), a decision of this Court under section 3(1) (*b*) as it stood before amendment in 1945. However, it is clear that Parliament may also provide that receipts, part or all of which might ordinarily be termed capital, shall be treated as income for the purposes of the Act. Hence it is that after stating what income *means*, Parliament has enacted, by subsection 1, that it shall *include* certain things "and also the annual profit or gain from any other source including

(*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property;

Clause (*f*) was enacted for the first time by section 1 of chapter 55 of the 1934 statutes as a result of the decision in *Minister of National Revenue* v. *Spooner* (2), affirming (1931) S.C.R. 399.

(1) [1952] 1 S.C.R. 123. (2) [1933] A.C. 684.

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The first point to be determined is whether the moneys received by the respondent are "royalties" within the meaning of this clause. The word does not bear the original meaning ascribed to it as rights belonging to the Crown *jure coronae*. As pointed out in *Attorney General of Ontario* v. *Mercer* (1) in the Judicial Committee and in this Court (2), it has a special sense when used in mining grants or licences signifying that part of the reddendum which is variable and depends upon the quantity of minerals gotten. It is a well-known term in connection with patents and copyrights. In a business sense in Canada, it covers the payments which were to be, and were, paid monthly by way of percentages of the actual gross sales (to quote paragraph 4 of the assignment), "of natural gas under the said franchise". It is settled by authority both here and in England that the appearance of the word "royalties" in the assignment does not necessarily dispose of the matter but, to quote Finlay J. in *British Salmson Aero Engines Ltd.* v. *Commissioners of Inland Revenue* (3), "the fact that people who, after all, know all about it, choose in their agreement to refer to these annual sums * * * as "royalties", is a matter not to be entirely neglected." Furthermore, the word is used in the respondent's tax returns for each of the years 1944 and 1945, to describe the moneys received by it from Franco. I quite agree that this is not decisive but, that circumstance added to the first, are at least evidence of the manner in which, in a business sense, the word is looked upon in this country. A particularly useful judgment is that of the High Court of Australia in *McCauley* v. *The Federal Commissioner of Taxation* (4), where it is pointed out that in an agreement drawn in England the term "royalties" has been used to describe payments for removing furnace slag from land (*Shingler* v. *P. Williams and Sons* (5)) and in an agreement drawn in New Zealand to describe payments for flax cut: *Akers* v. *Commissioner of Taxes* (6).

Finally, even if the payments were not received as royalties, they fall within the expression "other like periodical receipts". They are at least similar to percentages "as on

(1) (1883) 8 A.C. 767.
(2) (1881) 5 Can. S.C.R. 538.
(3) (1937) 22 Tax. C. 29 at 35.
(4) (1944) 69 C.L.R. 235.
(5) (1933) 17 Tax C. 574.
(6) [1926] G.L.R. (N.Z.) 259.

output, paid to the owner of an article, esp. a machine, by one who hires the use of it": Webster's New International Dictionary sub nom "royalties".

These receipts depend upon the use of the franchise. In *Natural Gas and Fuel Co. of Hamilton* v. *Dominion Natural Gas Co.* (1), Lord Macmillan, speaking for the Judicial Committee, points out that the by-law of the Town of Barton and the relative agreement there in question conferred what was correctly designated as a "franchise", and that in Canadian local government law the term is not used with the technical signification which it possessed in other connections. Here, as there, it is employed so as to include such rights and privileges as were conferred by the original agreement between the respondent and the town. That such a body of rights is real or personal property does not admit of doubt, and the moneys received by the respondent from Franco were dependent upon the use of that franchise. It is not the production of natural gas upon which depend the payments by Franco to the respondent as it is only under the powers conferred by the franchise that natural gas may be supplied and conducted to the consumers thereof. By virtue of the concluding part of clause (*f*), the receipts, so dependent, are income even though they are payable on account either of the use or sale of the franchise.

It is not without importance to note the changes that were made in 1945 in clause (*b*) of subsection 1 of section 3 of the *Act* dealing with contractual annuities as a result of the Report of the Royal Commission on Taxation of Annuities and Family Corporations. Clause (*f*) remains intact and perhaps it may be difficult to find a basis for any suggested change to cover a case like the present when one bears in mind that no total sum was fixed for the sale of the franchise by the respondent to Franco and that provision was made by paragraph 5 of the assignment for the contingency of the town exercising its right to purchase during or at the end of the first or second ten year terms—whereupon Franco was to pay the respondent twenty-five percentum of the net profits of such sale. It has not been overlooked that even if the town should so exercise its right to purchase, the respondent had disposed of part of its

(1) [1934] A.C. 435.

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property (the franchise) for the intervening period just as Miss Nethersole had disposed of a portion of her copyright in *Nethersole* v. *Withers* (1). However, in that case the claim of the Inspector of Taxes was that, under Case VI of Schedule D of the English Act, a certain amount received by Miss Nethersole was "annual profits or gains not falling under any of the foregoing cases and not charged by virtue of any other schedule." It was held by the Court of Appeal and the House of Lords that the payment was not an annual profit or gain.

The determination of this appeal depends upon the proper construction of clause (*f*) of subsection 1 of section 3 of the *Income War Tax Act* and I have been unable to secure any assistance from the *Nethersole* case or any of the other English cases cited by counsel on either side. They must be read with care and always bearing in mind the different statutory enactments with which they were concerned.

The appeal should be allowed with costs here and in the Court below and the assessments of the Minister restored.

RAND J.:—By the terms of an agreement dated September 19, 1938 between the Gas Company respondent and the town of Vermilion, the latter granted to the company an exclusive franchise to supply the town and its inhabitants with natural gas, together with all necessary powers to lay pipe lines under the streets and other public ways or places and otherwise to perform the public service undertaken. The franchise was to continue for ten years with a right of renewal, indefinitely, for further terms of like duration. The Gas Company agreed to do certain work of drilling wells for the gas, and in the event of default the town was authorized to take action looking to the termination of the contract.

The company was not successful in its drilling, and having exhausted its funds entered into an agreement dated January 6, 1940 with Franco Public Service Limited, by which, with the consent of the town, it transferred to the

(1) (1948) 28 Tax C. 501.

Service Company the franchise with all rights and powers annexed to it. The Service Company covenanted to pay to the Gas Company:—

> By way of royalty, from the proceeds of all sales of natural gas under the said franchise, the following percentages of the actual gross sales of gas reckoned at consumers' prices, less consumers' discounts:
>
> (*a*)) During the first three years, six and a quarter per cent (6¼%);
>
> (*b*) During the next 7 years, eight and one-third per cent (8⅓%);
>
> (*c*) Thereafter during the currency of this agreement, and of the said franchise twelve and one-half per cent (12½%).

The royalties were to be deposited to the credit of the Gas Company in one of the banks in the town "not later than the 15th of month covering sales for the preceding month". In the event, within the first two periods of the franchise, of the town exercising its right to purchase under the original contract, the Service Company was to pay to the Gas Company 25 per cent of the proceeds after all the debts of the Service Company had been paid.

The narrow question is whether these monthly payments are income for the purposes of the *Income War Tax Act*, and the clause of the latter under which the Crown supports its contention that they are is sec. 3(1) (*f*) which reads:—

> (*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property;

The word "royalty" in the agreement is not, of course, controlling, but it does bear upon the propriety of the use of the word, in the minds of business men, to describe the type of payment involved. The statutory language, dealing with the results of accounting processes determining economic gain in business, must, in large degree, use the vocabulary employed in them; and the meaning of the word as it appears in the statute must have regard to its general acceptation in the course of property and business transactions.

Now a rent is, primarily, something reserved, in some form or other, and in a conceptual sense, from property or property interest transferred from one person to another. The word "royalties" is best known, perhaps, as a term to express an interest in the nature generally of future payments upon a grant or lease of mines, such as gold, coal,

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petroleum or gas rights; and it makes no real difference in substance or as to the nature of the payments whether they arise through a "reservation", strictly so-called, or a covenant.

The language of para. (*f*) seems to be directly related to that signification of the term, and I should take it to be beyond serious doubt that prima facie the payments here come within the expression "royalties * * * or other like periodical receipts". The query then is whether they "depend upon the production or use" of any property. Purists in language might object to the word "use" in relation to carrying on a franchise; the franchise is perhaps more properly said to be "exercised" than "used". But the words "production or use" are intended to cover a great many particulars of a general class of dealings with property, and to "use" a franchise would not at all be beyond the range of common parlance. I should say, then, that the word "use" is appropriate to the exercise of such a franchise; and that a franchise is personal property was not challenged.

Are the payments, then, constituting as they do part of the consideration for the sale of the franchise, to be excluded from tax as being capital in their nature? In *Wilder* v. *The Minister* (1), a decision of this Court, it was held that an annuity of $1,000 a month for the life of the annuitant, which was part of the price for the transfer of a business from an individual to a company, was of a capital nature and not within the definition of "income" in sec. 3(1) (*b*); but under para. (*f*) of the section that ground seems to be expressly met by the language "notwithstanding that the same are payable on account of the use or sale of any such property". Now, the property is the franchise; the royalty is payable on account of the sale of it; and the payment depends upon its exercise. The paragraph seems to me to be satisfied completely by the terms of the transaction, and I must hold the respondent to come within it.

I would therefore allow the appeal and direct judgment for the amount claimed with costs in both Courts.

(1) [1952] 1 S.C.R. 123.

LOCKE J. (dissenting):—By an agreement dated September 19, 1938, the Town of Vermilion granted to the respondent, inter alia, the right to enter upon the streets of the town and install gas pipe lines and related structures and equipment for the supply of natural gas to inhabitants on terms defined by that instrument. Rights of the nature granted to the respondent are referred to as a "special franchise" in section 291 of the *Town and Village Act*, c. 150, R.S.A. 1942, and by section 292 the council was empowered to grant such rights with the approval of the Board of Public Utility Commissioners for any period not in excess of twenty years.

By the agreement the town granted the exclusive right to supply natural gas to its inhabitants to the respondent for a period of ten years from the date of the agreement, and by a further clause it was provided that at the expiration of that term the company might have the option of renewing:—

> the said exclusive franchise and its contract for a further period of ten years and a similar option at the expiration of each succeeding ten-year period for which the said contract and franchise may be renewed.

provided that such renewals should be subject to such alterations as might be agreed upon between the parties, and that if either party refused to renew or if the parties failed to agree as to the conditions of such renewal:—

> then the Company may refer the matters in dispute to the Board of Public Utilities Commissioners for settlement and the order of such Board shall be final and binding on both parties hereto.

A further term provided that if the company failed to refer any such matter to the Board within thirty days after a written request by the town to do so, the town council might purchase the company's rights under the contract and in all apparatus and property used for the purposes thereof on such terms as might be agreed upon or, failing agreement, as might be fixed by the Board of Public Utility Commissioners.

By an order dated January 24, 1941, the Board of Public Utility Commissioners, a body constituted under the *Public Utilities Act* (c. 28, R.S.A. 1942), which referred to the agreement of September 19, 1938, as granting exclusive privileges for a period of ten years to the respondent, approved the agreement.

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By an agreement in writing dated January 6, 1940, to which the Town of Vermilion was a party, the Wain-Town Company assigned the agreement of September 19, 1938, to Franco Public Service Limited, the latter company assuming the obligations of the respondent to the town contained in that agreement and the town joining for the purpose of evidencing its consent to the transaction. The consideration for the assignment was stated in the following language:—

> In consideration of this assignment Franco doth hereby covenant and agree with Wain-Town to pay to Wain-Town by way of royalty, from the proceeds of all sales of natural gas under the said franchise, the following percentages of the actual gross sales of gas reckoned at consumers' prices, less consumers' discounts:
>
> (*a*) During the first three years six and a quarter per cent (6¼%)
>
> (*b*) During the next 7 years, eight and one third per cent (8⅓%)
>
> (*c*) Thereafter during the currency of this agreement, and of the said franchise twelve and one-half per cent (12½%).)

A further term provided that in the event of the town exercising its right to purchase the gas utility during or at the end of either the ten year term of the franchise or during or at the end of the first renewal period of ten years the Franco Company would pay to Wain-Town twenty-five per cent of the net proceeds of such sale.

The matter to be determined is as to whether amounts received by the respondent from the Franco Company during the taxation years 1944 and 1945 of the nature referred to as royalties in the agreement of January 6, 1940 were taxable income of the respondent during these years. In a carefully considered judgment, by which the decision of the Minister of National Revenue affirming assessments made upon the respondent was set aside, Mr. Justice Angers (1) has found that these receipts were not taxable. The question turns upon the interpretation to be placed upon paragraph (*f*) of subsection 1 of section 3 of the *Income War Tax Act*, c. 97, R.S.C. 1927, and the amendments to that *Act* applicable to these taxation periods. The definition of taxable income, in so far as it affects this matter, as contained in subsection 1 of section 3 of the *Act*, reads:

> For the purposes of this Act "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees

(1) [1951] Ex. C.R. 1.

or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture, or business, as the case may be, whether derived from sources within Canada or elsewhere.

and is stated to include, inter alia:—

(*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

The evidence discloses that the Wain-Town Company did not discover natural gas on its own properties or construct pipe lines or install the apparatus required for the supply of gas to the town and what was conveyed to the Franco Company was simply the rights of the company under the agreement which granted the franchise. Apparently the Franco Company proceeded with the necessary installations and supplies the Town of Vermilion with natural gas acquired by it from the wells of certain companies with which it is associated. For the Crown it is said that within the language of paragraph (*f*) the payments made to the respondent company are either royalties or other like periodical receipts which depend upon the production or use of personal property, that is, the franchise granted by the town to Wain-Town. For the respondent it is contended that the payments are simply instalments of the purchase price of the sale of a capital asset, that is, of the incorporeal hereditament described in the statute as a special franchise.

Paragraph (*f*) of subsection 1 of section 3 was introduced into the *Income War Tax Act* by section 1 of c. 55 of the Statutes of 1934. It appears to be common ground that this amendment was made in consequence of the decisions of this Court and of the Judicial Committee in *Minister of National Revenue* v. *Spooner* (1). In that case a landowner had sold a percel of land in Alberta to a company engaged in drilling for oil for the consideration of a sum in cash, certain fully paid shares of the company and the delivery of ten per cent of the petroleum, natural gas and oil which might be produced from the said lands, which

(1) [1931] S.C.R. 339; [1933] A.C. 684.

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was referred to in the agreement of sale as a royalty reserved to the vendor. Affirming the decision in this Court, it was held that the so-called royalties were not taxable income.

Paragraph (*f*) of subsection 1 does not reproduce the terms of any of the various Income Tax Acts in England or of the rules passed under the authority of any such Act and little help in its interpretation is to be found in any of the English decisions. In the present matter the franchise was sold outright, without any reservation, and thus the sale was of a different nature from that considered in *Spooner's* case. While the agreement of January 6, 1940 referred to the percentages of the actual gross sales of gas as royalties, this, while a matter to be considered, is not decisive nor relieves us of the necessity of determining what was the real nature of the transactions. The expression "royalties" in the paragraph, in the absence of a statutory definition, is to be assigned its ordinary and natural meaning. The word appears in section 109 of the *British North America Act,* where lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the time of Union were reserved to them. It is not, however, in the sense of a royal prerogative or right that the word is used in the *Income Tax Act,* but rather in the sense that the word is commonly used in business transactions to describe sums paid for the right to use a patent or copyright, or to exercise some like incorporeal right, or some payment to be made from the production from property the ownership of which remains vested in the grantor. In my opinion, the word in its ordinary meaning does not describe, or extend to, a payment such as was stipulated for in the agreement between the parties in this matter, where the payment is made as part of the purchase price of the outright sale of personal property transferred without reservation to the Franco Company.

By the terms of the agreement, the payments to which the Wain-Town Company should become entitled were to be paid monthly to its credit in the Vermilion Branch of the Canadian Bank of Commerce covering sales of gas in the preceding month and are clearly not of the nature of annuities. The remaining question is, therefore, whether

they are "other like periodical receipts", within the meaning of paragraph (*f*). The *Income War Tax Act*, as the name implies and as the language of the defining section discloses, is intended to impose a tax on income. In *Withers* v. *Nethersole* (1), Lord Simon, delivering the judgment of the House of Lords, said in part (p. 402):—

> Much emphasis was laid by the Crown on r. 19(2) of the General Rules which begins: "Where any royalty or other sum is paid in respect of a user of a patent . . ." but the Solicitor General did not dispute the Master of the Rolls' proposition (which is plainly correct) that "other sum" in the phrase quoted means other sum which is of a revenue nature and does not include a capital sum.

In my opinion, the same rule of construction should be applied to the language above quoted and so the "other like periodical receipts" referred to are those of an income or revenue, as distinguished from a capital nature. I think the payments stipulated for by the agreement in question were instalments on account of the purchase price of the franchise of a capital nature, such as were the annuities stipulated for as part of the sale price of property considered by this Court in *Wilder* v. *Minister of National Revenue* (2). Since I consider that these payments do not fall within any of the four classifications mentioned in subparagraph (*f*), it is unnecessary to consider whether they are otherwise payments of the nature referred to in the concluding portion of the paragraph.

I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *F. J. Cross.*

Solicitors for the respondent: *MacLeod, Riley, McDermid, Bessemer & Dixon.*

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(1) [1948] 1 All E.R. 400. (2) [1952] 1 S.C.R. 123.

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*May 7, 8, 9
*June 30

THE PRINCE EDWARD ISLAND POTATO MARKETING BOARD (Nominal PLAINTIFF) ..... APPELLANT;

AND

H. B. WILLIS INCORPORATED (Nominal DEFENDANT) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA and others ..... INTERVENERS.

ON APPEAL FROM THE SUPREME COURT (IN BANCO) FOR PRINCE EDWARD ISLAND.

Constitutional Law—Regulation of interprovincial and export trade—Competence of Parliament to enact The Agricultural Products Marketing Act (Can.) 1949, 1st Sess. c. 16—Of Governor General in Council to delegate powers to provincially organized Board—Validity of Scheme established under the Agricultural Products Marketing (P.E.I.) Act, 1940, c. 40.

The Agricultural Products Marketing (Prince Edward Island) Act, (S. of P.E.I., 1940, c. 40) as amended, delegated to the Lt. Governor in Council authority to establish schemes for the marketing within the Province of any natural products and to constitute boards to administer such schemes. On Sept. 5, 1950 the Lt. Governor in Council appointed the appellant Board and delegated to it power to regulate the marketing of potatoes within the Province. *The Agricultural Products Marketing Act* (Can.) 1949, 1st Sess., c. 16, authorized the Governor in Council to delegate to marketing boards which had been established under legislation of any province to regulate the marketing therein of agricultural products, like powers in the interprovincial and export trade. On Oct. 25, 1950 the Governor in Council by P.C. 5159 delegated to the appellant Board powers in relation to the interprovincial and export trade in P.E.I. potatoes similar to those it had had conferred upon it with regard to local sales thereof. The Board thereafter issued several orders of which No. 1 imposed an annual licence fee on dealers engaged in marketing potatoes in P.E.I.; No. 2 a levy on dealers for every cwt. shipped from the Island; No. 3 a minimum price below which certain types of potatoes could not be bought from local producers and forbade consignment or export sales; No. 6 imposed a levy on producers in respect of all potatoes marketed by P.E.I. producers and made the dealers agents of the Board for the purpose of collecting the levy. No. 2 was repealed but any existing liability for the levy under No. 2 was continued.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

Held: reversing the judgment of the Supreme Court of Prince Edward Island *in banco*, that the four questions referred to it by the Lieutenant-Governor-in-Council should be answered as follows:

1. Is it within the jurisdiction and competence of the Parliament of Canada to enact *The Agricultural Products Marketing Act*, (1949) 13 George VI., (1st Sess.) c. 16?

Answer: Yes (unanimous).

2. If the answer to question No. 1 is yes, it is within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159?

Answer: Yes (unanimous).

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: Yes except as to s. 19 (Kerwin, Taschereau, Estey, Cartwright, Fauteux, JJ.); Yes (the Chief Justice); Yes except as to ss. 4 and 19 (Rand J.); No (Kellock and Locke JJ.).

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: Yes except as to Orders numbers 2 and 6 (Kerwin, Taschereau, Rand, Estey, Cartwright, Fauteux JJ.); Yes (the Chief Justice); No (Kellock and Locke JJ.).

APPEAL from a judgment of the Supreme Court of Prince Edward Island *in banco* (1) upon a reference by the Lieutenant Governor in Council of the four questions set out in the preceding head note. By order of the Chief Justice of Prince Edward Island, the Attorney General of Prince Edward Island and the Attorney General of Canada were at the outset granted leave to intervene at any stage of the proceedings. The Attorneys General of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Newfoundland were by order of the Chief Justice of Canada, notified of the Reference on appeal to this Court. The arguments submitted sufficiently appear in the reasons for judgment that follow.

R. H. Milliken Q.C. and *H. F. MacPhee Q.C.* for the appellant.

J. W. de B. Farris Q.C. and *K. M. Martin Q.C.* for the respondent.

F. P. Varcoe Q.C. and *J. T. Gray* for the Attorney General of Canada, Intervenant.

(1) 29 M.P.R. 93; [1952] 4 D.L.R. 146.

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P.E.I. POTATO MARKETING BOARD v. H. B. WILLIS INC.

W. E. Darby Q.C. for the Attorney General of Prince Edward Island, Intervenant.

C. J. A. Hughes for the Attorney General of New Brunswick, Intervenant.

L. A. Kelley Q.C. for the Attorney General of British Columbia, Intervenant.

J. R. Dunnet for the Attorney General of Saskatchewan, Intervenant.

THE CHIEF JUSTICE:—In my opinion, the appeal of the Prince Edward Island Potato Marketing Board should be upheld.

The judgment of the Supreme Court of Prince Edward Island *in banco* was delivered on the 31st of January, 1952. The Lieutenant-Governor-in-Council had referred to that Court for hearing and consideration the following questions:

(1) Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI, (1st Session) c. 16?

(2) If the answer to question No. 1 is yes, is it within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159?

(3) Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular s. 16 thereof?

(4) Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Tweedy J. wrote the main judgment, in which the Chief Justice and MacGuigan J. concurred, the Chief Justice simply adding a few additional reasons.

The main ground of the judgment of Tweedy J. appears to have been that the Supreme Court of Canada in *A.G. of N.S.* v. *A.G. of Can.* (1) which held that the Parliament of Canada and each provincial legislature were not capable of delegating one to the other the powers with which it had been vested, nor of receiving from the other the powers with which the other has been vested. In the opinion of the Supreme Court *in banco* of Prince Edward Island that judgment was really decisive with respect to the first two questions in the reference under appeal.

(1) [1951] S.C.R. 31.

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Rinfret C.J.

With deference, such is not the effect of the judgment of this Court in the Nova Scotia reference. It was made quite clear in our reasons for judgment that they only applied to the questions as put and which had to deal only with an Act respecting the delegation from the Parliament of Canada to the Legislature of Nova Scotia and *vice versa*. The unanimous opinion of this Court was that each legislature could only exercise the legislative powers respectively given to them by ss. 91 and 92 of the Act, that these sections indicated a settled line of demarcation and it did not belong to the Parliament of Canada or the Legislatures to confer their powers upon the other. At the same time it was pointed out that *In re Gray* (1) and *The Chemical Reference* (2), the delegations there dealt with were delegations to a body subordinate to Parliament and were, therefore, of a character different from the delegation meant by the Bill submitted to the Court in the Nova Scotia reference.

But, on the other hand, the delegations passed upon by this Court *In re Gray* and *The Chemical Reference* were along the same lines as those with which we are concerned in the present appeal. It follows that our judgment in the Nova Scotia reference can be no authority for the decision which we have to give in the present instance. It may be added that at bar counsel did not rely upon that ground in this Court.

The first question submitted to the Supreme Court *in banco* of Prince Edward Island had to do with the jurisdiction and competence of the Parliament of Canada to enact *The Agricultural Products Marketing Act* (1949), 13 George VI, (1st Session) c. 16. That Act was assented to on the 30th of April, 1949. The preamble, among other things, stated that it was "desirable to co-operate with the provinces and to enact a measure respecting the marketing of agricultural products in interprovincial and export trade". S. (2) of the Act reads as follows:—

2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export

(1) (1918) 57 Can. S.C.R. 150. (2) [1943] S.C.R. 1.

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trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor in Council may by order revoke any authority granted under subsection one.

The effect of that enactment is for the Governor-in-Council to adopt as its own a board, or agency already authorized under the law of a province, to exercise powers of regulation outside the province in interprovincial and export trade, and for such purposes to exercise all or any powers exercisable by such board, or agency, in relation to the marketing of such agricultural products locally within the province. I cannot see any objection to federal legislation of this nature. Ever since *Valin* v. *Langlois* (1), when the Privy Council refused leave to appeal from the decision of this Court (2), the principle has been consistently admitted that it was competent for Parliament to "employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated". The latter are the words of Lord Atkin, who delivered the judgment of the Judicial Committee in *Proprietary Articles Trade Association et al* v. *A.G. for Canada et al* (3). The words just quoted are preceded in the judgment of Lord Atkin by these other words:—

> Nor is there any ground for suggesting that the Dominion may not * * * *

It will be seen, therefore, that on that point the Judicial Committee did not entertain the slightest doubt.

In *The Agricultural Products Marketing Act* of 1949 that is precisely what Parliament has done. Parliament has granted authority to the Governor-in-Council to employ as its own a board, or agency, for the purpose of carrying out its own legislation for the marketing of agricultural products outside the province in interprovincial and export trade, two subject-matters which are undoubtedly within its constitutional authority. Moreover, it may be added, that in doing so Parliament was following the advice of the Judicial Committee in the several judgments which

(1) (1879) 5 App. Cas. 115. (2) (1879) 3 Can. S.C.R. 1.
(3) [1931] A.C. 310.

it rendered on similar Acts and, more particularly, on the Reference concerning the Natural Products Marketing Act, (1) adopted by Parliament in 1934 (S. of C. 24 and 25 George V, c. 57), (1937), that the proper way to carry out legislation of that character in Canada, in view of the distribution of legislative powers under the British North America Act, was for Parliament and the Legislatures to act by co-operation.

I would, therefore, answer question (1) in the affirmative.

Question two was not answered by the Supreme Court *in banco* of Prince Edward Island as a result of the fact that it had answered question one in the negative. As my answer to question one is in the affirmative, so will be my answer to question two.

The Governor-in-Council by P.C. 5159, passed on the 25th October, 1950, has done nothing else, nor more, than act in accordance with the powers conferred upon it by s. (2) of *The Agricultural Products Marketing Act* of 1949. Indeed the text of the Order-in-Council is practically and substantially the same as the text of the Act itself. Applying it to the Prince Edward Island Potato Marketing Board, the Order-in-Council refers to the Scheme for the marketing of potatoes, made by the Lieutenant-Governor-in-Council on the 5th September, 1950, and particularly to paras. (*a*), (*b*), (*c*), (*f*), (*g*), (*i*), (*j*), (*o*) and (*p*) of s. 16 of the Scheme. The evident object of that enumeration was for purposes of interprovincial and export trade to limit the exercise of the powers conferred upon The Potato Marketing Board by the Lieutenant-Governor-in-Council of Prince Edward Island to those powers which are exercisable by The Potato Marketing Board under the paragraphs so enumerated. As the Scheme itself, and, in particular s. 16, are the subject of question three, they will be considered by me in my answer to that question.

It will be noted that no question was put in the reference with regard to the validity of the *Agricultural Products Marketing (Prince Edward Island) Act*, 1940, 4 George VI, c. 40. The reference, therefore, assumes that the Act itself is valid; and the question is merely whether the Lieutenant-Governor-in-Council had the required jurisdiction and competence to establish the Scheme and, in particular, s. 16.

(1) [1937] A.C. 377 at 389.

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The purpose and intent of the Provincial Act, as stated in s. 4(1), is "to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part". Ss. (2) of s. 4 is as follows:—

> 4. (2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Then s. 5, without limiting the generality of any of the other provisions of the Act, authorizes the Lieutenant-Governor-in-Council to vest in any Provincial board any or all of the additional powers enumerated in sub-paras. (*a*) to (*k*) inclusive.

When s. 6 was first enacted it stated that every provincial board was authorized to co-operate with the Dominion Board to regulate the marketing of any natural product of the Province and to act conjointly with the Dominion Board, and perform such functions and duties and exercise such powers as were prescribed by the Act or the regulations. This was amended in 1950 by striking out the words "Dominion Board" in the second and fourth lines thereof and substituting therefor in each instance the words "Provincial Marketing Boards of other Provinces".

Then s. 7 of the Prince Edward Island Act enacted that every Provincial Board might, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product, to which was added, in 1950, the following:—

> and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

S. (8), which authorizes the Dominion Board to exercise its powers with reference to the marketing of a natural product, was repealed in 1950 and should no longer be considered.

S. (9) of the Provincial Act, as amended in 1950, no longer contained the words "in co-operation with the Dominion Board", and should now be read without those words.

I have referred to these amendments merely to indicate the present state of the Provincial Act, but, I repeat, that its validity is not submitted in the Reference, and the question is only whether the Scheme, adopted on the 5th September, 1950, was within the jurisdiction of the Lieutenant-Governor-in-Council to establish.

In fact, the only doubt suggested with regard to the validity of the Scheme concerns s. (16) thereof. Now, it is obvious that the Provincial Act itself had no other object than to deal with the local marketing within the province, and that intention is emphasized throughout the several sections of the Act.

The same intention appears in s. (16) of the Scheme. The opening words give the Potato Board powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein. The Scheme defines what is meant by the words "regulated area" and that area is thereby limited to the Province of Prince Edward Island. Then these same words are repeated throughout the Scheme and, particularly, in the several paras. of s. (16).

It should be noted that although the Scheme is that of the Prince Edward Island Potato Marketing Board, it has received the approval and, in fact, was made by the Lieutenant-Governor-in-Council, and that question No. (3), therefore, should be considered only in respect of the jurisdiction and competence of the latter.

There could be no ground for suggesting that the Lieutenant-Governor-in-Council could not vest in the Boards constituted by it any powers considered necessary or advisable to enable those Boards effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province. This is especially given to the Lieutenant-Governor-in-Council

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by ss. (2) of s. (4) of the Act. I can see nothing in s. (16) of the Scheme which is not covered by the authorities so conferred upon the Lieutenant-Governor-in-Council, either under s. (4) or under s. (5) of the Act. We must come to that conclusion more particularly in view of the absence in the Reference of any question concerning the authority of the Provincial Act and that, therefore, its validity must be assumed for the purpose of considering the Scheme.

In that connection it is significant that the answers of the Supreme Court *in banco* of Prince Edward Island were that the Scheme in general, and s. (16) in particular, were not within the jurisdiction of the Lieutenant-Governor-in-Council "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". That answer would have been more complete if the Supreme Court *in banco* had stated that it could be and should be so limited. It is sufficient for this Court to say that it must of necessity be limited to transactions within the Province. Far from there being any intention on the part of the Legislature of Prince Edward Island to extend its scope to transactions outside the Province, the Act itself and the Scheme took particular care to limit it to the local trade, and under all canons of construction, including, of course, *The Interpretation Act* (s. 31) they must be so understood.

Question (4) of the Reference submits certain orders made by the Prince Edward Island Potato Marketing Board and asks whether they were within the jurisdiction and competence of that Board and again the answer of the Supreme Court *in banco* was in the negative "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". This, in my view, is practically an answer in the affirmative for none of those orders pretend to affect transactions outside the Province. However, Board orders Nos. 2 and 6(2) are singled out in the answer of the Court below. There is no object in directing our attention to Order No. (2), because, prior to the Reference being submitted to that Court, Order No. 2 was repealed.

The objection to Order 6(2) is stated to be that it might be regarded as indirect taxation, and also that the tax or impost levied under that Order "is clearly far in excess of the valid requirements of the Board for *intra vires* administration expenses, and must be taken to be imposed in contemplation of activities beyond the jurisdiction of the Board". For that reason it was held that "the levy is therefore *ultra vires* and invalid".

The first answer to that objection is that it is based entirely upon a pure question of fact, of which there is not the slightest evidence in the record, and it is not to be assumed that the Board would levy any tax or impost in excess of its requirements. Moreover, the Provincial Act authorizes the Lieutenant-Governor-in-Council to vest in the Board any powers considered necessary or advisable to enable it effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province (s. 4(2) of the Act). The Board is undoubtedly competent to act in accordance with those powers. This Court cannot take judicial notice of facts which may be said to indicate that the levy is beyond the requirements of the Board for the objectives which it is to carry out. No facts of that character appear in the record. It will be time enough to pass upon that question whenever, in some litigation, it is shown that the Board has, in a particular instance, exceeded its requirements.

I have no doubt that the Act itself and the Scheme approved by the Lieutenant-Governor-in-Council were amply sufficient to justify the Orders mentioned in Question (4).

With deference, I am unable to see how the word "regulate" in s. 19 of the Scheme indicates an intention on the part of the Provincial Legislature to extend the scope of this whole enactment beyond the confines of provincial jurisdiction. On the contrary, it seems to me that s. 19 should be "regarded as harmless authority to confer and collaborate informally with representatives of the Nova Scotia Potato Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board", and for those Boards to "act conjointly" with the representatives of the Prince Edward Island Potato Marketing Board. Moreover, it should be pointed

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out that any action of the local potato board is "subject to the approval of the Prince Edward Island Potato Marketing Board".

As to the vague suggestion that the levy provided for in s. 16(*k*) of the Scheme might be looked upon as "a measure of indirect taxation", it has not been made a point for the decision appealed from, but it would seem to have lost its weight—and I do not consider that it ever had any weight —since the adoption of the Board by the Governor-in-Council.

The ingenious argument of Mr. Farris that the Provincial Board had no capacity to receive the delegation of powers from the Federal Government has failed to convince me. As stated above, Parliament could choose its own executive officers for the carrying out of this legislation, and when so chosen the Provincial Board became the agent authorized by the Governor-in-Council with "all or any powers like the powers exercisable by such Board or agent in relation to the marketing of such agricultural product locally within the province". That, of course, must be understood *mutatis mutandis*. The Board did not need the enabling capacity provided for in s. (7) of the Prince Edward Island Act. It became a body, or an entity, and it was not necessary for the Province to give it the power to "perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product"; or, in the words of the amendment of 1950, "to accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act".

Such authority, as contained in s. (7) of the Provincial Act, was not necessary, except perhaps for the province to express its desire that the Provincial Board should not accept any authority from the Governor-in-Council except "with the approval of the Lieutenant-Governor-in-Council". In the present case, the Provincial Board received its powers directly from the Federal Government. But s. (7) can do no harm, since, in the exercise of the powers delegated to the Provincial Board by the Federal Government, the Board becomes the agent of the latter government and gets its powers from such appointment.

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On the whole, I would answer each of the questions in the affirmative.

The judgment of Kerwin and Fauteux JJ. was delivered by:—

KERWIN J.:—In delivering the judgment of the Judicial Committee in *A.G. for British Columbia* v. *A.G. for Canada* (Natural Marketing Act Case) (1), Lord Atkin, at page 389, remarked:—

> It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

In *A.G. of N.S.* v. *A.G. of Canada* (2), this Court decided that the method proposed to be adopted by the Legislature of Nova Scotia to meet this test was not authorized. In the present case, in the Court below reliance was placed upon what was there said by the several members of this Court but the opinion of none of the latter justifies the conclusion reached by the Supreme Court of Prince Edward Island *in banco,* or the reasons upon which that conclusion was based. In the Nova Scotia case, it was proposed that the Legislature should enact that the Lieutenant-Governor-in-Council of Nova Scotia might, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter was, by s. 92 of the British North America Act, 1867, exclusively within the legislative jurisdiction of the Legislature and that any laws so made by Parliament should, while such delegation was in force, have the same effect as if enacted by the Legislature. All the members of this Court decided that this could not be done as a contrary conclusion would be obnoxious to the tenor and scheme of the British North America Act. By that Act certain powers were conferred

(1) [1937] A.C. 377. (2) (1951) S.C.R. 31.

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upon the Parliament of Canada and the Legislature of a province, and we held that neither could transfer its authority to the other.

What is here attempted to carry out Lord Atkin's suggestion is an entirely different matter. At the outset, it should be emphasized that no question is submitted as to the validity of the provincial statute *"Agricultural Products Marketing (Prince Edward Island) Act"* (1940, c. 40). In substance, and, as will later appear, in very important respects, that Act is the same as the British Columbia statute which was held to *intra vires* in *Shannon* v. *Lower Mainland Dairy Products Board* (1). Having provided for the constitution by the Lieutenant-Governor-in-Council of a Board to be known as "Prince Edward Island Marketing Board" s. 4 enacts:—

> 4. (1) The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.
>
> (2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Provision was then made whereby the Lieutenant-Governor-in-Council might vest in any provincial board, without limiting the generality of any of the other provisions, certain specified powers of regulation, including the registration of all persons engaged in the production, packing, transporting, storing or marketing of the regulated product and to fix and collect licence fees therefrom. S. 7 (as amended in 1950) enacts:—

> 7. Every Provincial board may, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

(1) [1938] A.C. 708.

By the interpretation section, as amended in 1950, "Dominion Act" means "The Agricultural Products Marketing Act" of Canada. This Canadian Act is c. 16 of the Statutes of 1949 (1st Session) and s. 2 thereof provides:—(As to which see p—).

My answer to the first question as to whether this Act is within the jurisdiction and competence of Parliament is in the affirmative. Parliament, legislating with reference to inter-provincial and export trade which it and not any provincial legislature has the power to do, may validly authorize the Governor General in Council to confer upon a provincial board appointed under the Prince Edward Island statute of 1940, the power to regulate such marketing. This Court held in *Valin* v. *Langlois* (1), that Parliament could confer authority and impose a duty upon a provincial Court in connection with contested elections under the Canada Elections Act. In refusing leave to appeal (2), the Judicial Committee indicated its approval of that judgment. Admitting, as counsel for the respondent argued, that the Island Board was not made a corporation and that its members are distinct from the Board as a whole, I reiterate the view expressed in *Labour Relations Board, Sask.* v. *Dominion Fire Brick and Clay Products Ltd.* (3), that such a Board is a legal entity. Having been validly established by the Legislature, it has the capacity to receive and accept the authority authorized by Parliament to be conferred upon it by the Governor-General-in-Council. Counsel for the respondent further submitted that in overruling the judgment of this Court in *Bonanza Creek Gold Mining Co.* v. *The King* (4), the Judicial Committee (5), drew a distinction between powers and rights exercisable within a province and capacity to accept extra-provincial powers. That is quite true but what was in issue there was the extent of the power of the Ontario Legislature under 92(11) of the British North America Act "The Incorporation of Companies with Provincial Objects". While the judgment of the Judicial Committee in that particular case proceeded upon the basis that the Bonanza Creek Gold Mining Company had really been

(1) (1879) 3 Can. S.C.R. 1.
(2) (1879) 5 App. Cas. 115.
(3) [1947] S.C.R. 336 at 339.
(4) (1914) 50 Can. S.C.R. 534.
(5) [1916] A.C. 566.

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incorporated by virtue of the Royal prerogative, there is nothing in the reasons of Chief Justice Fitzpatrick and Duff J., relied upon by the respondent, to indicate that they were dealing with anything more than the limitation of "provincial objects". In fact the latter pointed out that the question whether capacity to enter into a given transaction is compatible with this limitation was one to be determined upon the particular facts, and he held that on the true construction of the Ontario Companies Act the Company only acquired capacity to carry on its business as an Ontario business and that there was no legislation by the Dominion or the Yukon professing to enlarge that capacity.

The second question is as to the jurisdiction and competency of the Governor-General-in-Council to pass P.C. 5159. That Order-in-Council granted authority to the Prince Edward Island Products Marketing Board, as established by the Lieutenant-Governor of the Province, to regulate the marketing outside the province in interprovincial and export trade of Island products, and that for such purposes the Board might with reference to persons and property situated within the Island exercise powers like the powers exercisable by it in relation to the marketing of Island products locally within the province under certain paragraphs of s. 16 of the Island's Products Marketing Scheme as amended from time to time. It was not contended that, if the answer to the first question be in the affirmative, the answer to the second should not be the same.

Question 3 is as to the jurisdiction and competency of the Lieutenant-Governor-in-Council to establish the Scheme referred to, and particularly s. 16 thereof. In dealing with this question it is necessary to bear in mind the provisions of the Act under which the Scheme was adopted by the Lieutenant-Governor-in-Council. Subsections 1 and 2 of s. 4 have already been extracted and it is important to note that what is being dealt with is the control and regulation of the transportation, packing, storage and marketing of natural products within the Province. This same wording appeared in the British Columbia statute considered in the *Shannon* case. There, the Privy Council stated that it was apparent that the legislation was

confined to regulating transactions that took place wholly within the province. After pointing out that natural products as defined were not confined to those produced in British Columbia, the judgment proceeded: "It was suggested that 'transportation' would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that 'transportation' is confined to the passage of goods whose transport begins within the Province to a destination also within the Province." Therefore, in view of the similarity of the British Columbia and Prince Edward Island statutes, unless a fair reading of the Scheme as a whole leads one to the opposite conclusion, it should not be held that the Lieutenant-Governor-in-Council exceeded the powers conferred upon him by the statute and attempted something beyond provincial jurisdiction. For that reason, s. 4 of the Scheme, which provides: "This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes of any kind or grade thereof in the regulated area", is in my view valid.

S. 16 of the Scheme is the one conferring specified powers upon the Potato Board and as it provides that "The Potato Board shall have the following Powers exercisable in Prince Edward Island in relation to the marketing of potatoes *therein*", it also is valid unless some particular clause thereof clearly goes beyond the statutory powers. The only clauses requiring consideration are (*d*), (*e*) and (*k*). I can find no objection to clause (*d*) which merely authorizes the licensing of potato dealers. Clause (*e*) authorizes the Board

> (*e*) to fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing potatoes with power to classify such persons into groups and fix the licence fees payable by the members of the different groups in different amounts and to recover any such licence fees by suit in any Court of competent jurisdiction;

In substance this is the same as s. 5(*d*) of the Prince Edward Island Act:—

> (*d*) To fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, packing, transporting, storing or marketing the regulated product; and for this purpose to classify such persons into groups, and fix the licence fees payable by the members of the different groups in different amounts; and to recover any such licence fees by suit in any Court of competent jurisdiction;

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This s. 5(*d*) is in the same terms as s. 4A(*d*) of the British Columbia statute considered in the *Shannon* case and as to which the Judicial Committee held (page 721):—

> A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes.

Clause (*e*) of s. 16 of the Scheme is therefore valid. Clause (*k*) authorizes the Board

> (*k*) to establish a fund in connection with this Scheme to be utilized in such manner as may be deemed necessary or advisable by the Potato Board for the proper administration of the Scheme:

and may stand as it is comparable to section 4A(*j*) of the British Columbia statute:—

> 4A(*j*). To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

which the Judicial Committee also held unobjectionable for the same reasons.

S. 19 of the Scheme reads as follows:—

> 19. The Potato Board may name two representatives to act conjointly with representatives named by the Nova Scotia Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board as a committee to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area, and the Potato Board may, subject to the approval of the Board, delegate to said committee such of its powers as it may deem advisable.

No authority can be found for the kind of sub-delegation therein provided for and, in my opinion, this clause is not within the jurisdiction and competence of the Lieutenant-Governor in Council.

The fourth question is with reference to the jurisdiction and competence of the Board to make certain Orders under the Scheme. Order No. 1 provides that the dealers must take out a licence and pay a fee therefor of five dollars. Order No. 2 provides:—

> (1) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every dealer shall pay to the Board a charge at the rate of One Cent (1c) for every One hundred pounds of potatoes shipped or exported by such dealer from the Province of Prince Edward Island.
>
> (2) Each dealer shall render to the Potato Board on the 6th day of each month a statement of all cars of potatoes shipped during the preceding month which statement shall correctly show the quantity of

potatoes shipped in each car. With each such statement the dealer shall forward to the Potato Board his remittance to cover the charge or levy provided by paragraph one hereof calculated at the said rate on the volume of potatoes shown by said statement.

Order 6, made February 14, 1951, by para. (1) repealed Order No. 2 "subject to the provision that every dealer shall continue liable to pay to the Potato Board the full amount of the charge or levy which is now due or accruing due and unpaid in respect of potatoes shipped or marketed up to this date." By paragraphs 2, 3, 4 and 5 of Order No. 6:—

(2) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every producer shall pay to the Potato Board a charge or levy at the rate of one cent per hundred pounds of potatoes in respect of all potatoes sold or marketed by such producer.

(3) Every dealer shall be an agent for the Potato Board for the collection of said levy or charge from the producers whose potatoes such dealer ships or exports.

(4) Every dealer when purchasing potatoes in Prince Edward Island shall deduct from the amount payable by him to the Vendor of same the amount of the said levy or charge in respect of the potatoes so purchased by him.

(5) Every dealer shall render to the Potato Board on the 6th day of each month a true and correct statement of all cars of potatoes shipped by such dealer during the preceding month, which statement shall clearly show the quantity of potatoes shipped in each case. With each such statement the dealer shall forward to the Potato Board his remittance to cover the charge or levy provided by paragraph 2 hereof calculated at the said rate on the volume of potatoes shown by said statement.

These paragraphs are clearly referable to export trade and cannot be supported. While Order No. 2 was repealed before the Order of Reference was made by the Lieutenant-Governor in Council, the revoking Order (No. 6) provides for the continuance of any existing liability for the levy.

I would therefore answer the questions as follows:

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

TASCHEREAU, J.:—The Lieutenant-Governor-in-Council of the Province of Prince Edward Island has referred for advice to the Supreme Court of that Province *in banco,* four questions which are the following: (As to which see p. 394)

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The unanimous opinion of the Court of Appeal was that the questions should be answered as follows:—

1. No.

2. No answer.

3. As to section 19 of the scheme—No. As to the scheme in general, and section 16 in particular,—No, unless and insofar as the scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province.

4. As to Board Order Number 6(2), and the now-repealed Board Order Number 2—No. As to the Board Orders in general—No, subject to the proviso set out in the answer to question 3.

I fully concur with the view that the two first questions should be answered in the affirmative. I have no doubt that the Parliament of Canada has the necessary competence to regulate the marketing of agricultural products *in interprovincial and export trade,* and to co-operate with the provinces which have enacted legislation respecting the marketing of such products *within the province.* (Vide *Lawson* v. *Interior Tree Fruit Committee* (1); (*Marketing Act Reference* (2)) and (3).

It was also I think, within the jurisdiction of the Governor-General to pass P.C. 5159, and to vest in the Board powers which are identical with those authorized to be vested by the statute. (*Shannon* v. *Lower Mainland* (4); (*Chemicals Reference* (5)).

The Supreme Court of Prince Edward Island relied upon *A.G. of Nova Scotia* v. *A.G. of Canada* (6) to answer in the negative, but I do not think that that case supports the view that has been adopted. The judgment merely decided that neither Parliament nor the legislatures can delegate powers to each other so as to change the distribution of powers provided for in ss. 91 and 92 of the British North America Act. Here the issue is entirely different. The Federal legislation does not confer any additional powers to the legislature but vests in a group of persons certain powers to be exercised in the interprovincial and

(1) [1931] S.C.R. 357 at 371.
(2) [1936] S.C.R. 398.
(3) [1937] A.C. 377 at 389.
(4) [1938] A.C. 708 at 722.
(5) [1943] S.C.R. 1.
(6) [1951] S.C.R. 31.

export field. It is immaterial that the same persons be empowered by the legislature to control and regulate the marketing of Natural Products within the Province. It is true that the Board is a creature of the Lieutenant-Governor-in-Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada. (*Valin* v. *Langlois* (1)).

As to question No. 3, for the reasons given by my brother Kerwin, whose judgment I had the advantage of reading, it is my opinion that the scheme is valid including s. 16. However, s. 19 is not authorized by the Act. We find in s. 6 of the Act the necessary authority given to the Board to *co-operate* with other Provincial Marketing Boards to regulate the marketing of natural products, but nowhere do we find that the Potato Board is empowered to appoint a committee and *delegate* to it, subject to the approval of the Board, such of its powers, as it may deem advisable.

The charge or levy imposed in Order No. 2 and in Order No. 6 for the purpose of establishing a fund in connection with the Marketing Scheme, seems in either case to be clearly indirect. In the first case it is imposed upon the dealer, and upon the producer in the second, and, therefore, it remains that it is charged upon an article of commerce in course of trade and not against the final purchaser. The effect of this charge or levy necessarily tends to increase the sale price by the amount of the tax. (*Atlantic Smoke Shops* v. *Conlon* (2) and (3)). Order No. 2 was repealed by Order No. 6, but as the revoking Order imposed a liability upon every dealer to pay to the Potato Board the full amount of the charge or levy due or accruing due and unpaid in respect of potatoes shipped or marketed, it follows that both must be held invalid.

I would therefore answer the interrogatories as follows:—

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

(1) (1879) 5 App. Cas. 115. (2) [1941] S.C.R. 670.
(3) [1943] A.C. 550.

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RAND J.:—This appeal arises out of a Reference by the Lieutenant-Governor-in-Council of Prince Edward Island to the Supreme Court of that province of questions relating to both Dominion and Provincial legislation dealing with agricultural products.

Under *The Agricultural Products Marketing (Prince Edward Island) Act* of 1940, authority was conferred on the Lieutenant-Governor-in-Council to establish schemes for the regulation within the province of the marketing of any natural product, to be administered by a principal Board and marketing boards.

By such a scheme a board might be authorized, among other things, to require all persons engaged in a trade within the province to register and obtain licences, to prescribe licence fees therefor, and to fix maximum and minimum prices at which the product might be bought or sold in the province. A board could co-operate with the Marketing Board constituted under The Agricultural Products Marketing Act of the Dominion, and, conjointly, exercise its powers under the local law. With the approval of the Lieutenant-Governor-in-Council, a board could accept and exercise any power conferred upon it pursuant to the Dominion Act in relation to the marketing of a natural product.

A scheme for the regulation of the marketing of potatoes throughout the province was established by order-in-council of September 5, 1950. A Potato Board was constituted of five members which, besides the general powers already mentioned, was authorized to establish a fund for carrying out the scheme for which it might fix and collect charges in the manner as for licence fees; to borrow money for the objects of the scheme within a maximum aggregate of obligations of $10,000; to distribute among producers proceeds of the sales of potatoes; and generally to do such things as might be ancillary to these objects.

The Governor-in-Council, under the Dominion Marketing Act, by order-in-council of October 25, 1950 granted authority to the Potato Board "to regulate the marketing outside the province of Prince Edward Island in inter-provincial and export trade of Prince Edward Island potatoes produced" in that province and for such purpose "to exercise powers like the powers exercisable by it in relation to the marketing of Prince Edward Island potatoes

locally within the province" under specified paragraphs of s. 16 of the scheme as from time to time amended. Among the paragraphs omitted were (*d*) dealing with the licensing of dealers, (*e*) the collection of licence fees, (*k*) establishing a fund in connection with the scheme, (*l*) borrowing money, (*m*) distributing the proceeds of sales among producers, and (*n*) establishing technical and advisory committees and the employment of experts.

The questions submitted to and the answers given by the court were:—

1. Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI, (1st Session) Chapter 16? Answer, No.

2. If the answer to question No. 1 is yes, is it within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159? No answer.

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: As to section 19 of the Scheme—"No." As to the Scheme in general, and Section 16 in particular—"No, unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province."

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: As to the Board Order Number 6(2), and the now-repealed Board Order Number 2—"No." As to the Board Orders in general—"No, subject to the proviso set out in the answer to Question 3."

From the answers this appeal has been brought.

The validity of the provincial legislation generally was not impugned since its provisions are virtually identical with those of the Act of British Columbia which was approved by the Judicial Committee in *Shannon* v. *Lower Mainland Dairy Products Board* (1). The Committee there construed the Act as a whole to be limited to transactions strictly within the field of local or provincial trade. The administration of the Act so circumscribed, apart from co-operative Dominion legislation, may encounter serious practical difficulties if not insuperable obstacles; but that cannot affect its constitutional validity nor its administration conjointly with Dominion powers.

(1) [1938] A.C. 708.

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The principal point of attack was the efficacy of the Dominion delegation. Mr. Farris argued that the province was incompetent to confer on the Board capacity to accept such powers from the Governor-in-Council. This question was not involved in Shannon, *supra*, as the administration there was provincial only and s. 7 of the Act was not expressly considered. The Potato Board is not, under the statute, a corporation, and the contention is this: the power to create such an entity and to clothe it with jural attributes and capacities is derived from head 13 of s. 92 of the Act of 1867 which deals with property and civil rights within the province; as the incorporation of companies under head 11 has its source in the prerogative, a body so created may have unlimited "capacities"; the prerogative is not drawn on for a body created under any other head than 11; a board created as here can have, then, only a capacity in relation to local law. From this it follows that the purported grant of authority from the Dominion is inoperative.

The central feature of this argument is the notion of the creation of an "entity". That a group of human beings acting jointly in a certain manner, with certain scope and authority and for certain objects, can be conceived as an entirety, different from that of the sum of the individuals and their actions in severalty, is undoubted; and it is the joint action so conceived that is primarily the external counterpart of the mental concept.

But to imagine that total counterpart as an organic creation fashioned after the nature of a human being with faculties called "capacities" and to pursue a development of it logically, can lead us into absurdities. We might just as logically conceive it as a split personality with co-ordinate creators investing it with two orders of capacities. These metaphors and symbolisms are convenient devices to enable us to aggregate incidents or characteristics but carried too far they may threaten common sense.

What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another co-ordinate jurisdiction in a federal constitution cannot give other legal incidents to other joint actions is negated by the admission that the Dominion by

appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. As related to courts, the matter was disposed of in *Valin* v. *Langlois* (1). No question of disruption of constitutive provincial features or frustration of provincial powers arises: both legislatures have recognized the value of a single body to carry out one joint, though limited, administration of trade. At any time the Province could withdraw the whole or any part of its authority. The delegation was, then, effective.

The next challenge was to certain provisions of the scheme. In the approach to them it should be assumed that, generally, they are intended only for the regulation of local trade, but several of them are couched in language that must be examined.

By clause 4 the scheme is declared to apply "to all persons who grow, pack, store, buy or sell potatoes of any kind or grade" in the province. I find it difficult to limit this language to local business, but to answer the question finally I take it in its application to the substantive provisions.

These are to be found chiefly in clause 16. para. (*a*) which enables the Potato Board to prescribe the manner of marketing generally; (*b*) to designate the agencies through which potatoes will be marketed; and (*c*) prohibiting the buying, selling, etc. of potatoes which do not conform to quality standards set by the Potato Board. So considered, there is clearly a regulation of external trade which renders clause 4 ultra vires.

The same result follows in the case of para. (*g*) which enables the Board to fix the minimum prices at which potatoes may be bought or sold "for delivery in Prince Edward Island". If the latter were an exclusively ultimate delivery for consumption, there would be no excess: but there may be intermediate deliveries in the course of external trade. Likewise, the application of para. (*m*),

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authorizing any agency designated by the Potato Board to distribute among producers the proceeds of the sales of potatoes, carries regulation beyond the provincial field.

Para. (*d*) (1), providing for licensing dealers and fixing fees, construed to apply to all dealers requires a distinction to be made between fees primarily for revenue and primarily for regulation. In *Brewers & Maltsters'* v. *A.G. (Ont.)*, (1), distillers and brewers operating under licenses from the Dominion were held subject to a provincial licence carrying a fee of $100 whether the product was solely for local consumption, for export, or for both. The fee was justified both as direct taxation and under head 9. Lord Herschell emphasized the uniformity of the fee, its relatively small amount, and that it was imposed without regard to the quantity of goods sold.

In *Lawson* v. *Interior Committee* (2), the levy was part of a local regulation of interprovincial and local trade; the tax imposed might vary with the quantity of the product marketed subject to a minimum and maximum amount of charge; and it was held invalid both as indirect taxation and as not being within head 9.

In *Shannon, supra,* the Judicial Committee held that in the regulation of exclusively local business by a system of licences, fees under head 9 were not restricted to direct taxation.

In *Lower Mainland Products* v. *Crystal Dairy Ltd.* (3), there were two local levies; a compulsory transfer of money from one set of dealers to another, and an assessment for expenses; in each case the levy was related to the quantity of product sold. Here, too, external trade was affected. Both were held to be indirect taxation and invalid.

The scheme before us is primarily one of trade regulation. Apart from taxation, so far as it extends to external trade it is invalid. Licence fees for revenue purposes with only an incidental regulation on local and external trade, as in the *Maltsters'* case, can be imposed on the latter if not indirect in their incidence, but if related to sales they become a burden on that trade and, as in *Lawson's* case, are *ultra vires.*

(1) [1897] A.C. 231. (2) [1931] S.C.R. 357.
(3) [1933] A.C. 168.

Clause 19 of the scheme was challenged. This authorizes the Potato Board to name two representatives to act with representatives of the Nova Scotia, New Brunswick and Newfoundland marketing boards as a committee "to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area"; and, "subject to the approval of the (Provincial) Board, to delegate to that committee such of its powers as it may deem advisable." Co-operative action between boards of different provinces having the same administrative objects is quite unobjectionable; but I find nothing in the statute permitting a sub-delegation of powers of this nature.

Finally, order No. 6 of the Potato Board was attacked. It provides that "for the purpose of establishing a fund in connection with the scheme, every dealer shall pay to the Board a charge at the rate of one cent (1c) for every hundred pounds of potatoes shipped from the province." As mentioned, neither para. (*e*) of clause 16, which authorizes licence fees nor (*k*) which permits the establishment of a fund by means of similar fees, was adopted by the Dominion order-in-council, and I cannot take it that that express omission can be supplied by either (*o*) or (*p*) which authorize generally such acts as may be considered necessary to the execution of the scheme. On the contrary view, (*o*) and (*p*) would be sufficient in themselves for the entire administration on behalf of the Dominion; but the order-in-council specifies with particularity only nine paragraphs out of sixteen in clause 16 and adopts no other clause. The assessment is clearly a mode of indirect taxation effecting primarily a regulation of trade: and as the cases examined indicate, its application to trade beyond the province puts it ultra the powers of the Board.

This order purported to repeal order No. 2 which provided for a similar assessment and which for the same reasons was invalid; and the purported preservation in order No. 6 of unpaid levies under No. 2 likewise fails.

I would, therefore, answer the questions as follows:—

1. Yes.
2. Yes.
3. Except as to sections Nos. 4 and 19, Yes.
4. Except as to orders Nos. 2 and 6, Yes.

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The judgment of Kellock and Locke, JJ. was delivered by:—

KELLOCK, J.:—The central question in this appeal is as to the respective jurisdictions of Parliament and the provincial legislature with respect to regulation of the marketing of a natural product. It is now settled that neither jurisdiction is competent without the other to cover the entire field of local as well as interprovincial and international marketing. The limitation upon the legislative jurisdiction of Parliament was settled by the decisions in *The King* v. *Eastern Terminal Elevator Co.* (1), and *A.G. for B.C.* v. *A.G. for Canada* (2), (Natural Products Marketing Act Reference). While on the other hand, the limitation under which the legislature of a province labours is illustrated by the decision in *Lawson* v. *Interior Tree, Fruit and Vegetable Committee* (3). It was pointed out by Lord Atkin in the *Natural Products Reference supra,* at 389, that satisfactory results cannot be achieved by either legislature leaving its own sphere and encroaching upon that of the other.

The scheme here in question was established by a provincial Order-in-Council under the provisions of the *Agricultural Products Marketing (P.E.I.) Act* (1940) 4 Geo. VI c. 40, as amended in 1950 by 14 Geo. VI c. 18. The purpose and intent of the statute is stated in s. 4, ss. 1, to be

> to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products *within the province,* including the prohibition of such transportation, packing, storage and marketing in whole or in part.

By ss. 2, the Lieutenant-Governor-in-Council is authorized to establish, amend and revoke schemes for the control and regulation *within the province* of the transportation, packing, storage and marketing of any natural products, to constitute marketing boards to administer such schemes, and to vest in such boards any powers considered necessary or advisable for the purpose.

(1) [1925] S.C.R. 434. (2) [1937] A.C. 377.
(3) [1931] S.C.R. 357.

This statute, with some minor differences, is essentially in the form of the statute of British Columbia, in question in *Shannon* v. *Lower Mainland Dairy Products Board* (1), which was held to be *intra vires* of the provincial legislature. In that case, after pointing out that it is now well settled that s. 91(2) of the British North America Act does not give the Dominion the power to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province, Lord Atkin said at p. 719:—

> And it follows that to the extent that the Dominion is forbidden to regulate within the province, the Province itself has the right under its legislative powers over property and civil rights within the Province.

At p. 720 he added:

> 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.

None of the questions on the present reference relates to the competency of the provincial statute here in question, no doubt because of the decision in *Shannon's* case.

The grounds of attack upon the scheme in the case at bar are that (*a*) its whole purpose and result is to control extra provincial trade; (*b*) the legislative powers of Parliament cannot be delegated to a provincial legislature or any agency thereof; and (*c*) the taxes imposed by rules Nos. 2 and 6 of the Potato Board are not authorized by the statute and in any event are indirect.

The provincial Order-in-Council was made on September 5, 1950, subsequent to the Dominion Act which had been assented to on April 30, 1949, but before P.C. 5159 was made thereunder on October 25, 1950. With respect to the second ground of attack, with which I shall deal first, there is in fact no question here of any delegation of legislative authority by Parliament either to the provincial legislature or to the Lieutenant-Governor-in-Council. Neither the Dominion statute nor P.C. 5159 purports to empower either to do anything. Mr. Farris contends that the Canadian Act is incompetent to confer any authority on the provincial board for the reason that the board, although not a corporation, is an entity apart from its

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members, and the provincial legislature is without legislative competence to endow it with capacity to accept powers from Parliament exercisable with respect to international and interprovincial trade. He referred to the judgment of Farwell J. in *Taff Vale Ry. Co.* v. *Amalgamated Society of Ry. Servants* (1).

In my opinion, the provincial board "is but a name for the individuals that compose it," to adopt the language of Atkin L.J., as he then was in *Mackenzie-Kennedy* v. *Air Council* (2). Under the legislation there in question, the Air Council was given attributes more closely resembling those of a corporation than in the case of the provincial board. But, like the board, the Council was not expressly created a corporation. It was held by all the members of the court that the Council was not a corporation. Atkin L.J., in the course of his judgment, pointed out that there were in existence prior to the Act of 1917, by which the Air Council was constituted, other statutes expressly constituting department of state, corporations. At p. 534, after referring to the language of Littledale J. in *Tone River Conservators* v. *Ash* (3), namely, that "To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident," the learned Lord Justice said:

> If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.

In these circumstances, he found himself unable to find, in the language employed by the Legislature, "the manifest intention to incorporate" which Littledale J. thought essential.

In the case at bar there is, in my opinion, a clear indication to be found in the legislation that it was not the intention of the provincial Legislature to incorporate. The statute of 1940 followed and repealed the earlier P.E.I. Natural Products Marketing Act (1934) 24 Geo. V c. 17. By s. 3 of that statute the Lieutenant-Governor-in-Council

(1) [1901] A.C. 426. (2) [1927] 2 K.B. 517.
(3) (1829) 10 B. & C. 349 at 384.

was authorized to establish a board for the purposes of the statute, and the board, by ss. 6, was expressly made a body corporate, but when the Act of 1940 was passed, ss. 6 of the earlier legislation was dropped. A further indication of the legislative intention may be gathered from s. 7 of the Act to amend the statute law, c. 1 of the statute of 1951, which adds a new section to the Act of 1940, as follows:

16. No action shall be brought against any person who since the fifth day of September, 1950, has acted or purported to act or who hereafter acts or purports to act as a member of any board appointed under or pursuant to the provisions of this Act for anything done by him in good faith in the performance or intended performance of his duties under this Act.

I therefore think that there is no question of incorporation in the case of the provincial board, and that the principle to which Mr. Farris called our attention does not apply. There is, accordingly, no lack of capacity on the part of the individuals, from time to time, who make up the potato board to receive authority from Parliament.

Coming to the scheme itself, it must depend for its validity upon the provincial statute alone, as the Lieutenant-Governor-in-Council derives his authority to establish the scheme from that statute and from that statute alone. Para. 4 of the scheme provides that it shall apply to "all" persons who grow, pick, store, buy or sell potatoes of any kind or grade thereof in the regulated area. Para. 16 provides that the Potato Board shall have certain powers exercisable "in Prince Edward Island" in relation to the marketing of potatoes "therein", including the power (*a*) to prescribe the manner in which potatoes shall be marketed, (*b*) to designate the agency through which potatoes shall be marketed, (*c*) to prohibit the buying, selling, packing, storing or transporting of potatoes which do not conform to quality standards, (*d*) to license potato dealers and determine the amount of licence fees and the terms and conditions upon which dealers may buy, sell, transport and otherwise handle potatoes, (*e*) to fix and collect licence fees from all or any persons so engaged, (*f*) to exempt any person or class from the scheme, (*g*) to fix the minimum price or prices at which potatoes may be bought or sold "in Prince Edward Island for delivery in Prince Edward Island," (*h*) to require production of records, (*i*) to regulate

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the shipment and marketing of potatoes in such manner as the board may deem advisable, (*j*) to establish a fund in connection with the scheme and to fix and collect charges in a similar manner to the collection of licence fees from *all* or any persons producing, packing, transporting, storing or marketing potatoes. Para. 18 provides that *every* person who buys, sells, transports, or otherwise handles potatoes shall have a licence issued by the board, and *no* person may buy, sell, offer for sale, or otherwise deal in potatoes produced in the regulated area unless he is in possession of a licence.

On November 6, 1950, the board issued its Order No. 1 providing that *no* dealer should engage in the marketing of potatoes without a dealer's licence obtained from the board. On December 18, 1950, by Order No. 3 the board fixed certain minimum prices at which potatoes might be bought from producers delivered at "Prince Edward Island shipping points." Sub-para. 3 provided that from and after midnight of December 20, 1950, *no dealer or other person* should sell or market potatoes on consignment or ship potatoes "from" Prince Edward Island for sale on consignment.

On November 6, 1950, Order No. 2 had been passed levying a charge of one cent for every one hundred pounds of potatoes "shipped or exported" by dealers "from" the province, but by Order No. 6 of February 14, 1951, Order No. 2 was repealed, but the liability of dealers for amounts then due was preserved. Order No. 6 goes on to provide that *every* producer shall pay a levy of one cent per one hundred pounds of potatoes in respect of "all potatoes sold or marketed by such producer." *Every* dealer is to be an agent of the board for the purpose of collection of this levy.

By para. 19 the board is authorized to name two representatives to act conjointly with representatives named under the authority of legislation of Nova Scotia and Newfoundland to "regulate and co-ordinate the marketing of potatoes produced in the said provinces" and in Prince Edward Island, and to delegate to such committee the powers of the board.

In my view, the powers so given go beyond the mere regulation of the potato trade within the province or carriage thereof from one provincial point to another, and encroach upon the sphere of the regulation of interprovincial and export trade. There is no attempt to confine the scheme or the orders under it to local as distinguished from export trade, and it is to be remembered, as was admitted at the bar, that the business of marketing potatoes in the province is preponderantly an export business.

The order of the Lieutenant-Governor-in-Council would appear to have been passed on the theory that in so far as it went beyond the matter of regulation of purely local trade, the powers of the board could be supplemented by an Order-in-Council under the Dominion statute. That this is so was quite frankly admitted by the Attorney-General for Prince Edward Island in his argument before this court. The provincial Order-in-Council is to be judged, however, on the basis of that which was authorized by the provincial statute alone, as the competency of the Lieutenant-Governor-in-Council could not be increased by anything which might be done by the Governor-General-in-Council under the Dominion Act; *A.G. for N.S.* v. *A.G. for Canada* (1). I see no basis upon which the good may be severed from the bad. I therefore conclude that the scheme is invalid. While the Dominion Order-in-Council is valid to clothe the designated individuals with authority to regulate interprovincial and international trade, it is clear, in my view, that the orders made by the board apply and were intended to apply indiscriminately over the whole field, local, interprovincial and international, and are therefore incapable of being supported in the restricted field.

In the result, while it is clearly within the competence of Parliament and a provincial legislature to authorize an agency such as the agency contemplated by the legislation here in question so as to bring about regulation of the whole field of trade in a natural product, it is necessary that the Dominion and provincial legislation respectively be confined to the legislative jurisdiction of each legislature.

(1) [1951] S.C.R. 1.

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While in the Reference re the *Minimum Wage Act of Saskatchewan* (1), it was found possible to construe the legislation there under consideration as applicable only to persons subject to provincial jurisdiction, I do not think it practicable so to construe the provincial Order-in-Council here in question, having regard not only to the form of its enactment but also to its subject matter. The legislative intention, as expressly disclosed by para. 4, extends over the whole field of trade, and even if that paragraph could be written out of the scheme, the same intent is expressed in sub-paras. (*a*), (*b*), (*f*) and (*i*) of para. 16. In my view, to strike out any one or more of these provisions, leaving the rest standing, would be to rewrite the Order-in-Council, which I do not think it is open to the court to do.

I would therefore answer questions 1 and 2 in the affirmative, and questions 3 and 4 in the negative.

The judgment of Estey and Cartwright, JJ. was delivered by:—

ESTEY, J.:—This reference is concerned with the validity of a plan for co-operation between the Parliament of Canada and the provincial legislatures in the marketing of natural products.

The legislature of Prince Edward Island enacted in 1940 the *Agricultural Products Marketing (Prince Edward Island) Act* (S. of P.E.I. 1940, c. 40) which authorized the Lieutenant Governor in Council to set up a scheme for the marketing of natural products. The language of this statute anticipated co-operation with the Parliament of Canada.

The Parliament of Canada in 1949 enacted *The Agricultural Products Marketing Act* (S. of C. 1949 (1st Sess.), c. 16) designed particularly to make possible co-operation with the provinces in the marketing of natural products.

The legislature of Prince Edward Island in 1950 amended (S. of P.E.I. 1950, c. 18) its statute of 1940 in order to make it more in accord with that of the Parliament of Canada.

(1) [1948] S.C.R. 248.

In this reference the validity of the provincial act is not questioned, no doubt because its provisions are, in all material particulars, to the same effect as those of the act of British Columbia declared to be within the competence of the provincial legislature in *Shannon* v. *Lower Mainland Dairy Products Board* (1).

On September 5, 1950, as authorized by the provisions of the above-mentioned provincial statute, the Lieutenant-Governor-in-Council, by Order-in-Council, established a scheme "for the control and regulation within the Province of the transportation, packing, storage and marketing" of potatoes. The Order-in-Council also provides for a board of five members designated as the Prince Edward Island Potato Marketing Board (hereinafter referred to as the Potato Board) to carry out the provisions of the scheme. The board elects its own chairman and may appoint a secretary-treasurer and such other officers and employees as the members may deem expedient. In para. 16 in the Order-in-Council its powers are particularly set out.

The Governor General in Council, under the authority of s. 2 of *The Agricultural Products Marketing Act,* passed P.C. 5159, October 25, 1950, granting to the Potato Board "powers like the powers exercisable by" that board "in relation to the marketing of Prince Edward Island potatoes locally within the province" as set out in nine of the sub-paras. of para. 16 of the scheme under the provincial Order-in-Council.

The Government of Prince Edward Island referred to the Supreme Court of that province the following four questions: (As to which see p. 394).

This is an appeal from the answers given to the questions by the Supreme Court of Prince Edward Island.

The *Agricultural Products Marketing Act* is restricted to the interprovincial and export trade and neither purports to nor does it interfere with provincial trade as did earlier legislation declared to be *ultra vires*. *Re The Natural*

(1) [1938] A.C. 708; Plax. 379.

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Products Marketing Act 1934, as amended, 1935, (1) and (2). It is, however, contended that the statute is *ultra vires* in so far as it provides for the delegation of power by the Governor in Council as set forth in s. 2:

> 2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.
>
> (2) The Governor in Council may by order revoke any authority granted under subsection one.

The Supreme Court of Prince Edward Island concluded that the Parliament of Canada, in the foregoing s. 2, had provided for a delegation of a type this Court held to be *ultra vires* in *A.G. of N.S.* v. *A.G. of Canada* (3). It was there held the delegation of legislative powers by the Parliament of Canada to a provincial legislature, or by a provincial legislature to the Parliament of Canada, of their respective legislative powers was beyond the competence of these bodies. The problem here presented is quite different in that it is the delegation by the Governor General in Council to the Potato Board, an agency created by the Legislature of the province.

The constitution of this Potato Board is similar to that of the Labour Relations Board of Saskatchewan in respect of which Mr. Justice Kerwin, with whom my Lord the Chief Justice concurred, stated: "* * * the Board is a legal entity, and * * * 'has a right to be heard in Court'" *Labour Relations Board, Sask.* v. *Dominion Fire Brick and Clay Products Limited* (4).

It is, however, contended that the Parliament of Canada cannot confer upon this Potato Board the powers the Governor General in Council sought to do by Order-in-Council P.C. 5159. Our attention was directed to the

(1) [1936] S.C.R. 398.
(2) [1937] A.C. 377; Plax. 327.
(3) [1951] S.C.R. 31.
(4) [1947] S.C.R. 336.

distinction between capacity and powers as expressed by Viscount Haldane in *The Bonanza Creek Gold Mining Co.* v. *Rex* (1), where he stated:

> But actual powers and rights are one thing and capacity to accept extraprovincial powers and rights is quite another * * * In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies.

That the legislature appreciated the foregoing distinction between capacity and powers is evidenced both by the history of the legislation and the language adopted in the enactment itself. The legislature, in passing The Agricultural Products Marketing Act in 1940, repealed (s. 14) The Natural Products Marketing Act 1934 (S. of P.E.I. 1934, c. 17), which provided that the Lieutenant Governor in Council might establish a board to be known as the Provincial Marketing Board and, under s. 3(6) thereof, it was expressly created "a body corporate." In the 1940 act the Lieutenant Governor in Council was again authorized to constitute a board to be known as the "Prince Edward Island Marketing Board" and to "constitute marketing boards," but it does not contain a provision making either a body corporate.

The language of the 1940 statute is equally indicative of the intention of the legislature where, in relation to the marketing boards, it authorizes only the vesting of powers therein. S. 4(2), under which the Potato Board was created, provides that the Lieutenant-Governor-in-Council "may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers" and again in s. 5 the Provincial Board (which includes the Potato Board) may be vested with "additional powers." Then the Lieutenant-Governor-in-Council, in constituting the board, provided in the opening words of para. 16 that it "shall have the following powers." Whatever the precise nature and character of such a statutory

(1) [1916] 1 A.C. 566; 2 Cam. 75 at 89.

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unincorporated body, as ultimately determined, may be, it is sufficient here to observe that the legislature, in constituting this board as it did, without making it a corporate body, intended that the board should exercise the capacities of natural persons, but restricted the exercise thereof to the powers vested in them as a board. As stated by Farwell J., whose language was approved by the House of Lords, when speaking in reference to an unincorporated body, "The Legislature has legalized it, and it must be dealt with by the Courts according to the intention of the Legislature." *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1).

It is conceded that the Governor-General-in-Council might appoint the five individual members of the Potato Board and vest them with the same powers as set out in P.C. 5159. When, however, it is appreciated that this Potato Board is an unincorporated legal entity with the capacity of a natural person, there appears to be nothing in principle or authority to prevent the Governor-General-in-Council designating and authorizing it to discharge such duties and responsibilities as may be deemed desirable within the legislative competency of the Parliament of Canada.

The province, under s. 7 of the provincial act, retains control over its board. The Governor-General-in-Council may, of course, from time to time, change, alter or withdraw any authority it has conferred upon the board under P.C. 5159. The scheme here created is, throughout, a co-operative effort on the part of the respective governing bodies in which each maintains its own respective legislative fields. The board, under the scheme, is responsible to the respective governments in the discharge of those powers which each has competently conferred upon it.

The principle of the delegation and imposition of duties by the Parliament of Canada upon bodies created under provincial legislation was recognized in *Valin* v. *Langlois* (2). With the greatest possible respect to the learned

(1) [1901] A.C. 426 at 429. (2) (1879) 3 Can. S.C.R. 1.

judges in the Appellate Court who held a contrary opinion, I think question No. 1 should be answered in the affirmative.

The Governor General's Order-in-Council P.C. 5159 appears to be within the provisions of the *Agricultural Products Marketing Act* as enacted by the Parliament of Canada in 1949 and, therefore, the answer to question No. 2 should be in the affirmative.

Under question No. 3, if the Lieutenant-Governor-in-Council has established the scheme within the limits of the act of 1940, the competence of which is here not questioned, it is valid. It is suggested, however, that the Lieutenant-Governor-in-Council, in passing para. 4 of the scheme, has exceeded the limits of the power authorized by the provincial act. Para. 4:

> 4. This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes * * * *

The respective provisions of the scheme must be read and construed together. The general language setting forth the scope and application of the scheme in para. 4 must be read with the provisions of para. 16 granting to the board its powers. This para. 16 at the outset expressly states:

> The Potato Board shall have the following powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein.

The several powers enumerated in subparas. (*a*) to (*k*) are in accord with the opening words. When, therefore, the general language of para. 4 is read in relation to the powers as vested in the board under para. 16, it becomes clear that it was intended para. 4 should be construed and ought to be construed to apply only within the field of competent provincial jurisdiction.

In so far as the Lieutenant-Governor-in-Council, in para. 16(*d*) and (*e*), authorized the Potato Board to require licences and to impose fees therefor, the act was within the competence of the province. *Shannon* v. *Lower Mainland Dairy Products Board supra* at p. 391:

> A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be

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no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes.

It was also contended that subpara. 16(*k*) is invalid. It provides for the establishment of a fund "for the proper administration of the scheme" and contemplates that it shall be fixed and collected in the manner provided by subpara. 16(*e*). Such an imposition would appear to be within the competence of the Province, so long as it is not made in a manner and an amount that would cause it to enter into the price of the commodity and, therefore, to be in reality an indirect tax. Lord Herschell, in relation to the imposition of a uniform licence fee of $100, when considering it as a matter of direct or indirect taxation, stated:

> They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. *Brewers and Maltsters' Association of Ont.* v. *A.G. for Ont.* (1).

The language of para. 16(*k*) so read and construed does not appear to be objectionable.

Para. 19 of the scheme provides for an interprovincial committee "to regulate and co-ordinate the marketing of potatoes produced" in the provinces of Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland and provides that, subject to the approval of the Prince Edward Island Marketing Board, the Potato Board may delegate to that committee "such of its powers as it may deem advisable." This provision contemplates the provinces dealing with interprovincial and export trade and is beyond the competence of the province to enact. I would, therefore, answer question No. 3 yes, except para. 19.

(1) [1897] A.C. 231; 1 Cam. 529 at 534.

The scheme, as constituted by the Lieutenant-Governor-in-Council, may be valid, and yet the board, in adopting orders and regulations, may exceed its authority and it is suggested in question No. 4 that the board has done so. The board has made seven orders, an examination of which would indicate that all but Orders Nos. 2 and 6 are within the authority of the board. Under Order No. 2 the board imposed, for the purpose of establishing a fund in connection with the scheme, upon every dealer a charge or levy at the rate of one cent for every 100 pounds of potatoes shipped or exported by such dealer. This Order was repealed by Order No. 6, but it was provided that any amount due or accruing due and unpaid under Order No. 2 remained an outstanding liability. Order No. 6 then proceeded to impose a similar charge or levy of one cent per 100 pounds of potatoes upon every producer in respect of all potatoes sold or marketed by such producer. It might be sufficient to say that neither the act nor the scheme authorizes the Potato Board to make a levy of the sort contemplated by these Orders, but there is a further objection to their validity. This charge or levy is in relation to a sale of potatoes and its nature and character is such that it would be passed on by the dealer as part of, and, therefore, would enter into, the price of the commodity. It is, therefore, in substance an indirect tax and cannot be competently enacted by the province or any agency thereof. Question No. 4 should be answered yes, except as to Orders Nos. 2 and 6.

The questions submitted should be answered: Question No. 1, yes; Question No. 2, yes; Question No. 3, yes, except as to para. 19; Question No. 4, yes, except as to Orders Nos. 2 and 6.

Appeal allowed.

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REPORTER'S NOTE: Following the Reference by the Lieutenant-Governor-in-Council to the Supreme Court of Prince Edward Island *in banco,* by order of Campbell C.J. the appellant as a representative of the class interested in maintaining the affirmative of the questions put, and the respondent as representative of the class interested in maintaining the negative, were named nominal plaintiff and defendant respectively. On the fyling of pleadings it appeared to the Court *in banco* that questions were raised as to the validity of Acts of the Parliament of Canada and the Legislature of Prince Edward Island, and the Attorney General thereof and the Attorney General of Canada having been granted leave to intervene at any stage of the proceedings and the Attorney General of Prince Edward Island having intervened, and it appearing to the Court *in banco* that a conclusive determination of the said questions by the Court of highest resort was desired by the parties and that such determination could be more expeditiously obtained by removing the case to the Supreme Court of Canada, it was ordered by the Court *in banco* that the Reference be so removed. Pursuant to this Court's direction argument as to its jurisdiction was heard on Oct. 25, 1951. H. F. McPhee K.C. appeared for the appellant and K. M. Martin K.C. for the respondent. Judgment was reserved and on Nov. 2, 1951, Cartwright J. delivered the unanimous judgment of the Court holding that under s. 37 of the *Supreme Court Act* an appeal lies only from the opinion of the highest court of final resort in the province in any matter referred to it by the Lieutenant-Governor-in-Council and no such opinion having been pronounced the appeal should be quashed but with no order as to costs.

LOUIS PHILIPPE PICARD (*Defendant*)...APPELLANT;

AND

PIERRE WARREN (*Plaintiff*).....RESPONDENT.

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* Mar. 24
* Jun. 30

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

Jury trial, civil—Production of plea after delays have expired—Motion to fix facts—Whether 30 days elapsed after case stood ready for trial—When "stands ready for trial"—Whether plaintiff deprived of his right to jury trial—Tacit consent to extension of delays to pleas—Arts. 195, 205, 207, 442 C.P.

The respondent brought action against the appellant for damages for personal injuries in September, 1947, and made option in his statement of claim for a trial by jury. The appellant applied for particulars which were given only in January, 1948. The plea to the action—accompanied by a partial inscription in law—was not filed until May 7, 1948. The respondent did not secure a certificate of default.

On a motion made by the respondent for the assignment of the facts to be inquired into by the jury, the appellant objected that the respondent was in default under Art. 442 C.P., having allowed thirty days to elapse from the date at which the case stood ready for trial without proceeding to bring on the trial, that consequently the respondent was deprived of his right to a jury trial and that the case should proceed in the ordinary manner, i.e., before a judge alone. This objection was maintained by the Superior Court but dismissed by the Court of Appeal for Quebec.

Held: The appeal should be dismissed since the respondent was not in default under Art. 442 C.P. and, therefore, was not deprived of his right to a jury trial.

Held: The right to a jury trial is an exceptional one under Quebec Law, the required formalities must be strictly observed and the delay under Art. 442 is of public order in contra-distinction with those pertaining to the filing of the pleas which can be extended by the parties or the Court even after foreclosure.

Held: As soon as the case stands ready for trial—i.e., generally when issue is joined—and remains thus during 30 days, the right to the jury trial is lost if the party who asked for it does not during that period proceed on the motion for the assignment of facts, unless the Court has granted an extension.

Held: In the present case, as there is no doubt that a tacit consent had been given for the late filing of the plea and partial inscription in law, the appellant was not, therefore, foreclosed; and since, under the circumstances, the inference can be drawn from the conduct of the parties that, at least up to the time of the filing of that plea and inscription, there was a mutual understanding not to observe strictly the delays respecting the filing of pleas, the 30 days period had, therefore, not yet commenced to run at that time.

* PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Fauteux JJ.

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Held also, that a judgment affirming or denying the existence of the right to a jury trial determines, not a question of procedure, but a substantive right and also a question of jurisdiction, and is, therefore, a "final judgment" within the meaning of that expression as used in the *Supreme Court Act.*

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the decision of the Superior Court and holding that the respondent was not in default under Art. 442 C.P.

John Ahearn, Q.C., for the appellant, As the plea was not filed within the delay of Art. 197 C.P., the appellant was in default to plead. He was foreclosed, and the case was therefore ready for trial and the delay of Art. 442 C.P. had commenced to run. *Dudemaine* v. *Coutu* (2), *Morrison* v. *Montreal Tramways* (3), *Montreal Tramways* v. *Jacques* (4), *Consolidated Theatres Ltd.* v. *Nihon* (5), *Wise* v. *Boxenbaum* (6) and *Hoolahan* v. *Phee* (7).

The right to a jury trial being an exceptional one, the formalities and the delays must be strictly observed.

"Ready for trial" means ready for the instruction of the case, that is, the evidence and hearing.

The late filing of the plea with the plaintiff's consent does not revive the right to the trial by jury which had expired: *Dudemaine* v. *Coutu* (*supra*) and *Hoolahan* v. *Phee* (*supra*). This applies to an express as well as to an implied consent and the certificate of default is not required.

On the question of the jurisdiction of this Court, it is submitted that it is a final judgment as it determines a substantive right in controversy in a judicial proceeding. The judgment decides that the appellant must be judged by a jury, which is an exceptional mode of trial in Quebec. It is final in the sense that it settles definitely and finally that the case will be heard by a jury. It is also a question of jurisdiction.

Oscar Drouin, Q.C., for the respondent. The jurisprudence has been fixed for a number of years to the effect that "ready for trial" means when issue is joined. But the Court of Appeal in Quebec in its most recent cases

(1) Q.R. [1951] K.B. 554.
(2) [1943] S.C.R. 464.
(3) Q.R. 35, R.P. 219.
(4) Q.R. 21, R.P. 310.
(5) Q.R. 68, K.B. 373.
(6) Q.R. 70, K.B. 9.
(7) Q.R. [1949] K.B. 315.

has acknowledged that the issue, in spite of the delays provided by the Code, sometimes does not become joined solely and automatically by the lapsing of the delays, but that sometimes the consents of the parties can extend the legal delays for joining the issue: *Parent* v. *Parent* (1). Once the right to the jury trial is lost, the parties cannot revive it either by express or implicit consent. But a party can give to the other a procedural delay which would delay the commencement of the 30 days.

In the present case, a tacit consent for the filing of all the proceedings after the delays was given by both parties. There was a tacit agreement of will between the parties equivalent to a formal one, and, therefore, the delays of Art. 442 have not run during the period in question.

On the question of jurisdiction, it is submitted that this is not a final judgment as this is purely a question of procedure. The case of *Dudemaine* v. *Coutu* (*supra*) is not applicable as there the question was not raised and the appeal was dismissed.

The judgment of the Court was delivered by

FAUTEUX, J.: Par action, prise et signifiée en septembre 1947, l'intimé a réclamé de l'appelant une somme de $35,050.00, à titre de dommages résultant de torts personnels et a, en sa déclaration opté pour un procès par jury. Sur l'existence et la validité de l'exercice de ce droit au procès par jury au temps de l'institution de l'action, il n'y a aucune contestation. On a prétendu, cependant, que, subséquemment, l'intimé aurait fait défaut de se conformer aux dispositions de l'article 442 du *Code de procédure civile* et aurait, pour cette raison, perdu ce droit au procès par jury, et qu'en conséquence, la cause doit s'instruire en la manière ordinaire, devant un Juge seul. Telle fut l'objection formulée par l'appelant à l'encontre de la motion faite par l'intimé pour la définition des faits. Acceptée par la Cour Supérieure, cette prétention a été rejetée par une décision unanime de la Cour du Banc du Roi, siégeant en appel (2). C'est de ce dernier jugement dont se plaint l'appelant après en avoir préalablement obtenu la permission par jugement de la Cour précitée.

(1) Q.R. [1951] K.B. 227.
(2) Q.R. [1951] K.B. 554.

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Au seuil de l'argumentation du mérite de cet appel s'est soulevée la question suivante sur la juridiction de cette Cour:

Le jugement frappé d'appel constitue-t-il, au sens de la *Loi de la Cour Suprême du Canada*—telle qu'existant lors de l'institution de l'action—un jugement définitif, i.e. "une décision qui détermine en totalité ou en partie un droit absolu d'une des parties au procès dans une procédure judiciaire?" Dans la version anglaise, "droit absolu" se lit: "substantive right".

Le droit au procès par jury,—objet immédiat du présent débat—est, par suite des dispositions du *Code de procédure civile,* un droit d'exception dans la province de Québec. Dans le cadre de cette exception et sujet à l'observance des formalités prescrites à son exercice et à sa conservation, ce droit demeure intégralement la faculté accordée au justiciable de soumettre sa cause au jugement de ses pairs. Aussi bien une décision affirmant ou niant l'existence de ce droit détermine-t-elle, non pas une simple question de procédure, mais un droit absolu; et portant de plus sur la compétence du tribunal devant entendre et juger la cause, cette décision dispose également d'une question de juridiction. La décision de cette Cour dans *Dudemaine* v. *Coutu* (1) reconnaît substantiellement ces principes. A la page 468, M. le Juge Taschereau déclare:

> Le code, en décrétant en quels cas il y aura lieu à ce mode de procès, a non seulement accordé un droit aux plaideurs, mais il a aussi conféré une juridiction à douze hommes d'entendre ce litige...

Ces considérations, portant sur le droit absolu du plaideur d'avoir, dans certains cas et à certaines conditions, un procès par jury, et le droit absolu de tous les plaideurs d'être, dans tous les cas, jugés par un tribunal compétent, suffisent, je crois, pour conclure que le jugement frappé d'appel "détermine en totalité ou en partie un droit absolu d'une des parties au procès dans une procédure judiciaire". Cette objection préliminaire doit donc être écartée.

Sur le mérite:

L'appelant soumet qu'au jour de la présentation de la motion pour la définition des faits, l'intimé ayant laissé écouler plus de trente jours, avait encouru la déchéance de droit prévue en l'article 442 du *Code de procédure civile.*

(1) [1943] S.C.R. 464.

Aux fins de l'examen et de l'adjudication de ces prétentions, il convient d'abord de reproduire au texte la version française et la version anglaise de cet article, d'en rappeler la portée générale et de préciser, en fonction de cet appel, le sens véritable de certaines des dispositions de cet article.

Version française:

442. A défaut par la partie qui a demandé le procès par jury de procéder sur cette demande dans les trente jours qui suivent celui où la cause est mûre pour le procès ou pour un nouveau procès, elle est de plein droit déchue de la faculté de le faire; mais le juge peut, sur demande faite dans l'intervalle, lui accorder un délai additionnel pour raison valable.

L'autre partie peut, dans les quinze jours après l'expiration de ce délai, procéder au procès par jury.

A défaut de le faire, dans aucun de ces cas, la cause peut être inscrite pour enquête et audition en la manière ordinaire.

Version anglaise:

442. When any party who has demanded a trial by jury allows a delay of thirty days to elapse from any date at which the case stands ready for trial or for a new trial, without proceeding to bring on the trial, he is thereupon by the sole operation of law deprived of his right to a jury trial; but the judge may upon application made within the delay, extend it for cause shown.

The other party may, within fifteen days from the expiry of the said delay, proceed to a trial by jury.

If the delay elapses, in either case, without such proceedings being taken, the case may be inscribed for proof and hearing in the ordinary manner.

Que le droit au procès par jury soit un droit d'exception, qu'une stricte observance des conditions auxquelles la loi l'assujettit soit essentielle à son existence et à sa conservation, et que la déchéance édictée de ce droit en soit une *strictissimi juris*, sont autant de propositions définitivement fixées par la jurisprudence et plus particulièrement par la décision de cette Cour dans *Dudemaine* v. *Coutu*.

Le fait qui amène cette déchéance,—l'article 442 le décrit clairement,—c'est l'omission "par la partie qui a demandé le procès par jury de *procéder sur cette demande* dans les trente jours qui suivent celui où la cause est *mûre pour le procès*", ou, dans les termes de la version anglaise, c'est le fait, par la partie qui a demandé le procès par jury, de permettre qu'un délai de trente jours s'écoule "from the date at which the case *stands ready for trial* without proceeding *to bring on the trial.*"

Reste à préciser le moment où la cause est "mûre pour le procès" et la nature de ces procédures qu'il faut, avant

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l'expiration des trente jours suivant ce moment, commencer à faire pour satisfaire à l'obligation de "procéder sur cette demande" ou "proceeding to bring on the trial."

Suivant la jurisprudence, la cause est "mûre pour le procès" ou "stands ready for trial" quand la contestation est liée. Les parties admettent cette proposition.

Généralement bien fondée, cette interprétation cependant, ne peut être et n'est pas, d'ailleurs, toujours tenue au strict absolu. Il ne fait aucun doute, en effet, que les expressions "cause mûre pour le procès" ou "ready for trial" envisagent une situation plus large que celle prévue par l'expression "contestation liée". Ainsi la contestation peut être liée par la forclusion de répondre à une défense accompagnée d'une inscription en droit partielle; mais on ne saurait, en telle occurrence, prétendre, de ce chef, que la cause est "mûre pour le procès" ou "stands ready for trial" tant qu'il n'y a pas d'adjudication sur cette inscription car, aux termes des dispositions de l'article 195 C.P.C.:

> Nulle contestation en fait ne peut être inscrite avant le jugement sur l'inscription en droit, et ce jugement doit disposer de l'inscription en droit sans ordonner de preuve et sans la réserver au mérite.

C'est d'ailleurs, le point décidé par la Cour d'Appel (Lamothe, Juge en chef, Lavergne, Carroll, Pelletier et Martin, JJ.) dans *Montreal Tramways Co.* v. *Hector Jacques* (1), décision à laquelle il est référé par la même Cour dans *Consolidated Theatres* v. *Nihon* (2).

Également faut-il tenir compte du fait que, suivant le jeu de la procédure, il se peut que la cause étant devenue "mûre pour le procès" v.g., par la forclusion de plaider, cesse de continuer de l'être par suite de la production autorisée—soit par la permission de la Cour ou par le consentement de la partie adverse—d'un plaidoyer comportant des faits nouveaux. Dès lors, la cause n'est plus et ne peut être, à raison de cette forclusion antérieure, considérée "mûre pour le procès"; et, si moins de trente jours se sont écoulés entre le moment où, d'abord, elle le devint par suite de la forclusion, et celui où, subséquemment, elle a cessé de l'être, par suite de la production autorisée du plaidoyer, la déchéance du droit au procès par jury n'a clairement pas été encourue. Si, au contraire, trente jours se sont écoulés entre ces deux instants, sans que ce délai de l'article 442

(1) Q.R. (1919) 21 R.P. 310. (2) Q.R. (1940) 68 K.B. 373.

n'ait été prolongé en vertu de la disposition y contenue, la partie qui a demandé le procès par jury devient en défaut et la déchéance de droit est acquise. Dans la première de ces alternatives, il est vrai que la tenue actuelle du procès par jury est virtuellement retardée par suite de ce consentement ou de cette permission relatifs à la production tardive du plaidoyer; mais ce consentement ou cette permission n'ont pas pour objet ou effet l'extension du délai de trente jours, mais le recul de l'avènement du fait à compter duquel seulement la cause devient mûre pour le procès et à compter duquel uniquement, suivant la loi, il commence à courir.

Le délai qui est d'ordre public est celui établi par l'article 442. Les délais ayant trait à la production des plaidoiries ne le sont pas; le Législateur lui-même permet aux parties ou au tribunal de les prolonger, même après forclusion. (*Donolo Inc.* v. *Joly* (1).)

Quelle est la nature des procédures qu'il faut commencer à faire dans les trente jours suivant celui où la cause est devenue "mûre pour le procès" pour satisfaire à l'obligation de "procéder sur cette demande" ou "proceeding to bring on the trial?" De toute évidence, ces procédures ne peuvent être celles qui sont antérieures et qui conduisent la cause à ce moment où elle devient "mûre pour le procès" puisque c'est précisément à partir de cet instant que commence à courir le délai pour procéder à les faire, mais bien ces procédures exclusivement prescrites pour le procès par jury, indispensables à sa tenue actuelle, ou nécessaires "to bring on the trial." Ces procédures spéciales que vise l'article 442 sont donc les diverses motions pour définir les faits, former le tableau du jury, fixer la date du procès, assurer l'assignation du jury et sa composition. Dans *Copland* v. *Can. Pacific Rly. Co.* (2), Sir Alexandre Lacoste, Juge en chef de la Cour d'Appel, rendant le jugement pour la Cour, déclare à la page 168:

> Mon interprétation de l'article 442 est la suivante: Les mots "cause mûre pour procès" doivent s'entendre, quand la cause est prête pour que l'on procède au procès par jury. Ce qui comprend les mesures requises pour en arriver à soumettre la cause au jury, c'est-à-dire la définition des faits, la formation du tableau du jury, la fixation du procès, l'assignation du jury et sa composition.

(1) Q.R. [1950] K.B. 488.

(2) Q.R. (1901) 4 R.P. 163.

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Dans *Laurendeau* v. *Lévesque* (1), M. le Juge Gagné, avec le concours des Juges McDougall, Bertrand et Hyde, reproduisant un extrait de ses notes dans l'affaire *Hoolahan* v. *McPhee*, dit:

> La cause est mûre pour le procès lorsqu'elle est à cet état qui permet de faire les procédures exigées par le chapitre 21 du Code. La première, c'est la motion pour définir les faits; puis viennent la préparation de la liste des jurés, l'assignation de ceux-ci, etc.
>
> "Il s'agit donc de déterminer dans cette cause-ci à quel moment l'intimée aurait pu faire cette motion pour définition des faits.

Ainsi, il apparaît clairement—et cette conclusion suffit pour disposer du présent appel—que, dès que la cause est devenue "mûre pour le procès" et est demeurée telle pendant une période de trente jours, le demandeur qui, en sa déclaration, a demandé le procès par jury, encourt la déchéance édictée en l'article 442 s'il laisse écouler cette période sans procéder sur la motion pour la définition des faits, à moins qu'il n'obtienne un délai additionnel, à ces fins, sur demande faite dans cet intervalle.

Ces préliminaires de droit étant posés, examinons les circonstances et prétentions de l'appelant relatives à cette phase de la procédure où, suivant lui, l'intimé aurait encouru la déchéance de l'article 442. L'intimé ayant, le 22 janvier 1948, produit les détails supplémentaires à la déclaration, l'appelant devait, dans les six jours subséquents, produire sa défense. Ce n'est, cependant, que le 7 mai qu'il logeait au greffe un plaidoyer accompagné d'une inscription en droit partielle. Il était donc, à cette date, et depuis le 29 janvier, forclos de plaider et, dès lors, la contestation était liée. Et, la cause étant mûre pour le procès, commençait à courir la période de trente jours pour être, celle-ci, écoulée dès après le 28 février. C'est le jour suivant le 28 février que s'éteignait irrémédiablement le droit de l'intimé au procès par jury. Le consentement qu'il pouvait, après cette date, donner à l'appelant pour la production du plaidoyer et l'inscription en droit partielle, était efficace à la production de ces procédures mais ne pouvait l'être à la renaissance du droit au procès par jury.

La contestation n'ayant pas été liée par la production ponctuelle du plaidoyer, il apparaît que la question à décider est de savoir si, à la lumière des dispositions pertinentes de la loi et d'après les circonstances révélées par le dossier,

(1) Q.R. [1950] R.P. 356.

l'appelant a été, en l'espèce, par la seule omission à produire sa défense dans les six jours suivant le 22 janvier, forclos de ce faire. L'article 205, traitant de la forclusion, se lit comme suit:

Après l'expiration du délai pour produire une pièce de plaidoirie, la partie défaillante est de plein droit forclose de le faire sans le consentement de la partie adverse ou la permission du juge.

La demande du certificat constatant la forclusion est faite verbalement.

Les dispositions de cet article ont fait l'objet d'une étude particulière par la Cour d'Appel, dans la cause de *Laskiewicz* v. *Montreal Tramways Co.* (1). Rapportée en abrégé seulement, il devient nécessaire d'en reproduire ici certains commentaires pris aux notes de MM. les Juges Bissonnette et Pratte.

M. le Juge Bissonnette:

De cet article, deux déductions s'imposent. Tout d'abord, si la forclusion existe de plein droit, il n'en reste pas moins évident que le code exige qu'elle soit constatée par un certificat émis, à la demande de la partie adverse, par le protonotaire. Dans l'espèce, ceci n'a pas été fait. En second lieu, cette demande de certificat peut être faite, à la discrétion et à la faculté de la partie, et quand elle le juge à propos. Si donc, elle ne fait pas une telle demande, si elle ne fait pas constater la forclusion, c'est qu'elle entend accorder, du moins implicitement, un délai additionnel à la partie adverse. Comme l'intimée a reçu par voie de signification, ces particularités, qu'elle n'en a pas demandé le rejet et qu'elle a plaidé sur icelles, il faut nécessairement déduire qu'elle estimait, à bon droit d'ailleurs, qu'il n'y avait pas encore forclusion au sens de l'art. 205 C.P. et qu'elle avait donné le consentement prévu dans cette disposition pour étendre le délai de production.

M. le Juge Pratte:

Il paraît clair, à la lecture de cette disposition qu'une partie qui a fait défaut de produire une pièce de plaidoirie dans le délai fixé par la loi n'est pas absolument forclose; le texte dit seulement qu'elle est de plein droit forclose de le faire *sans le consentement de la partie adverse ou la permission du juge.*

Mais les consentements ne sont pas nécessairement constatés par écrit, ni même toujours donnés en termes exprès. Le plus souvent, dans la pratique, ils sont donnés implicitement et peuvent s'induire de la conduite de la partie. D'où l'on voit que la question de savoir si la forclusion a opéré dans un cas donné peut donner lieu à des discussions qu'il est important de prévenir, pour une bonne expédition des affaires.

C'est sans doute pour empêcher les débats possibles sur ce point, que l'ancien code exigeait que la forclusion fut demandée et constatée par un certificat du protonotaire.

L'ancien code contenait deux dispositions concernant la forclusion: l'article 137 visait le défaut de produire le plaidoyer, et l'article 140, les autres actes de la plaidoirie.

(1) Q.R. [1951] K.B. 389.

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Fauteux J.

Voici le texte de ces deux dispositions:

137. Tout plaidoyer au mérite, par voie d'exception ou autrement, doit être produit sous huit jours à compter de la comparution, excepté dans les cas auxquels il est autrement pourvu dans la section qui précède.

Si le plaidoyer n'est pas produit dans ce délai, la partie adverse peut en faire la demande et s'il n'est pas produit avant l'expiration du troisième pour juridique subséquent, le protonotaire peut accorder au demandeur un acte de forclusion.

140. Après l'expiration de ces délais, la partie en défaut de produire est de plein droit forclose de le faire sans le consentement de la partie adverse, ou la permission du tribunal.

Le code actuel n'a pas reproduit l'art. 137. Quant à l'art. 140, modifié de manière à rendre la disposition applicable au plaidoyer, il est devenu l'art. 205 du code actuel.

Cette dernière disposition, lorsqu'elle a été édictée, a eu pour effet de faire disparaître la nécessité de requérir le plaidoyer pour pouvoir forclore le défendeur, et ne contenait rien au sujet de la constatation de la forclusion. Mais, plus tard, l'article a été modifié en y ajoutant l'alinéa suivant:

2e par.—La demande du certificat constatant la forclusion est faite verbalement.

Il est vrai que le texte précité n'exige pas expressément que la forclusion soit constatée par un certificat, mais il implique nécessairement une reconnaissance de l'ancienne règle d'après laquelle il fallait faire constater la forclusion; autrement il ne servirait à rien.

Des commentaires précités, il suffit à la considération de l'espèce, de retenir qu'on reconnaît, au jugement ci-dessus, que le consentement de la partie adverse—et on peut ajouter, que la permission du Juge—empêchent la forclusion; que ce consentement, n'étant pas qualifié par le *Code*, peut être écrit, verbal, exprès ou implicite. Il suffit qu'il soit donné. Il appartient évidemment à celui qui l'invoque d'en prouver le fait et cette preuve peut résulter de l'admission de la partie adverse aussi bien que des présomptions nées particulièrement, soit de la conduite des parties, de la correspondance échangée entre elles, ou encore des circonstances révélées au dossier.

En la présente cause, il ne fait aucun doute que, le 7 mai, l'intimé a tacitement consenti à la production du plaidoyer et de l'inscription en droit partielle. Le dossier ne révèle aucune objection de la part de l'intimé à cette production, ni aucun consentement exprès ou aucune permission du tribunal relativement à cette production tardive. A la vérité, l'appelant s'est tout simplement contenté de faire signifier ces procédures par voie d'huissier. A ce moment, cependant, les trente jours étaient expirés. Il devient donc

nécessaire de rechercher si ce consentement tacite préexistait à l'écoulement de cette période. Le dossier manifeste que l'intimé n'a pas, comme c'était son droit, fait constater cette forclusion par l'émission d'un certificat de défaut, certificat qu'il lui était loisible de demander et d'obtenir si, véritablement, il ne consentait pas à une production tardive du plaidoyer. Il pouvait également, s'il n'avait pas donné ce consentement, procéder *ex parte* suivant les dispositions de l'article 207. (*Morrison* v. *Montreal Tramways* (1)). Il ne l'a pas fait. L'intimé avait lui-même, antérieurement, bénéficié d'un consentement tacite de l'appelant pour produire, bien après l'expiration du délai fixé, à cette fin, par la Cour, les détails ordonnés en premier lieu. En fait, il devait les fournir au début de novembre mais ne l'a fait que le 12 décembre. A tout cela, il faut ajouter que la déclaration en cette cause comporte près d'une centaine de paragraphes. Qu'on puisse, sous toutes ces circonstances, déduire de cette conduite des procureurs l'existence, au moins jusqu'à ce stage de la procédure, d'une entente mutuelle à ne pas s'en tenir à la stricte observance des délais relatifs à la production des plaidoiries, est une inférence qui ne paraît pas déraisonnable. Aussi bien, ne peut être tenue comme mal fondée la conclusion unanime à laquelle en sont venus les Juges de la Cour d'Appel, sur cette question de fait.

Pour ces raisons, je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitor for the Appellant: G. Pelletier.

Solicitor for the Respondent: O. Drouin.

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(1) Q.R. (1932) 35 R.P. 219.

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* Mar. 26, 27
* Oct. 7

LA COMPAGNIE D'ENTREPRENEURS EN CONSTRUCTION LIMITÉE (DEFENDANT) ..... APPELLANT;

AND

JEAN JOSEPH SIMARD (PLAINTIFF) ..... RESPONDENT.

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

Contract—Sale of steam shovel without certificate of inspection—Whether sale null ab initio—*Whether tender of certificate before judgment was sufficient*—Pressure Vessels Act, *R.S.Q. 1941, c. 177, s. 12, as amended.*

By a written contract, the appellant sold to the respondent a used pressure vessel, namely, a steam shovel. Pursuant to its undertaking, the appellant made delivery at the respondent's sand pit. Subsequently, the respondent sought, by his action, the annulment of the sale on the ground that the shovel had been sold and delivered without the certificate mentioned in s. 12 of the *Pressure Vessel Act* (R.S.Q. 1941, c. 177 as amended), which provided that no such vessel "shall be again commercially dealt with for the purpose of being again used, before its owner has obtained from the chief inspector a certificate authorizing the use of the said vessel".

An offer to have the shovel inspected and the certificate delivered was made by the appellant before filing its plea and was renewed with the plea. On motion made by the appellant pursuant to Art. 392 C.P., two experts were appointed and reported that the certificate could be issued.

The action was maintained by the Superior Court and by a majority in the Court of Appeal for Quebec on the ground that the sale in violation of section 12 of the *Act* was absolutely null and could not be validated by the tender.

Held (Rand J. dissenting), that the appeal should be allowed and the action dismissed.

Per Rinfret C.J.: Section 12 of the *Act* deals only with commercial sales and not with a sale of the nature of the one in the present case. Furthermore, even if this were a commercial sale, the section is not aimed at the sale itself but at the delivery, and, therefore, at the most, there would have been a suspensive condition which would bring the case within the decision of *Jean* v. *Gagnon* ([1944] S.C.R. 175), since the certificate was tendered before judgment. But in fact, since the sale was not affected by the provisions of section 12, the delivery made satisfied all the obligations of the vendor towards the purchaser.

Per Taschereau, Estey and Fauteux JJ.: The word "owner" in section 12 of the *Act* refers to the vendor and, in this case, he had the double obligation of delivering the shovel and of obtaining the certificate. Without the certificate, the shovel could not be commercially dealt with and its sale would be voidable. But since the vendor had

* PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Fauteux JJ.

tendered the certificate before judgment, he had discharged the obligation imposed by section 12 and the sale was, therefore, now complete.

Per Rand J. (dissenting): Section 12 aims at furnishing the same security in second hand sales as in the case of new machines and applies to every stage of the sale from the contract to the delivery; and until the certificate is given, the vessel cannot be dealt with commercially and, therefore, the sale was null and void.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, Galipeault JJ.A. and Casey J.A. dissenting, the judgment of the Superior Court and holding that the sale of the steam shovel was null.

Roland Fradette, Q.C., for the appellant. Section 12 of the *Pressure Vessels Act* does not impose a prohibition which would render null and void the sale of the vessels mentioned therein. In any event, the disposition respecting the obligation to obtain the certificate, creates at the most a suspensive condition as regard the delivery of the vessel. The tender of the certificate was made before the plea to the merits (*Jean* v. *Gagnon* (2)), and the suspensive condition was, therefore, fulfilled. Furthermore, even if the inspection had been made, the action was at least premature, since there was no allegation nor evidence that the condition could not be fulfilled.

Charles Edouard Chayer, Q.C., for the respondent. The steam shovel which the appellant purported to sell without the certificate could not by virtue of s. 12 be commercially dealt with. The vendor has the obligation of obtaining the certificate and in this case the appellant had to obtain it before the shovel could be again commercially dealt with. The violation by the appellant of s. 12 rendered the sale non-existent because it had no object, the object here being "hors du commerce", and null *ab initio,* because it was prohibited by a law of public order. The respondent was therefore justified in refusing as he did the tender. Any way this sale is considered, it was not operative and therefore the tender had no basis. The case of *Jean* v. *Gagnon* (*supra*), cited by the appellant, is distinguishable.

(1) Q.R. [1951] K.B. 546. (2) [1944] S.C.R. 175.

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The CHIEF JUSTICE: L'appelante, défenderesse en Cour Supérieure, se pourvoit à l'encontre d'un arrêt de la Cour du Banc du Roi (en appel) (1), rendu le 2 mai 1951, rejetant l'appel d'un jugement prononcé par la Cour Supérieure à Chicoutimi, et qui a maintenu l'intimé dans les conclusions d'une action en nullité d'une vente intervenue entre les parties le 16 février 1948. Les honorables juges Galipeault et Casey étaient toutefois dissidents et ont en conséquence conclu au maintien de l'appel et au rejet de l'action de l'intimé.

Il s'agit d'une convention constatée par un écrit sous seing privé, en date du 16 février 1948, par laquelle l'appelante vendait à l'intimé une pelle mécanique à vapeur. Le prix de vente est stipulé à $2,500, payable $1,000 comptant, et la balance représentée par trois billets promissoires de $500 chacun échéant respectivement les 17 février, 1949, 1950 et 1951.

L'intimé a fondé son action sur l'article 12 de la *Loi des Appareils sous pression* (c. 177, S.R.Q. 1941, modifiée par le Statut 6, Geo. VI, c. 51). Il se plaint de ce que la pelle à vapeur, qui est un appareil sous pression, au sens de la Loi, lui a été vendue et livrée avant que l'appelante ait obtenu le certificat "D" autorisant l'usage de la machine (art. 15, par. 4 ajouté par 6 Geo. VI, c. 51, art. 4).

Voici le texte de cet article 12:

12. Tout appareil sous pression usagé, qu'il ait ou non subi des réparations, ne peut être remis dans le commerce pour servir de nouveau, à moins que son propriétaire n'ait obtenu de l'inspecteur en chef un certificat autorisant l'usage dudit appareil.

Le contrat porte que la pelle est vendue sans garantie et que l'intimé en prendra livraison dans sa carrière de gravier, mais "en autant qu'elle fonctionnera." La machine fut en fait transportée dans une carrière de gravier appartenant à l'intimé et mise en état de fonctionnement.

Le 3 mars 1948, l'appelante écrivait elle-même à l'intimé et l'informait que la bouilloire de la pelle n'avait pas été inspectée pour l'année courante. Elle mentionnait, cependant, que la pelle avait déjà été inspectée et qu'un certificat avait été émis antérieurement; elle suggérait à l'intimé de faire inspecter lui-même la bouilloire de la pelle et elle lui réclamait le paiement de la somme de $1,000, soit la partie du prix payable comptant, que l'intimé n'avait pas encore acquitté.

(1) Q.R. [1951] K.B. 546.

Sur réception de cette lettre, l'intimé faisait savoir à l'appelante qu'il exigeait qu'une inspection soit faite de la bouilloire. L'appelante lui répondit que l'inspection en question, pour le passé ou l'avenir, n'était pas une obligation que lui imposait le contrat de vente mais que cette obligation incombait à l'acheteur, puisque ce dernier avait convenu de se porter acquéreur de la pelle en libérant le vendeur de l'obligation de garantie.

La réponse à cette lettre fut l'action en nullité fondée sur la prétention que l'appareil sous pression usagé, au sens de la Loi, aurait été remis dans le commerce pour servir de nouveau, sans que le certificat prévu ait été émis.

Après la signification de l'action, soit le 12 avril 1948, l'appelante fit venir un inspecteur qui se rendit au lieu où se trouvait la pelle à vapeur. L'intimé refusa d'en laisser faire l'inspection. L'appelante fit alors signifier à l'intimé une mise en demeure et lui fit des offres réelles dans les termes suivants: elle offrait de faire inspecter la bouilloire, sans admettre toutefois qu'elle y fut tenue, et elle faisait également l'offre des frais de l'action avant la production de la défense, ajoutant que, si la bouilloire n'était pas dans les conditions voulues, elle consentirait à l'annulation de la vente; mais, si le certificat de l'inspection de la bouilloire était émis, l'intimé devait alors se conformer au contrat de vente et payer la somme de $2,500, selon les termes de la convention. L'appelante offrait les frais dans une alternative comme dans l'autre.

Les offres furent refusées et l'appelante les renouvela par sa défense, consignant en même temps la somme de $99.10 pour les frais judiciaires taxables de l'action avant contestation.

Après la production de la défense, l'appelante fit motion pour faire nommer un expert, sous l'autorité des articles 392 et suivants du *Code de Procédure Civile*. Elle demanda que l'expert nommé fut un inspecteur du Gouvernement provincial exerçant la fonction sous l'autorité de la Loi précitée.

La motion ayant été octroyée, l'inspection de la bouilloire fut confiée, du consentement des parties, à MM. P.-E. Bourque et Antonio Bouchard, tous deux inspecteurs des appareils sous pression à l'emploi de la province. Les conclusions des experts furent en tous points favorables à

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l'émission du certificat. Ils ajoutèrent que lorsqu'ils connaîtraient le nom du propriétaire réel, un certificat "D" serait émis pour une période d'un an, tel que requis par la *Loi des Appareils sous pression.*

Le seul motif des jugements de la Cour Supérieure et de la Cour du Banc du Roi (en appel) (1) est que l'appelante a fait défaut de faire inspecter la bouilloire et de fournir le certificat prévu lors de la vente, qu'il s'ensuit que cette vente est nulle de nullité absolue comme étant contraire à l'ordre public.

La consignation des offres réelles, la nomination des experts, la validité de leur rapport et le fonctionnement de la machine ne sont pas en question devant cette Cour.

Toute la preuve a révélé que la machine était dans des conditions normales de fonctionnement et que le rapport des experts établit sans conteste que la bouilloire, selon leur propre expression, "est en parfaite condition".

La question se pose donc en droit: La vente que constate l'écrit sous seing privé entre les parties est-elle inexistante, frappée de nullité absolue, par cette seule raison que l'appelante aurait enfreint l'article 12 de la *Loi des Appareils sous pression?*

L'appelante a prétendu devant nous que le défaut d'avoir obtenu le certificat prescrit n'entraîne aucune nullité en l'espèce et que le défaut de faire émettre le certificat ne crée tout au plus qu'une condition suspensive qui n'affecterait que la livraison.

Je partage l'opinion exprimée par les juges dissidents en appel, le Juge en chef de la province de Québec et M. le Juge Casey.

J'appuie cette opinion, tout d'abord, sur la nature même du contrat de vente entre les parties. Il ne s'agit pas ici d'une convention par laquelle l'intimé est devenu propriétaire uniquement par suite de sa signature. Il fut convenu que l'appelante "devra mettre cette pelle en marche, savoir la transporter sur la propriété de M. Simard, soit dans son pit de sable, et la laisser en condition de fonctionnement". ..."La Compagnie appelante ne garantit aucunement cette pelle à vapeur; vu que cette machinerie est usagée, qu'il

(1) Q.R. [1951] K.B. 546.

est au gré de M. Simard de la prendre comme elle sera, rendue dans le pit de sable, en autant qu'elle fonctionnera."

Et ce n'est "qu'en considération des motifs ci-inclus énoncés" que M. Simard s'engage à remettre la somme de $1,000, en monnaie, et la balance en trois billets promissoires de $500 chacun.

J'interprète ces stipulations comme voulant dire que la vente ne serait complétée que lorsque la pelle à vapeur aurait été transportée sur la propriété de M. Simard, à l'endroit mentionné, et que la pelle aurait été mise en condition de fonctionnement. Ce n'est, en effet, qu'en considération de ces motifs que M. Simard s'engage à payer. En fait, nous sommes informés par les offres réelles que l'intimé, même à la date où elles furent faites, n'avait pas encore effectué le paiement de la somme de $1,000 auquel il s'était engagé.

Je suis d'avis que ce premier motif doit être retenu à l'encontre de l'intimé.

En second lieu, le texte de l'article 12 de la *Loi des Appareils sous pression,* dont l'intimé demande l'application, édicte que tout appareil du genre de celui dont nous nous occupons "ne peut être remis dans le commerce pour servir de nouveau". Je ne puis me rendre à l'interprétation que cet article s'applique autrement qu'à une vente commerciale. Or, il s'agit ici d'une vente civile. Ce n'est pas, en effet, pour en faire commerce que l'intimé a acquis la pelle à vapeur.

Ainsi que le fait très bien remarquer l'honorable Juge Fernand Choquette dans un jugement rendu en l'affaire *La Compagnie de Sable Ltée* v. *Machinerie Moderne Ltée,* qui malheureusement n'est pas rapportée, le mot "commerce" dans l'expression de l'article 12 n'a pas le sens du mot "commerce" dans l'expression "hors du commerce" de l'article 1486 C.C., non plus que dans le sens de "commerce" de l'article 1059 C.C. Il faut, au contraire, lui donner un sens qui se rapporte au droit commercial.

"L'objet du droit commercial est la spéculation sur les meubles de toute nature, matières premières et produits fabriqués, que les commerçants achètent dans l'espérance de les revendre plus chers qu'ils ne les ont payés; dans l'article 1128 C.N., ce mot a un sens différent, plus large

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et voisin du latin "commercium"; il désigne la possibilité pour une chose de servir d'objet à un acte juridique (Planiol, Traité élémentaire de droit civil n° 1010."

Il n'apparaît pas à l'article 12 que le législateur ait voulu couvrir toutes les aliénations (il eut été trop facile de le dire). Par les termes dont il s'est servi, il a voulu limiter l'effet de la disposition à la "remise dans le commerce" ("commercially dealt with"). On ne saurait dire qu'un objet est "commercially dealt with" s'il s'agissait d'une aliénation à titre gratuit, et—il est presque inutile d'ajouter —d'une aliénation de nature non commerciale. Comment pourrait-on prétendre qu'une aliénation de ce genre remettrait l'objet dans le commerce? Ce serait une contradiction dans les termes.

Encore moins peut-on en venir à la conclusion que l'appelante aurait vendu une chose "hors du commerce". S'il s'agissait d'une vente commerciale—ce que nous n'avons pas ici—il faudrait alors dire qu'un objet qui n'est pas jusque-là hors du commerce serait placé dans cette catégorie par le fait même de la vente. Mais l'article 12 emploie les mots: "remis dans le commerce". Pour que l'appareil soit "remis dans le commerce", à raison de sa vente, il faudrait qu'il soit sorti du commerce avant la vente. Or, d'après la prétention de l'intimé, c'est la vente elle-même qui le met hors du commerce. Il ne peut être à la fois, par la vente elle-même, et en même temps "remis dans le commerce" avant qu'il en soit sorti.

J'en conclus donc par l'analyse même de l'article 12—peut-être que cet article, à cause de sa rédaction, peut difficilement être appliqué même à une vente commerciale—qu'à tout événement il ne peut recevoir d'application à une vente civile.

Ce qui, en plus, démontre que ce n'est pas l'acte contractuel de vente qui est visé par l'article 12 de la *Loi des Appareils sous pression,* ce sont les Règlements adoptés en vertu de cette Loi conformément à l'autorisation donnée au Lieutenant-Gouverneur en conseil à cet effet. Il n'y a qu'à lire les Règlements n^{os} 64, 65 et 66 pour voir que c'est bien là la façon dont l'article 12 a été compris, même dans le cas d'une vente commerciale.

Ces Règlements se lisent comme suit:

64. Personne ne doit remettre dans le commerce, pour servir de nouveau, un récipient usagé sans l'avoir fait inspecter par un inspecteur.

65. La personne qui dispose d'un récipient doit donner, par écrit, à l'inspecteur en chef, le nom et l'adresse de la personne à qui le récipient sera livré.

66. Après une inspection satisfaisante, l'inspecteur émet un certificat "D" à la personne à qui le récipient sera livré pour être utilisé. Nul ne doit livrer ce récipient avant l'émission du certificat "D".

On voit donc, tout d'abord, qu'il faut faire inspecter l'appareil usagé avant de le "remettre dans le commerce, pour servir de nouveau" et que, dans le but de faire effectuer cette inspection, la personne qui dispose de l'appareil doit donner, par écrit, à l'inspecteur en chef le nom et l'adresse de la personne à qui le récipient sera livré. Pour qu'une personne qui dispose de l'appareil puisse ainsi donner à l'inspecteur en chef le nom et l'adresse de la personne à qui se fera la livraison, il me paraît nécessaire que l'acte contractuel soit déjà passé. Je ne vois pas comment le vendeur pourrait accomplir cette formalité avant la vente. Mais, surtout, l'on remarquera que le Règlement n° 65 ne parle pas de vente mais de livraison.

D'ailleurs, le Règlement n° 66 est encore plus catégorique. L'inspecteur, après une inspection satisfaisante, émet le certificat "D", non pas au vendeur mais à l'acheteur ("à la personne à qui le récipient sera livré, pour être utilisé"); et ce règlement ne dit pas que la vente ne doit pas être effectuée avant l'émission du certificat "D", mais simplement: "Nul ne doit livrer ce récipient avant l'émission du certificat "D"."

C'est donc avec raison, suivant moi, que l'honorable Juge Choquette, dans la cause déjà citée, fait remarquer que, d'après ces textes, les formalités prescrites sont subséquentes à la disposition de l'appareil; qu'elles ne doivent précéder que la livraison et que, par conséquent, elles ont tout au plus l'effet d'une condition suspensive, avec le résultat que, la condition étant accomplie, elle a un effet rétroactif au jour auquel l'obligation a été contractée (C.C. 1085).

A plus forte raison cela doit-il être dans un contrat comme celui qui nous occupe, où la vente n'a pas été parfaite par le seul consentement des parties et n'a pas eu pour effet de transmettre la pelle à vapeur immédiatement, puisque le vendeur s'était obligé à la transporter sur

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la propriété de l'intimé, à la mettre en marche, à "la laisser en condition de fonctionnement", et que l'intimé n'en devenait propriétaire que lorsqu'elle serait "rendue dans le pit de sable et en autant qu'elle fonctionnera".

J'en arrive donc à la conclusion qu'il est erroné d'interpréter l'article 12 comme s'adressant à une vente de la nature de celle que nous avons dans le cas actuel, parce que c'est une vente non commerciale. Mais en plus qu'en appliquant cet article à la lumière des Règlements nos 64, 65 et 66, même s'il s'agissait d'une vente commerciale, ce n'est pas la vente qui est visée par l'article 12, c'est la livraison. Ce ne serait donc pas l'acte contractuel qui serait vicié par l'absence d'un certificat d'inspection antérieur à cet acte et la vente ne serait pas défendue. La livraison seule le serait. Tout au plus y aurait-il donc condition suspensive qui ferait tomber la cause actuelle sous l'arrêt de cette Cour dans l'affaire de *Jean* v. *Gagnon* (1). Dans ce cas, les offres réelles de l'appelante auraient été faites en temps utile et l'intimé aurait dû les accepter. Mais je dirais plutôt, en l'espèce actuelle, qu'entre les parties, la vente n'étant pas affectée par l'article 12, la livraison effectuée par l'appelante satisfaisait à toutes les obligations du vendeur vis-à-vis de l'acheteur. Seule la livraison aurait eu lieu avant l'obtention du certificat et pourrait, même en matière commerciale, constituer une infraction technique à la loi, qui n'aurait pas pour effet d'annuler cette livraison, mais tout au plus de rendre le vendeur passible des pénalités imposées par la *Loi des Appareils sous pression.*

J'infirmerais le jugement de la Cour Supérieure et celui de la majorité de la Cour du Banc du Roi (en appel), et, adoptant les raisons ci-dessus mentionnées, ainsi que celles de l'honorable Juge en chef de la province de Québec et de M. le Juge Casey, je maintiendrais les offres réelles de l'appelante et je rejetterais l'action de l'intimé, avec les dépens de la Cour Supérieure à partir du moment où les offres furent faites, ainsi que ceux de la Cour du Banc du Roi (en appel) et de la Cour Suprême du Canada.

The judgment of Taschereau, Estey and Fauteux JJ. was delivered by

TASCHEREAU, J.—Le Très Honorable Juge en chef a exposé les faits d'une façon complète, et il est en conséquence inutile de les relater de nouveau. Je désire cepen-

(1) [1944] S.C.R. 175.

dant ajouter quelques notes pour préciser les raisons pour lesquelles je crois que le présent appel doit être maintenu.

La *Loi concernant Les Chaudières à Vapeur et les Appareils sous Pression* (S.R.Q. 1941, c. 177 telle qu'amendée par 6 Geo. VI, chap. 51), prévoit que quatre formes de certificats peuvent être émis, désignés comme suit:

1° Le certificat "A" émis pour l'approbation de la construction des appareils sous pression après vérification de tous les plans et devis et inspection finale desdits appareils à l'endroit de la fabrication;

2° Le certificat "B" émis pour l'approbation de l'installation des appareils sous pression, avant qu'ils soitnt utilisés dans leur lieu d'opération;

3° Le certificat "C" émis lors de l'inspection annuelle des appareils sous pression;

4° Le certificat "D" émis pour tout appareil usagé avant sa remise dans le commerce.

C'est ce quatrième paragraphe qui nous intéresse, car il s'agit dans l'occurrence d'un appareil usagé, et dans ce cas, l'article 12 de la Loi trouve son application. Il se lit ainsi:

12. Tout appareil sous pression usagé, qu'il ait ou non subi des réparations, *ne peut être remis dans le commerce* pour servir de nouveau, à moins que son propriétaire n'ait obtenu de l'inspecteur en chef, un certificat *autorisant l'usage dudit appareil.*

Lorsque la Compagnie appelante a vendu à l'intimé, pour la somme de $2,500, cette pelle à vapeur usagée, qui est l'objet de ce litige, elle avait donc la double obligation de livrer l'objet vendu, et d'obtenir de l'inspecteur en chef le certificat "D" autorisant sa *"remise dans le commerce"*. Il ne fait pas de doute que le mot "propriétaire" que l'on trouve à l'article 12 de la Loi signifie bien le "vendeur".

Cependant, l'appelante n'a pas rempli cette obligation qui lui incombait et qui lui était imposée par la loi, mais sur réception de l'action en annulation de vente que l'intimé a dirigée contre elle, le 24 mars 1948, elle a offert de faire inspecter la pelle à vapeur afin d'obtenir le certificat requis, et de payer les frais de l'action. Vu le refus du défendeur d'accepter ces offres, l'appelante a produit son plaidoyer dans lequel les offres ont été renouvelées avec consignation. Lorsque la défense fut produite, l'appelante fit motion pour obtenir une expertise, et MM. P.-E. Bourque et Antonio Bouchard, inspecteurs du Gouvernement provincial, furent nommés de consentement. Le rapport fut à l'effet qu'ils étaient d'opinion que le certificat "D" pouvait être émis vu que la pelle mécanique rencontrait toutes les exigences de sécurité voulues.

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La cause se résume donc à une question de droit, et j'en suis venu à la conclusion suivante: Il s'agit, je crois, d'une vente à laquelle une charge ou une obligation accessoire a été ajoutée par la loi, et imposée au propriétarie. C'est lui qui doit voir à ce qu'un certificat soit émis, à défaut de quoi, la pelle mécanique ne peut être livrée si elle "doit servir de nouveau". Si l'appelante n'avait pu obtenir ce certificat, condition essentielle à la remise de l'objet usagé dans le commerce, la vente eut été annulable, mais en l'obtenant, elle l'a complétée, et s'est libérée de l'obligation imposée par l'article 12 de la Loi.

Il me semble difficile de concevoir une autre solution pour déterminer le présent litige. Il faut de toute nécessité que le vendeur d'un appareil sous pression usagé trouve en premier lieu un acheteur à qui il doit remettre le certificat "D", auquel est subordonnée la livraison de l'objet vendu.

Sur réception de l'action, l'appelante a offert la pelle mécanique, s'est déclarée prête à fournir le certificat, et a consigné les frais encourus. L'offre du certificat est venue après l'action, mais ceci ne peut affecter le sort de la cause. Tant que le jugement n'était pas prononcé annulant le contrat pour défaut par l'appelante de remplir son obligation, celle-ci pouvait compléter son titre. (*Jean* v. *Gagnon* (1)). Dans cette cause, cette Cour a confirmé la jurisprudence et l'opinion unanime des auteurs. Ainsi, dans *Gagnon* v. *La Coopérative Fédérée de Québec* (2), M. le Juge Dorion, parlant pour la Cour d'Appel, a dit ce qui suit:

> L'intimée prétend de son côté qu'elle n'est pas dans le cas de l'article 1092 et que, admettant qu'il y a lieu à l'annulation du contrat par suite de son défaut d'en exécuter les obligations en négligeant de donner les garanties promises, cette annulation en vertu du pacte commissoire tacite, n'a pas lieu de plein droit, que par conséquent, elle peut, en exécutant son obligation avant que jugement intervienne, empêcher cette annulation et se prévaloir de son droit de payer par anticipation et de déduire l'intérêt.
>
> Cette distinction est parfaitement juridique et elle est admise par la doctrine française citée par l'intimée.

Planiol (Vol. 2, 8e éd., page 437) s'exprime dans les termes suivants:

> La résolution, étant l'œuvre du juge, et non de la volonté des parties, ne se produit qu'au moment du jugement... le défendeur peut jusqu'au jugement empêcher la résolution par une offre d'exécuter son engagement.

(1) [1944] S.C.R. 175 at 188. (2) Q.R. [1926] K.B. 59.

C'est aussi l'opinion de Baudry-Lacantinerie (Des Obligations, Vol. 2, page 189) où l'on trouve:

Au contraire, lorsque les sûretés promises n'ont pas été fournies, ce fait peut être réparé aussi longtemps qu'un jugement n'est pas venu déclarer la dette exigible, et, par suite, tant que cette décision n'a pas été rendue, le débiteur peut, en exécutant sa promesse, éviter la déchéance, etc., etc.

Je suis donc d'opinion que le présent appel doit être maintenu et l'action rejetée. Sur réception du certificat "D" auquel il a droit, et qui lui a été offert, l'intimé devra prendre livraison de la pelle mécanique et en payer le prix suivant les termes du contrat intervenu. L'intimé devra également payer les frais de toutes les cours, sauf ceux encourus jusqu'après plaidoyer en Cour Supérieure.

RAND J. (dissenting): The primary effect of the statute seems to me to be beyond doubt; to require as a condition of being an article of commerce that every new pressure vessel be built according to plans registered in the Department and under inspection authorized either by the provincial law or the law of the place of construction outside the province. The provisions contemplate construction, installation and operation; and they are designed to secure the safe condition of every vessel at the moment of sale.

Then section 12 deals with second hand or used vessels and declares,

Tout appareil sous pression usagé, qu'il ait ou non subi des réparations, ne peut être remis dans le commerce pour servir de nouveau, à moins que son propriétaire n'ait obtenu de l'inspecteur en chef, un certificat autorisant l'usage dudit appareil.

"Être remis dans le commerce pour servir de nouveau" means, in my opinion, to be made an authorized subject-matter of legal dealing; and it applies to every stage of sale from the contract to the delivery. To treat these two latter features, for the purpose of construing the statute, as severable, is to introduce a conception which the statutory language does not justify. What is aimed at is to furnish the same security in second hand sales as in the case of new machines; and until the certificate is given the vessel cannot, in any respect, be dealt with commercially.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the Appellant: R. Fradette.

Solicitor for the Respondent: C. E. Chayer.

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* Mar. 25
*Oct. 7

LA SOCIÉTÉ IMMOBILIÈRE MAISONNEUVE LIMITÉE (PLAINTIFF).. } APPELLANT;

AND

LES CHEVALIERS DE MAISONNEUVE (INTERVENANT) ..... } RESPONDENT.

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

Intervention—Aggressive—Main action having been dismissed, does intervention fall—Whether that is a question of practice and procedure.

The appellant brought action to have a lease declared null. The trial judge dismissed the action on the ground that it was a nullity *ab initio* since it had been taken against the mandataries instead of against the mandator. The respondent intervened in the action and asked to be declared the owner of the property in question. This intervention was also dismissed by the trial judge on the ground that it had to fall with the main action. There was no appeal from the judgment on the main action, but the respondent appealed with success the dismissal of the intervention.

Held, that the appeal should be dismissed and the intervention maintained.

Per Curiam: On the merits of the intervention, the respondent was justified in claiming title to the property.

Per Rinfret C.J., and Cartwright J.: The question as to whether an intervention of the nature of the one in the present case should fall *ipso facto* when the main action is dismissed is merely a question of practice and procedure, and there are here none of the special circumstances which would warrant this Court in changing its invariable practice not to interfere in such a matter.

Per Taschereau and Rand JJ.: The intervention in the present case determines the substantive right of the respondent to have its aggressive intervention declared well-founded notwithstanding the dismissal of the main action. Such an intervention, in contradistinction with the ordinary accessory intervention, does not necessarily suffer the fate of the main action; it is, therefore, more than merely a question of practice and procedure.

Per Kellock J.: The contention that the intervention was not the proper way for the respondent to proceed involves merely a question of procedure.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the decision of the Superior Court and holding that the intervention made in this case did not fall with the dismissal of the main action.

* PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Cartwright JJ.

(1) Q.R. [1951] K.B. 432.

Ubald Boisvert for the appellant. The deed was a true lease and nothing more. After the fulfilment of the conditions of the lease, the respondent would stop paying rent but would still have to pay the taxes and the maintenance. It would become the owner but title would remain in the hands of the appellant as trustee, since the respondent has not the legal capacity to acquire property.

To deal with the respondent's intervention, one must consider it as an action for conveyance of title, and if the tender is insufficient, as it is in this case, the procedure in conveyance must fail. Furthermore, having been filed before the incorporation of the respondent, the intervention is null.

The lease has the character of absolute voidness *ab initio* since the council has never been incorporated, is not a civil person and has no legal status. According to Art. 984 C.C., in order for a bilateral contract to be valid, both parties signing up to it must have a legal capacity to do so. Owing to the fact that the council never had a legal capacity to enter into a contract, it never was in a position to give a legal consent to the lease. And chaper 99 of 12 George VI cannot have the effect of giving validity to a lease void *ab initio*.

L. E. Beaulieu, Q.C., and *P. Ferland, Q.C.*, for the respondent. This is a matter of practice and procedure and following its jurisprudence on such a matter, this Court should not reverse the Court of Appeal.

In the aggressive intervention, the intervenant claims the right which is disputed between the two parties as his own. In the conservatory intervention, the intervenant takes sides with one of the parties and his intervention naturally follows the result of the action.

This is an aggressive intervention. In France and in Quebec, it may survive irrespective of the destiny of the action if that action is dismissed, except for a nullity *ab initio* (which is not the case here). The action was not null but simply defective because every member should have been sued.

The intervention was well-founded. The tender was sufficient to cover all that was due as far as the appellant permitted the respondent to find out what was due. The

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appellant is estopped from contending that the tender was not sufficient since he refused to give the information. All the obligations of the deed were fulfilled.

The judgment of the Chief Justice and of Cartwright J. was delivered by

THE CHIEF JUSTICE: Je ne puis voir dans cet appel qu'une question de pratique et de procédure.

Je ne trouve pas nécessaire d'exposer les faits de la cause, qui sont d'ailleurs assez compliqués.

Il suffit de mentionner que l'appelante s'est portée demanderesse en Cour Supérieure pour faire dire et déclarer qu'un certain bail fait et passé le 24 octobre 1938 entre elle et le Conseil Maisonneuve n° 1787 de l'Ordre des Chevaliers de Colomb était nul à toutes fins que de droit.

Ce bail était signé uniquement par Lucien Béliveau et Ambroise Gagnon. En conséquence, l'action était dirigée uniquement contre ces deux messieurs.

Lucien Béliveau s'en rapporta à la justice en déclarant qu'il n'entendait pas contester la poursuite de l'appelante. Ambroise Gagnon produisit une défense où il alléguait, entre autres, qu'en signant le bail (qui était en réalité une promesse de vente) il n'avait agi que comme le mandataire du Conseil Maisonneuve des Chevaliers de Colomb, qu'il avait dénoncé son mandat à l'appelante et qu'il n'existait aucun lien de droit entre lui et cette dernière.

Le juge de première instance fut d'avis qu'il était manifeste que l'action était "dirigée contre deux mandataires connus comme tels de la demanderesse. Il est incontestable qu'au temps de cette Convention, le Conseil de Maisonneuve n° 1787 des Chevaliers de Colomb n'était pas incorporé tel que le croyaient les deux parties à l'acte, et que ce groupement, comme tel, n'avait aucune existence juridique".

C'est pour cette seule raison que l'action contre les défendeurs originaires devait être renvoyée, vu que la demande était irrégulièrement formée et que les vices dont elle était affectée la frappaient de nullité *ab initio* (*Chalifoux* v. *Côté* (1)). En conséquence, sur le plaidoyer du défendeur Gagnon, l'action fut rejetée avec dépens.

(1) Q.R. [1944] K.B. 82.

Mais, dans l'intervalle, les Chevaliers de Maisonneuve ayant été constitués en corporation par l'acte spécial de la Législature provinciale sanctionné le 11 mars 1948 (n.b. l'action contre les mandataires était datée du 27 janvier 1948) sont intervenus dans la cause, et, après avoir fait recevoir leur intervention, conclurent à ce qu'il soit déclaré qu'ils avaient pleinement satisfait et au-delà aux conditions stipulées dans la Convention du 24 octobre 1938 pour devenir propriétaires absolus des immeubles décrits dans l'intervention et qui faisaient l'objet de cette Convention, et demandèrent qu'il soit constaté qu'ils étaient devenus les propriétaires absolus depuis le 14 octobre 1947. Avec l'intervention ils consignaient en Cour un montant de $4,009.25, sauf à parfaire si besoin était, et ils demandaient que leurs offres soient déclarées valables, suffisantes et libératoires; que l'appelante fut condamnée à leur passer titre suivant la Convention de promesse de vente dont il s'agit, faute de quoi, que le jugement à intervenir équivaille à titre au profit des intervenants à toutes fins que de droit.

La Cour de première instance ne se prononça pas sur le mérite de l'intervention. Elle fut d'avis que, comme la demande principale était rejetée, l'intervention devait tomber avec elle et elle l'a rejetée sans frais, tout en réservant les recours de l'intervenante.

Il n'y eut pas d'appel sur l'action principale. Seuls les Chevaliers de Maisonneuve en appelèrent du jugement. Il ne s'agissait donc plus que de savoir si, en vertu de la procédure dans la province de Québec, le renvoi de la demande principale devait entraîner *ipso facto* le rejet de l'intervention.

La Cour du Banc du Roi (en appel) (1), décida que non et faisant droit à l'appel elle statua que l'intervention devait être maintenue. Ce jugement fut unanime.

Il s'ensuit que sur la question que seul a décidée le jugement de première instance, à savoir que l'intervention tombait par le fait même que l'action principale avait été rejetée, la Cour d'appel fut d'avis contraire et elle procéda à maintenir les conclusions de l'intervention.

A mon avis, cette question de savoir si, dans la province de Québec, en vertu du Code de Procédure, une intervention du genre de celle qui est maintenant devant nous

(1) Q.R. [1951] K.B. 432.

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tombe *ipso facto* dès que l'action principale est rejetée est uniquement une question de pratique et de procédure. Or, il est de la jurisprudence invariable de la Cour Suprême du Canada qu'en pareille matière "although having an appellate jurisdiction, the Supreme Court will not exercise it in matters relating to the practice and procedure of the Courts below except under special circumstances."

Nous ne discernons aucune circonstance spéciale dans l'espèce qui nous est soumise. Le savant procureur de l'appelante n'en a pas mentionné et nous ne voyons aucune raison pour que cette Cour se départisse de sa pratique constante et invariable (*Voir* Cameron—"Supreme Court Practice and Rules", 3e éd., p. 77 et suivantes, où toute la série des décisions de cette Cour est collationnée).

L'effet de notre jugement sur cette question n'est pas que nous nous prononçons dans le sens de la décision de la Cour Supérieure ou dans celui de la décision de la Cour du Banc du Roi; il est seulement que, étant d'avis qu'il s'agit d'une question de procédure, nous suivons la jurisprudence traditionnelle de la Cour Suprême de ne pas intervenir dans les arrêts des Cours d'appel provinciales en matière de pratique et de procédure.

Nous devons donc maintenant procéder à considérer le mérite de l'intervention des intimés.

La Cour du Banc du Roi l'a envisagée comme ce qu'elle a appelé une intervention agressive. En effet, ses conclusions ne se bornent pas à demander le rejet de l'action principale. Après avoir demandé acte des offres au montant de $4,009.25, sauf à parfaire, que les intimés ont consignées au greffe de la Cour, elle demande que, ces offres étant déclarées valables, suffisantes et libératoires, il soit statué que les intervenants ont pleinement satisfait et au-delà aux conditions stipulées dans la Convention du 24 octobre 1938 pour qu'ils deviennent propriétaires absolus des immeubles dont il est question dans la cause; que, de fait, ils en sont devenus les propriétaires, ainsi que tous les membres qui font partie des Chevaliers de Maisonneuve, et ce depuis le 14 octobre 1947; que la Société Immobilière Maisonneuve Limitée soit condamnée à passer titre aux demandeurs, suivant la Convention susdite, et qu'il soit enjoint à cette Société de signer, dans un délai imparti, l'acte de vente produit avec la déclaration, ou tout autre

acte au même effet, faute de quoi, le jugement à intervenir équivaudra à titre au profit des intervenants, à toutes fins que de droit.

L'intervention contient une conclusion subsidiaire réclamant un montant de $305.15 que la Cour du Banc du Roi n'a pas cru devoir accorder.

La question de procédure étant écartée, il convient de statuer sur les conclusions ci-dessus mentionnées et c'est ce qu'a fait la Cour d'Appel en déclarant les offres et consignations des intervenants bonnes, valables et suffisantes et en ordonnant à la Société Immobilière Maisonneuve Limitée de signer, en faveur des Chevaliers de Maisonneuve, l'acte de vente produit avec l'intervention, avant le 15 juin 1951, à défaut de quoi le jugement équivaudra à l'acte de vente.

A vrai dire, ce résultat ne pouvait offrir le moindre doute, car lorsque la Société Immobilière Maisonneuve Limitée, le 4 mai 1939, acheta l'immeuble dont il est question, elle le faisait pour le compte des Chevaliers de Maisonneuve. En réalité, la Société Immobilière Maisonneuve Limitée n'a été formée, au sein du groupe connu sous le nom de Chevaliers de Maisonneuve, que dans le but d'acquérir l'immeuble dont le Conseil était déjà locataire et de le transmettre ensuite aux intervenants dès que certaines formalités auraient été remplies. Mais les intervenants n'avaient pas encore, à ce moment-là, été constitués en corporation; ils ne l'ont été que par une loi sanctionnée le 11 mars 1948, et c'est à la suite de cette incorporation qu'ils ont produit leur intervention.

Aux termes mêmes de la loi qui les incorporait, les Chevaliers de Maisonneuve étaient investis de tous les droits que le Conseil possédait depuis 1935, s'il avait eu alors la personnalité juridique et notamment des droits pouvant résulter de la Convention du 24 octobre 1938.

L'attitude adoptée par la Société Immobilière Maisonneuve Limitée a donc un caractère quelque peu ironique lorsqu'au lieu de se conformer à cette Convention par laquelle elle servait de truchement pour les intervenants, elle entreprit de contester l'intervention et s'est refusée à céder l'immeuble aux Chevaliers de Maisonneuve.

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Il a pu y avoir certaines obligations mises à la charge du Conseil par la Convention du 24 octobre 1938 qui n'auraient pas été suivies à la lettre pendant que le Conseil lui-même, prédécesseur de la corporation constituée par la loi du 11 mars 1948, avait la jouissance de l'immeuble, mais jamais la Société Immobilière Maisonneuve Limitée ne s'en est plainte qu'à la fin de janvier 1948. Il était alors manifestement trop tard pour protester contre un état de choses qu'on avait non seulement toléré, mais auquel on avait même participé, comme le fait remarquer l'honorable Juge Pratte rendant le jugement pour la Cour.

Suivant la Convention, la Société Immobilière Maisonneuve Limitée émit des certificats d'obligations qui ne devaient être vendus qu'à des membres des Chevaliers de Maisonneuve et dont le produit devait servir à payer, en partie au moins, le prix d'achat de l'immeuble. Les intervenants s'engagèrent à racheter ces certificats à compter de 1940, à raison de au moins $800 par année. Telle fut la méthode adoptée par les parties pour permettre aux intervenants d'obtenir un titre à l'immeuble.

La Cour d'appel en est arrivée à la conclusion que sans aucun doute, d'après la preuve, les intervenants ont payé plus qu'il n'était nécessaire pour acquitter les obligations assumées par eux. La seule querelle de la Société Immobilière Maisonneuve Limitée semble être qu'au lieu de racheter les certificats directement de leurs détenteurs, les offres des intervenants furent faites à la Société elle-même.

Il y a toutefois ceci à considérer: Dès le mois d'avril 1947, le Conseil offrit aux détenteurs d'obligations de leur racheter leurs certificats. Neuf seulement des cinquante-huit obligataires se sont prévalus de cette offre et le Conseil les a immédiatement payés; les autres ne se sont pas présentés.

Le Conseil demanda alors à la Société de lui donner la liste des obligataires, mais cette tentative demeura sans résultat. C'est à ce moment que le Conseil offrit à la Société, par ministère de notaire, un montant suffisant pour les payer, bien qu'il ne se considéra pas tenu de ce faire. Il n'est pas inutile de faire remarquer que les détenteurs d'obligations et les actionnaires de la Société Immobilière Maisonneuve Limitée étaient tous des membres du Conseil, en sorte que le présent litige a tous les caractères d'une querelle intestine. Nous sommes en présence de gens qui

se poursuivent eux-mêmes. La Société, en faisant valoir ses prétentions, ne fait, en somme, rien autre chose que d'exciper du droit d'autrui. Les bénéficiaires de ces actions et obligations ne sont pas devant la Cour personnellement et s'ils n'ont pas cru bon de profiter des dispositions des intervenants, l'on se demande en vertu de quel droit la Société elle-même serait fondée à s'en plaindre. Les intervenants la mettent en possession des montants requis pour satisfaire les actionnaires et les obligataires. Elle est contrainte d'agir ainsi par le refus de la Société de fournir aux intervenants la liste de ses actionnaires et obligataires. Elle est elle-même la cause qui a forcé les Chevaliers de Maisonneuve à procéder de cette façon. Nous ne pouvons voir comment elle pourrait s'y objecter valablement. Si quelqu'un pouvait le faire, ce serait les actionnaires et les obligataires eux-mêmes et non pas la Société.

Comme la Cour du Banc du Roi, nous croyons que la conclusion s'impose que les Chevaliers de Maisonneuve, qui sont aux droits du Conseil et, en particulier, à ceux qui ont fait l'objet de la Convention du 24 octobre 1938, sont bien fondés à exiger un titre aux biens qu'ils ont réclamés par leur intervention.

Pour les raisons déjà données par l'honorable Juge Pratte, au nom de la Cour du Banc du Roi, et dont les présentes ne sont que la répétition, nous sommes d'avis que le jugement dont est appel doit être confirmé, avec dépens.

The judgment of Taschereau and Rand JJ. was delivered by

TASCHEREAU, J.—Je suis d'opinion que les Chevaliers de Maisonneuve, qui sont aux droits du Conseil, et en particulier à ceux qui ont fait l'objet de la Convention du 24 octobre 1938, sont bien fondés à exiger un titre aux biens qu'ils ont réclamés par leur intervention.

J'ai eu l'avantage de lire les raisons données par le Très Honorable Juge en chef. Je m'accorde avec ses conclusions, mais, avec déférence, je ne crois pas que l'intervention du genre de celle qui nous a été soumise, présente uniquement une question *de pratique et de procédure* sur laquelle cette Cour refuse généralement d'intervenir. L'intervention produite par les Chevaliers de Maisonneuve n'est pas une simple intervention accessoire, faite dans l'intérêt de l'une des parties, qui doit tomber nécessairement quand

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SOCIÉTÉ IMMOBILIÈRE MAISONNEUVE LTÉE v. CHEVALIERS DE MAISONNEUVE

Taschereau J.

l'action principale est rejetée (*Quebec Railway* v. *Montcalm Land* (1)). Elle a un caractère tout à fait différent. Les intervenants en effet ne soutiennent les droits de personne, mais au contraire, ils revendiquent les leurs: ils réclament la propriété de l'immeuble en question, et demandent qu'un titre leur soit consenti. L'intervention est donc *agressive* et ne doit pas subir nécessairement le sort de l'action principale. Vide *Morrison* v. *Morrison* (2).

Il y a donc à mon sens plus qu'une simple question de pratique et de procédure, mais bien la détermination du droit substantif des intervenants, au cours d'une instance valide, de faire déclarer bien fondée leur intervention agressive, dans laquelle ils réclament la propriété d'un immeuble, malgré le rejet de l'action principale.

L'appel doit être rejeté avec dépens.

KELLOCK, J.—I agree with my Lord the Chief Justice that this appeal fails on the merits. I am further of opinion that the remaining contention of the appellant involves, in the present case, merely a question of procedure without any special circumstances inviting the interference of this court.

Had the Court of Appeal agreed with the learned trial judge that the intervention fell to the ground with the principal action, such a judgment would have left the respondent free to litigate its claims under the lease in an independent proceeding in which all question as to the right or obligation of the respondent to proceed by way of intervention would have been chose jugée. Accordingly, all that is involved in the present appeal, so far as the contention now under consideration is concerned, is that the rights of the parties ought to have been determined in a different proceeding from the one before the court. This, I think, brings the matter within the well settled rule referred to by my Lord. I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the Appellant: U. Boisvert.

Solicitor for the Respondent: P. Ferland.

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(1) [1927] S.C.R. 545 at 562. (2) Q.R. (1916) 23 R.L. 164.

KLOEPFER WHOLESALE HARDWARE AND AUTOMOTIVE COMPANY LIMITED ..... *(Defendant)* APPELLANT;

AND

R. G. ROY .....*(Plaintiff)* RESPONDENT.

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*May 15, 16

*June 30

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Vendor and Purchaser—Contract for Sale of Land—Repudiation by Vendor—Purchaser's right upon anticipatory breach to immediately sue for declaratory judgment and specific performance—The Judicature Act, R.S.O. 1950, c. 190, s. 15(b).

By a written agreement made on November 29, 1949, the appellant agreed to sell to the respondent, who agreed to purchase, certain lands in Toronto, the sale to be completed on or before January 29, 1950. On December 5, 1949, the appellant repudiated the contract. On December 14, 1949, the respondent by letter denied his right to do so and before the date fixed for completion issued a writ claiming a declaration that the contract was binding and enforceable and ought to be specifically performed.

The action was defended on the ground that the appellant had been induced by false representations to execute the agreement, that the document was incomplete as a contract with respect to material matters, that it was ambiguous, uncertain and that there was no memorandum in writing sufficient to satisfy the *Statute of Frauds*. These issues were decided against the respondent at the trial and in the Court of Appeal. The appellant contended that the action having been brought before the day fixed for completion was premature and that the respondent's claim, if any, was for damages only.

Held: (Dismissing the appeal), that the defences pleaded by the appellant failed. Since the respondent had claimed a declaratory judgment that there was in existence a binding and enforceable agreement, the action was not prematurely brought. *The Judicature Act,* R.S.O. 1950, c. 190, s. 15(*b*). The dictum in *Roberto v. Bumb* [1943] O.R. 299 at 310, disapproved if it was intended to mean that at the time of the issue of the writ the plaintiff did not have a complete cause of action for a declaration that the agreement was a binding contract and that it ought to be specifically enforced. Comment as to last sentence in Halsbury vol. 31, para. 468.

APPEAL from an order of the Court of Appeal of Ontario (1) affirming a judgment of Wells J. (2) decreeing specific performance of a contract for the sale of land and awarding damages.

R. M. W. Chitty Q.C. for the appellant. The plaintiff having sued upon an anticipatory breach is not entitled to a decree of specific performance. The law is clear and

*PRESENT: Kerwin, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1951] O.W.N. 774; [1952] 1 D.L.R. 158.

(2) [1951] O.R. 366; 3 D.L.R. 122.

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has not been challenged since 1853, that where prior to the time for performance of a contract one party has stated to the other that he does not intend to carry out the contract, the latter may choose to treat the contract as broken and sue immediately upon the breach, or he may refuse to accept the attempted repudiation and continue to treat the contract as subsisting and when the time for performance arrives, if it is not completed owing to the other party's default, sue for the breach. 31 Hals. 2nd ed. p. 401, para. 468; *Mersey Steel & Iron Co.* v. *Naylor* (1). When the defendant, the vendor, notified the plaintiff of its refusal to perform, the plaintiff has the choice of treating that as a breach of contract and suing immediately or he could refuse to accept the anticipatory breach and wait until the time for performance arrived, and if the contract was then subsisting, put the defendant to his election to perform by tendering, and if the defendant defaulted then treat that failure to perform as a breach and then sue. In each case the cause of action is the same, for breach of contract, but the breach is entirely different in the two cases. Therefore when the plaintiff was notified of the defendant's refusal to perform, he was put to his election whether to accept the anticipatory breach and sue without waiting or wait for the later breach, if it should occur, and make that the ground for his cause of action. Having unequivocally elected to sue upon the anticipatory breach, he cannot be heard to say that the contract was not then broken: *Scarf* v. *Jardine* (2) per Lord Blackburne at 360-1. The fact that the plaintiff did not claim the relief appropriate to an action for anticipatory breach cannot prevent his act in suing from being an unequivocal acceptance of the defendant's repudiation. He only had an action at the time if the contract had been broken. In order to sue he had to found his action on a breach of the contract. *Miller* v. *Allen* (3). The Court of Appeal relies upon *Roberto* v. *Bumb* (4). In that case it was only argued that the action was, at most, premature. The action was much more than premature. The plaintiff has only one cause of action for breach of the contract. The breach entitling the plaintiff to specific performance is a failure to perform

(1) (1884) 9 App. Cas. 434.
(2) (1882) 7 App. Cas. 345.
(3) (1912) 4 O.W.N. 346.
(2) [1943] O.R. 299.

in accordance with the terms of the contract when the time for performance has arrived and when the defendant has been properly put to his election to perform or default by making a proper tender upon him. If no tender is made the contract is at an end. *Brickles* v. *Snell* (1). Until there has been a failure to perform under those circumstances there is no breach and no cause of action. If, before that time arrives and that breach occurs, the plaintiff sues, it is to be presumed that he had a cause of action and where there has been an anticipatory breach and the plaintiff has elected to sue by reason of it, that anticipatory breach must be his cause of action. It is the only cause of action he can show to support his action. If his action was only premature he might have discontinued before the time for performance arrived and then properly put the defendant to its election to perform or default. He did not do so and the time for performance having passed without his doing so, his action for specific performance is gone. *Brickles* v. *Snell, supra. Jacta est alea.* His action is much more than premature, he has exhausted his cause of action for breach of the contract. The right to sue upon an anticipatory breach is a legal remedy. Specific performance is an extraordinary remedy in equity. The remedy is not available in law and is only granted in equity upon strict terms which must exist for it to be available because equity follows the law. 13 Hals. 2nd ed. p. 83.

There is no suggestion in any of the long line of cases that since 1853 have developed the right to sue for anticipatory breach, that such a breach can found an action for specific performance. Statements in the cases are unequivocably against such a suggestion. See particularly the judgment of Lord Atkinson in *British & Benningtons Ltd.* v. *N. W. Cachar Tea Co.* (2) quoted by Wells J. In Fry on Specific Performance 6th ed. p. 497, para. 1062, an anticipatory breach is only mentioned as giving a right to recission. Specific performance ought not to be decreed on the following grounds—(*a*) the contract was not complete; (*b*) performance of the whole contract cannot be enforced; (*c*) mistake; (*d*) the plaintiff made no tender. As to (*a*) the contract provides for the closing of the transaction on or before Jan. 29, the defendant to give possession on or

(1) [1916] 2 A.C. 599. (2) [1923] A.C. 48.

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before May 31 and to pay the plaintiff between closing and May 31, $641.75 per month for the space occupied by the defendant. The contract does not provide for any of the terms of the defendant's tenacy, nor for who was to heat the premises, pay the expenses of up-keep, electricity, water and gas, nor which of the parties would be entitled to the rents from the tenants during that period.

The Court can only grant specific performance of the whole contract. Fry on Specific Performance, 6th Ed. p. 383, para. 821, and since parts of it cannot now be performed the plaintiff should be confined to the remedy of damages by reason of the repudiation by the defendant. The plaintiff having sued before the time for completion of the sale, the defendant was never a tenant of the plaintiff's. The extent of the defendant's obligations as tenant were not defined by the contract and had never been agreed upon. The extent, therefore, of the extra obligations imposed on the defendant as owner in possession cannot be ascertained and the Court is not in a position to enforce performance of the whole contract as it is not able to adjust the rights between the parties in respect of that part of the contract entitling the defendant to a lease of the building after completion. To enforce performance of the whole contract the Court must imply many terms upon which the parties were not *ad idem*. The Court will not imply terms unless it is driven to the conclusion that they must be implied: *Hamlyn & Co.* v. *Wood & Co.* (1), or that they were left out because they were so obvious: *Shirlaw* v. *Southern Founderies* (2).

The contract was entered into by the defendant under a mistake sufficient to deprive the plaintiff of his remedy by way of specific performance. The evidence of White shows that he discussed with the plaintiff a tentative arrangement whereby if the defendant was unable to find suitable premises to move to before May 31 that it could remain on in the building being bought and that the plaintiff implied there would be no difficulty in entering into an arrangement of the kind desired by the defendant but that immediately after the agreement had been entered into the plaintiff advertised the whole building for rent. If the plaintiff had taken this stand before the contract was

(1) (1891) 2 Q.B. 488. (2) [1939] 2 All E.R. 113.

made, the defendant would not have entered into it. In its pleading the defendant sets up this as a misrepresentation, but does not need to go that far: 31 Hals. 2nd ed. p. 378, para. 432, and this is particularly so if a mistake made by the defendant is contributed to by anything done by the plaintiff. *Jones* v. *Rimmer* (1). The plaintiff made no tender but tender is necessary for two purposes, to show the readiness of the tenderor to perform and to put the tenderee to his election to perform or refuse to perform. *McDonald* v. *Murray* (2); *Snider* v. *Snider* (3). Here the plaintiff cannot approbate the repudiation to excuse tender and reprobate the repudiation to claim specific performance.

(At the close of the appellant's argument the respondent was told by the Court that he need only argue on the appellant's first point.)

F. A. Brewin Q.C. and *R. Scott* for the respondent. The facts of this case make it abundantly clear that the respondent upon the appellant's announced intention to repudiate the contract, did not elect to treat the contract as at an end, and sue for damages, but did elect to treat the contract as binding and at once invoked the assistance of the Court to enforce it. See correspondence between the respondent's and appellant's solicitors. The respondent has throughout these proceedings insisted that the contract was a binding contract. It is true that as the respondent has elected to treat the contract as valid and binding, that this would enable the other party to complete the contract and notwithstanding his repudiation of it to take advanage of any supervening circumstances which would justify him in declining to complete it. The facts of the case, however, indicate clearly that the appellant has made no effort or pretence at completing the contract and that there have been no intervening circumstances which would justify the appellant in declining to complete it. The respondent is only required to allege and prove as he has done, his willingness and readiness to complete. He is not bound to do further and to do a nugatory act such as tendering the purchase money which the appellant has already indicated he will not accept. *Jones* v. *Barkley* (4). The appellant has not pleaded failure to tender as a defence,

(1) (1880) 14 Ch. D. 588.
(2) (1885) 11 A.R. 101.
(3) (1911) 2 O.W.N. 1434.
(4) (1781) 2 Doug. 684.

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and if he did it would be met by the fact that tender is waived in the correspondence between the solicitors above referred to and the conduct of the parties.

The judgment of Kerwin, Estey and Fauteux, JJ. was delivered by:—

KERWIN J.:—By a written agreement dated November 29, 1949, the appellant agreed to sell and the respondent agreed to purchase certain lands and premises, and the sale was to be completed on or before January 29, 1950. On December 5, 1949, the appellant telegraphed to the respondent that it repudiated the contract, and on December 14, the respondent's solicitors wrote the solicitors for the appellant denying the latter's right to repudiate. On January 10, 1950, the writ of summons in this action was issued and the statement of claim delivered on January 17. It was argued that, admitting the respondent could immediately take advantage of the appellant's anticipatory breach and sue before the time fixed for completion, he could do so only on the basis that the contract was at an end, and he would, therefore, be confined to an action for damages for breach of contract. It was said that on the date of the writ, January 10, the respondent had no cause of action in the sense of being able to ask (as he did) for a declaration that the agreement of November 29 was a binding contract and that it ought to be specifically performed and carried into effect. That, of course, it may be observed is one of the usual claims in an action for specific performance and the judgment follows the claim.

No authority has been cited for the proposition advanced on behalf of the appellant and we find it untenable. It is settled that an action may be brought upon an anticipatory repudiation of a contract (*Fry on Specific Performance*, 6th ed. para. 1062), and in paragraph 1311 of *Williston on Contracts* it is said:—

> But would a court, it may be asked, grant specific performance on January 1, of the contract to convey Blackacre the following July, on the ground that the defendant had been guilty of an anticipatory repudiation on the earlier day? If such repudiation is an actual breach justifying an action at law, there seems no reason why a suit in equity should not be maintainable. Certainly no decree would require performance before July 1, and it would at least be made clear that repudiation does not accelerate the obligations of a contract.

With that statement we agree.

The argument of the appellant overlooks the power of the Court to make a declaratory judgment: Ontario Judicature Act, R.S.O. 1950, c. 190, s. 15(*b*). Although it was submitted that the point had not been advanced in *Roberto* v. *Bumb* (1), in the same manner as here, Laidlaw J.A. in that case did say, at page 310: "The cause of action was not complete when the proceedings were commenced in the Court", and, at page 311: "I think that a court of equity would not permit an appellant to avoid the contract merely because the action was started prematurely, nor would the respondent be thus deprived of his equitable right to a decree of specific performance, if he were otherwise entitled to it." If these extracts mean merely that at the time of the issue of the writ the Court could not have ordered that specific performance be carried out immediately, no objection may be found with them; but if they mean that the plaintiff did not have a complete cause of action for a declaration that the agreement was a binding contract and that it ought to be specifically enforced, we are unable to agree. The plaintiff having that right, the agreement would be carried out when the time for completion had expired.

The last sentence in paragraph 468 of Halsbury, volume 31, "in such cases neither party can claim specific performance" can only refer to the earlier part of the paragraph where it is stated that if one party has evinced an intention no longer to be bound by a contract, the other party is entitled to treat that as a repudiation and to accept it as such. If it means more, it cannot be supported.

The respondent was not put to any election upon the receipt of the telegram of December 5, 1949, and he has consistently taken the position that the appellant could not repudiate while the appellant has continued to aver that it was entitled so to do. The respondent's right to ask the Court for a declaration of validity and to specifically perform the contract arose immediately and nothing intervened before the date fixed for completion of the contract to change the position of the parties. The respondent was a party to a contract with the appellant which the latter had definitely stated it would not carry out and, therefore, it is not a case of a plaintiff not being able to show an

(1) [1943] O.R. 299.

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actual existing interest in the subject-matter at the date of the issue of the writ. It is of some significance and assistance that a vendor may bring an action for specific performance, and the inquiry as to title is whether he can make a good title and not whether he could do so at the date of the contract and, therefore, when once the inquiry has been directed, he may make out his title at any time before the certificate (*Fry*, paragraph 1366).

The contract between the parties was complete and without uncertainty. Performance of the whole contract could be enforced, and it must not be forgotten that by the time of the trial, the appellant had been in possession during the period for which it was to have a lease under the terms of the contract. Both Courts below have found that there was no mistake, and nothing was shown on the argument to cause us to think that that conclusion is not the right one on the evidence. A tender was not required when as was apparent from the actions of the appellant and from the proceedings and evidence at the trial, the appellant never intended to perform the contract. It is not necessary in connection with any of these points to refer to the clause in the contract:—

> It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported there by other than is expressed herein in writing.

Finally, as to the suggestion that damages would be sufficient because it is contended that the plaintiff desired to use the property as an investment, it is sufficient to say that generally speaking, specific performance applies to agreements for the sale of lands as a matter of course.

The appeal must be dismissed with costs.

The judgment of Locke and Cartwright, JJ. was delivered by:—

LOCKE, J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from a judgment of Wells, J. (2) by which specific performance of a contract for the sale of land was decreed.

(1) [1951] O.W.N. 774; [1952] 1 D.L.R. 158.

(2) [1951] O.R. 366; [1951] 3 D.L.R. 122.

The evidence of the contract between the parties is contained in an undated written offer made by the respondent to the appellant on November 29, 1949, which was accepted in writing by the latter on that date in the following terms:—

> I hereby accept the above offer and agree to duly carry out the same on the terms thereof.

The property thus agreed to be sold was a parcel of land situate on the north side of Wellington Street East in the City of Toronto: the stipulated price was the sum of $52,500 which was to be paid in part by the assumption of a first mortgage registered against the property and the balance in cash on the closing of the transaction. Other terms provided that the respondent might remain in possession of part of the premises for a stated period upon payment of a stipulated monthly rental, that the purchaser was to examine the title at his own expense and to have fifteen days from the date of the acceptance of the offer for that purpose, and included the usual provision for the adjustment of taxes, interest and other such matters as of the date of the completion of the sale which was to be on or before January 29, 1950. The matter of the completion of the sale was referred by the respective parties to their solicitors and by letter dated December 3, 1949, the solicitors for the appellant wrote to the solicitors for the respondent enclosing a draft deed of the property, asked for particulars as to the grantee and said that a statement of adjustments would follow in due course.

The appellant, however, thereafter decided not to carry out the agreement and on December 5, 1949, sent a telegram to the respondent in the following terms:—

> We repudiate contract for sale of premises 44-50 Wellington Street East on grounds of want of mutuality.

On the day following, the appellant's solicitors wrote the solicitors for the respondent confirming that this telegram had been sent and asked for the return of the draft which had been enclosed with their letter of December 3rd. On December 13, 1949, the solicitors for the respondent wrote the solicitors for the appellant making requisitions as to title. On the day following they wrote again

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acknowledging the letter of December 6th and insisted that the contract was binding on the parties and said:—

> You might advise us if you waive tender and we can get on with an action for specific performance.

The only written answer to these last communications was a letter from the solicitors for the appellant, saying that they had authority to accept service of any writ that the solicitors for the respondent were instructed to issue. No tender of a conveyance was made by the respondent to the appellant and the action was commenced in advance of January 29, 1950, the date fixed for the completion of the sale.

By the statement of claim the respondent claimed:

> a declaration that the said contract made between the plaintiff and the defendant on the 29th day of November, 1949, is a binding contract between the plaintiff and the defendant for the sale to the plaintiff of the lands and premises mentioned in paragraph 3 hereof, for the price set out in the said contract and that the same ought to be specifically performed and carried into effect.

and that the matter be referred to the Master to take the accounts, including an account of the damages suffered by reason of what was called the defendant's repudiation of the contract.

The defences pleaded were that the defendant had been induced by false representations to execute the agreement, that the document was incomplete as a contract with respect to material matters, that it was ambiguous and uncertain with respect to the terms of the defendant's tenancy thereof and that there was no memorandum in writing sufficient to satisfy the *Statute of Frauds*.

Wells J. by whom the action was tried found against the present appellant on each of these issues and also upon two further questions argued before him, namely, that by bringing the action in advance of the date fixed for the completion of the contract the plaintiff had elected to accept the repudiation of the contract by the defendant and was at best only entitled to damages and that the action for specific performance was premature.

The formal judgment entered pursuant to these findings declared that the agreement made between the parties was a binding contract and ought to be specifically performed and carried into effect, and included the usual directions

as to the taking of the account and reserved further directions until after the Master should have made his report.

The Court of Appeal concurred in the conclusions of the learned trial judge. In delivering the judgment of the Court, Laidlaw J.A. said in part that Wells J. had properly given effect to a clause in the contract reading:—

> It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby (sic) other than is expressed herein in writing.

in dealing with the issues of misrepresentation and of mistake. The reasons delivered at the trial, however, appear to me to make it clear that in dealing with these issues Wells J. based his conclusions on his acceptance of the evidence of the defendant. It is, therefore, unnecessary, in my opinion, to express any view as to the effect of this term of the contract in the circumstances of this case. In dealing with the argument that the action, in so far as the claim was for specific performance was premature, Laidlaw J.A. in finding against this contention followed the decision of the Court of Appeal in *Roberto* v. *Bumb* (1). While I respectfully agree with the conclusions of the Court of Appeal upon the various questions arising for decision in the present matter, I disagree with the opinion expressed in *Roberto's* case that an action for specific performance brought before the date fixed for the completion of the transaction by the parties is premature.

It is of importance to note that in the present matter, in addition to the claim for specific performance, the respondent asked for a declaration that the contract was binding upon the parties. To make such a declaration of right is expressly authorized by subsection (*b*) of s. 15 of the Judicature Act (c. 190, R.S.O. 1950), whether any consequential relief is or could be claimed or not. The section of the Ontario Act reproduces verbatim r. 5 of Order XXV of the Rules of the Supreme Court 1883, under which it has been held that the making of such a declaration is not confined to cases where the plaintiff has a cause of action against the defendant (*Guarantee Trust Co.* v. *Hannay* (2); *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (3), Lord Sumner at 452). In *Hanson* v. *Radcliffe Urban Council* (4), Lord Sterndale

(1) [1943] O.R. 299.
(2) [1915] 2 K.B. 536.
(3) [1921] 2 A.C. 438.
(4) [1922] 2 Ch. 490 at 507.

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expressed the opinion that the power of the court to make a declaration under this rule where it is a question of defining the rights of two parties is only limited by its own discretion. In the circumstances of the present case it cannot be successfully contended that in so far as a declaratory judgment was sought the action was premature.

As to that portion of the prayer for relief which asked a declaration that the contract "ought to be specifically performed and carried into effect", this was no doubt intended to be, not simply a claim for a declaration, but for the substantive relief of specific performance. As to this, it is argued that since the vendor was not bound to complete the sale until January 29th no action could be brought until a tender of conveyance had been made and there had been a refusal on the part of the vendor to convey the property on or before the named date. The terms of the telegram of December 5th and the letter of December 6th and the fact that the only answer made by the appellant's solicitors to the letter from the solicitors for the respondent of December 13th, in which they asked if the appellant waived the necessity of making a tender, was the letter of December 15th, made it clear that the appellant did not intend to carry out the agreement and that any tender would be rejected. In these circumstances none was necessary, in my opinion.

The argument appears to me to be based upon a misconception of the nature of the proceedings. Some support, however, for the submission that courts of equity do not interfere until the time for performance has passed and default has been made is to be found in a passage from *Fry on Specific Performance* (6th Ed. p. 3) where the learned author says that the court rarely, if ever, interferes until the time for performance has passed, a statement which is repeated at p. 539 of the 12th Edition of Pollock on Contracts. Opinions to the contrary are expressed in the passage from the Restatement of The Law of Contracts (Vol. 2, p. 645), referred to by the learned trial judge, and in Williston (Vol. 5, p. 3708).

In my opinion, the right of the respondent to resort to a court of equity for the enforcement of his rights and the protection of his interest in the land arose immediately upon receipt of the telegram of December 5th and the

letter of the day following. These statements were unequivocal declarations on the part of the appellant of its intention to disregard the terms of the contract and not to complete the sale. If, in fact, there was at that time a binding and enforceable agreement for the sale of the land, the respondent was as between himself and the appellant in the eyes of a court of equity the real beneficial owner (*Shaw* v. *Foster* (1), at 338 per Lord Cairns, at p. 349 per Lord O'Hagan: *Lysaght* v. *Edwards* (2), Jessel M.R. at 505; *McKillop* v. *Alexander* (3), Anglin J. at 578. In *Rose* v. *Watson* (4), Lord Westbury said that when the owner of an estate contracts for the immediate sale of land the ownership of the estate is in equity transferred by that contract.

Courts of equity are constantly asked to intervene for the protection of contractual and other property rights. In *Heathcote* v. *The North Staffordshire Railway Company* (5), Cottenham, L.C. in contrasting the exercise of the jurisdiction in equity in respect to contracts for the sale of goods and those for the sale of land, said in part (p. 112):

> If, indeed, A. had agreed to sell an estate to B., and then proposed to deal with the estate, so as to prevent him from performing his contract, equity would interfere, because in that case B. would by the contract have obtained an interest in the estate itself, which in the case of the goods he would not.

In *Hadley* v. *The London Bank of Scotland* (6), Turner L.J. said in part:—

> I have always understood the rule of the Court to be, that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in Equity transferred to the purchaser by the contract, the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.

The assistance of the court may be invoked to restrain by injunction a threatened breach of contract, thus in effect compelling its performance. In Kerr on Injunctions, 6th Ed. p. 411, the learned author says that it is not necessary that the breach in respect of which the interference of the court is sought should have been actually committed: it is

(1) (1872) L.R. 5 H.L. 321.
(2) (1876) 2 Ch. D. 499.
(3) (1912) 45 Can. S.C.R. 551.
(4) (1864) 10 H.L.C. 672 at 678.
(5) (1850) 2 M. & G. 100.
(6) (1865) 3 De G. J. & S. 63 at 70.

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KLOEPFER WHOLESALE HARDWARE v. ROY

Locke J.

enough that the defendant claims and insists on his right to do the act complained of, although he may not have actually done it. The court intervenes for the protection of equitable as well as legal rights (*Performing Right Society* v. *London Theatre* (1)). In the present matter the denial by the appellant of the existence of an enforceable agreement for the sale of the land was a denial of the fact that the respondent then had an equitable estate or interest in it and was as between himself and the appellant the beneficial owner: it was implicit in such an attitude that the appellant, the registered owner of the property, contended that it was at liberty to deal with the property as its own. Whether or not the defendant's attitude would have justified the respondent in bringing an action claiming an injunction to restrain any such dealing with the property, it is, in my opinion, clear that he was entitled immediately to bring an action for a declaration as to the nature of his interest and for a decree that the contract be specifically performed and to file a *lis pendens* against the title to the property to prevent any dealing with it, unless subject to his interest. The principles stated by Cockburn, C.J. in *Frost* v. *Knight* (2), as to the remedies at common law of a party to a contract, where the other contracting party announces in advance of the time for completion his intention not to perform it, do not appear to me to touch the question as to when the assistance of a court of equity may be sought in circumstances such as these.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Slaght, McMurtry, Ganong, Keith & Slaght.*

Solicitors for the respondent: *Cameron, Weldon, Brewin & McCallum.*

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(1) [1924] A.C. 1 at 14. (2) (1872) L.R. 7 Ex. 111 at 112.

BERNARD DUSSAULT .....APPELLANT; 1952

*Dec. 1, 2.

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—S. 461—Jury trial—Refusal of trial judge to have charge taken in shorthand—No report made under s. 1020 of the Criminal Code.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, Casey and McDougall JJ.A. dissenting, the appellant's conviction following his trial before a judge and jury on a charge of breaking and entering with intent to commit a theft. The evidence was circumstantial and the defence was an alibi.

After the address of the trial judge to the jury, counsel for the defence moved that the trial judge should direct the jury to the effect that they should acquit the accused if they entertained a reasonable doubt concerning the question of alibi, to which motion the trial judge answered that that had been sufficiently explained. The address of the trial judge was not taken by a stenographer, a defence motion to have it done having been refused.

The trial judge did not furnish to the Court of Appeal a report as provided for under s. 1020 of the *Criminal Code* nor was there any application made on behalf of the appellant in the Court of Appeal for an order requiring the trial judge to comply with the section and furnish a report. (*Baron* v. *The King* [1930] S.C.R. 194 and *Northey* v. *The King* [1948] S.C.R. 135 were referred to during the argument before this Court).

The offence was committed in December 1949, the verdict was given in October 1950 and the judgment of the Court of Appeal was rendered in June 1951. In view of the fact

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Fauteux JJ.

(1) Q.R. [1951] K.B. 556.

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DUSSAULT v. THE QUEEN

that the notice of appeal to this Court was served in July 1951 and the case filed in September 1951, counsel for the appellant was asked for, but gave no explanation as to, the cause of the delay in the setting down of the case for hearing in this Court.

Alexandre Chevalier Q.C. for the appellant.

René T. Hébert Q.C. for the respondent.

At the close of the argument on behalf of the appellant, the following oral judgment was delivered by the Chief Justice:

The Court is unanimously of opinion that it was open to the appellant to obtain before the Court of Appeal an order requesting the trial judge to file the report under s. 1020; in which case, the Court of Appeal and this Court as well would have had the proper material necessary for the consideration of the appeal. In the absence of such material, we have to dismiss the appeal.

Appeal dismissed.

MANNING TIMBER PRODUCTS LTD....APPELLANT; 1952

*June 10
*June 30

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Taxation—Revenue—Excess Profits Tax—The Excess Profits Tax Act, 1940, (Can.) c. 32, 1940 2nd Sess. as amended, s. 3—"substantial interest",—meaning of.

Held: that "substantial interest" in s. 3 of *The Excess Profits Tax Act, 1940,* as amended, does not mean a "majority" or a "controlling interest." The only possible meaning that it can be given is "large quantity", "considerable amount of shares." Moreover, in the French version of s. 3, which must be read with the English one, *(Authors & Publishers* v. *Western Fair* [1951] S.C.R. 596), the translation for "substantial" is "important."

Per: Cartwright J. In this case the ownership of 49 per cent of the shares of the appellant constituted a substantial interest within the meaning of the words in s. 3.

Judgment of the Exchequer Court [1951] Ex. C.R. 338, affirmed.

APPEAL from a decision of Sidney Smith, Deputy Judge of the Exchequer Court of Canada (1) dismissing the appeal of the appellant from the respondent's assessment against it for the year 1947 under *The Excess Profits Tax Act, 1940.*

D. K. MacTavish Q.C. and *G. Perley-Robertson* for the appellant. There are no facts in dispute and this whole case turns on the meaning of "substantial interest" in the proviso to s. 3 of The Excess Profits Tax Act. The Crown contends that one Fred Manning and his wife held all the shares but one in Manning Lumber Mills Ltd. (whose business appellant continued) and that the Mannings and the Lumber Company held 49 per cent of the shares in the appellant company. Appellant says that whatever meaning would be given the term "substantial interest" if it had no context, still the context here shows that in s. 3 "substantial interest" must mean "main interest" according to all established canons of construction. The Oxford Dictionary and the Century Dictionary both give one of the recognized meanings of "substantial" as being "main" or "in the main". Such phrases as "substantial justice", "substantial completion" show that this meaning

*PRESENT: Kerwin, Taschereau, Kellock, Locke and Cartwright JJ.

(1) [1951] Ex. C.R. 338.

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is quite common. The Crown conceded this at the hearing, though it denied that that was the meaning here. The proviso to s. 3 itself uses the term "substantially" in two places and it is also found in ss. 4(2), 4A (1) (*a*) (*i*), and 5(4). "Substantially" being so used, this is decisive on the authorities to show that the proviso to s. 3 uses the word "substantial" as meaning "main" there being nothing to exclude this meaning. *Re National Savings Bank Association* (1); *R.* v. *Poor Law Commissioners: Re St. Pancras* (2); *R.* v. *Poor Law Commissioners: Re Holborn Union* (3); *Brace* v. *Abercarn* (4); *Victoria (City)* v. *Bishop of Vancouver* (5); *Wolfe Co.* v. *R.* (6).

Since this is a taxation statute, some line must be found: and the only line that can be drawn is that between a major and a minor interest, between a controlling and a minority interest, which the Privy Council in *M.N.R.* v. *Wrights Canadian Ropes Ltd.* (7) fixed definitely at the 50 per cent mark.

Not only is the term "substantial interest" capable of more than one meaning but despite popular usage, the factors that point to the legislature's meaning "main interest" in s. 3 outweigh any factors that point the other way. The appellant also relies on the principle that a taxing measure capable of more than one meaning must be construed in favour of the taxpayer. *The King* v. *Crabbs* (8); *Kent* v. *The King* (9).

W. R. Jackett Q.C. and *F. J. Cross* for the respondent. The appellant made it clear at the hearing before the trial judge that the only point in issue is whether a 49 per cent interest was a "substantial interest" within the meaning of the proviso to s. 3 of *The Excess Profits Tax Act, 1940.* The word "substantial" has a number of quite different senses depending on the context in which it is used. This appears from an examination of the word as an adjective in the Shorter Oxford English Dictionary and the illustrations of its various uses given therein. Used with the indefinite article it is clear that it means "Of ample or considerable amount", or "having substance; not imaginary,

(1) (1866) L.R. 1 Ch. 547 at 549, 550.
(2) (1837) 6 A. & E. 1 at 7.
(3) (1838) 6 A. & E. 56 at 68.
(4) [1891] 2 Q.B. 699 at 705.
(5) [1921] 2 A.C. 384 at 390.
(6) [1921] 63 Can. S.C.R. 141 at 154.
(7) [1947] A.C. 109 at 118.
(8) [1934] S.C.R. 523.
(9) [1924] S.C.R. 388 at 396.

unreal, or apparent only; true, solid, real". None of the other meanings given can be applied to its use in the context "a substantial interest". This is made clear by reference to the French version where the word used in the present context is "important". Compare para. (*b*) of s. 3 where the words in the French version corresponding to "substantially" in the English version are "sensiblement" and "essentiellement". The French and English versions of the Statute must be read together. *Composers', Authors & Publishers Association of Canada, Ltd.* v. *Western Fair Association* (1). It is a question of fact as to whether an interest is substantial. The word does not require any precise proportion as a matter of law. *Palser* v. *Grinling* (2). That the word in ordinary use in a context such as that here does not mean "majority" or "controlling" as urged by appellant's counsel is shown by the use of the word in the Notice of Appeal where a number of persons are stated each to have had "substantial" investments in the appellant company. In any event the question as to whether the same persons had a substantial interest in the appellant's business and the previous business was entrusted by Parliament to the Minister and he formed the opinion that the same persons had a substantial interest in both businesses. The question is whether "the person or persons who has or have a substantial interest in the business . . . had, in the opinion of the Minister . . . a substantial interest in a previous business." (S. 3). The Minister formed that opinion. There was evidence on which he could and no ground of invalidity has been suggested. *The King* v. *Noxema Chemical Co. of Canada Ltd.* (3). The reason why this question was left for determination by the Minister is probably that Parliament did not find it possible to formulate a more precise test than that contained in the phrase a "substantial interest". It must be remembered that the phrase appears in a provision designed to protect the revenue against evasion by the improper use of an exemption provision in a wartime taxation statute. For the above reasons and for the reasons contained in the reasons for judgment delivered by the trial judge the appeal should be dismissed with costs.

(1) [1951] S.C.R. 596.
(2) [1948] A.C. 291 at 316-17.
(3) [1942] S.C.R. 178.

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MANNING TIMBER PRODUCTS LTD. v. MINISTER OF NATIONAL REVENUE

The judgment of Kerwin, Taschereau, Kellock and Locke, JJ. was delivered by:—

TASCHEREAU, J.:—In February, 1948, the appellant duly filed an Income and Excess Profits Tax return for the 1947 taxation year, but failed to show any excess profits tax payable. The contention is based on section 3 of *The Excess Profits Tax Act,* which is to the effect that a company is exempt from tax during its first year of operation, provided (*a*) it carried on a substantially new business with substantially new assets, (*b*) has started business after June 26th, 1944, unless it continued a previous business, and (*c*) some person or persons had a *"substantial interest"* both in the previous and in the new business.

It is common ground that the appellant first began business in 1947, year of its incorporation, that it continued a previous business, and it is also conceded that the Mannings who owned nearly all the shares of the previous business, held 49 per cent of the shares of the new company. The only point in issue is therefore whether a 49 per cent interest is a "substantial interest", within the meaning of the Excess Profits Tax Act.

The appellant was assessed in the sum of $29,458.78 and his appeals to the Minister as well as to the Exchequer Court were dismissed. The Honourable Sidney Smith, deputy judge, declined to accept the argument that "substantial interest" meant "majority" or "controlling interest."

I think that this judgment is clearly right. The word "substantial" has a number of quite different senses, all depending on the context in which it is used. In the present case, I agree with the submission of the respondent, that the only possible meaning that it can be given is "large quantity", "considerable amount of shares". When Parliament intended to deal with the standard profits of certain controlled companies, it used the words "a controlling interest", as it did in section 15*a*. Moreover, in the French version of section 3, which must be read with the English one (*Authors & Publishers* v. *Western Fair* (1)), the translation for "substantial" is "important".

The appeal fails and should be dismissed with costs.

(1) [1951] S.C.R. 596.

CARTWRIGHT J.:—The appellant contends that in the phrase "a person or persons who has or have a substantial interest in the business either by ownership of shares in the corporation or joint stock company that operates the business or otherwise," used in section 3 of the Excess Profits Tax Act as amended, the words "a substantial interest" mean "a controlling interest", and therefore in the case of a joint stock company, which the appellant is, "more than half of the issued shares". I am unable to accept this contention. I do not think that in their ordinary meaning the words "substantial interest" are synonymous with the words "controlling interest", and that Parliament did not intend so to use them is indicated by the fact that the latter words are used elsewhere in the same statute.

I agree with the view of the learned Deputy Judge that in this case the ownership of 49 per cent of the shares of the appellant constituted a substantial interest within the meaning of the words in section 3 quoted above.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Crease, Davey, Lawson, Davis, Gordon & Baker.*

Solicitor for the respondent: *F. J. Cross.*

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*May 14, 15
*Oct. 7

GEORGE EDWIN BEAMENT .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Absence from Canada on military service—Whether "resident" or "ordinarily resident" in Canada—Income War Tax Act, R.S.C. 1927, c. 97, s. 7A(1).

The appellant, prior to volunteering for active service with the Canadian Army in 1939, practised law in Ottawa, where he lived with his parents. In 1940, he went overseas and while there married, in 1941, a British subject previously domiciled in the United Kingdom and, thereafter, established a matrimonial home in that country. He remained overseas until May 1946, except for a few weeks in 1941 when he returned to Canada in connection with his military duties. From the date of his marriage until May 1946, his wife and, subsequently, his children remained in the United Kingdom. In May 1946, the appellant, his wife and their children came to Canada and took up permanent residence in Ottawa where he resumed his law practice.

During his absence abroad, the appellant continued as a non-active partner in a Canadian law firm and income tax returns covering partnership and investment income were filed on his behalf. During this period, he maintained a bank account and a safety deposit box in Ottawa, and his civilian clothes were stored at his parents' residence.

In his income tax return for 1946, the appellant sought a deduction under s. 7A(1) of the *Income War Tax Act* for the period of absence in 1946 on the ground that he was not previously "resident" or "ordinarily resident" in Canada in the year 1946 prior to his return in May. The Minister's disallowance of the deduction was upheld in appeals to the Income Tax Appeal Board and the Exchequer Court of Canada.

Held: The appeal should be allowed; since throughout the period in question the appellant was resident either in the army quarters or in the rented dwelling in which his wife was living, or in both, he was entitled to the deduction claimed.

Held: The words "resident" and "ordinarily resident" should be given the everyday meaning ascribed to them by common usage, there being no definition of these words in the *Income War Tax Act.*

Held: Even if it could be said that the residence of the appellant was throughout that period extraordinary, in the sense of being out of the usual course of his life considered as a whole, it would not follow that he had an ordinary residence in Canada; it would rather follow that he ceased to have anywhere a residence which was ordinary in the corresponding sense.

Held: Bearing in mind all the facts in this case and particularly that during that period the appellant was physically absent from Canada, had therein no dwelling or other place of abode to which he could as of right return and was maintaining his matrimonial home in the United Kingdom, he was not at any time during the relevant period resident or ordinarily resident in Canada.

*PRESENT: Kerwin, Kellock, Estey, Locke and Cartwright JJ.

In all appeals from judgments of the Exchequer Court in proceedings by way of appeal from the Income Tax Appeal Board, the reasons for judgment given by members of the Board should be included in the Appeal Case filed in the Supreme Court of Canada.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), dismissing the appellant's appeal from a decision of the Income Tax Appeal Board in respect of the appellant's 1946 assessment for income tax.

M. H. Fyfe Q.C. for the appellant. The appellant was not during the period in question resident in Canada because he was not physically present in Canada and had no abode or place of habitation there. He was not resident, he was out of Canada. Residence implies a place of abode and personal presence.

Not being resident in Canada, the appellant could not be ordinarily resident in Canada. Where the expressions "resident" and "ordinarily resident" are both used, the latter is narrower than the former with the result that a person who is not resident in Canada cannot be found to be ordinarily resident in Canada. If "resident" is given its fullest meaning, the expression ordinarily resident becomes superfluous.

The fact that the appellant went overseas on active service is no ground, in the circumstances, for saying that he remained ordinarily resident in Canada. Residence is to be distinguished from domicil.

A person can be resident in more than one place, but since ordinarily resident is narrower than resident, a person can be ordinarily resident in more than one place only if his stay in each place is substantial and habitual. Having changed his whole way of life by marrying in the United Kingdom and setting up matrimonial homes there and being present there, the appellant was during the whole period ordinarily resident in the United Kingdom and not in Canada.

D. W. Mundell Q.C. and F. J. Cross for the respondent. In the absence of a statutory definition, these words should receive the meaning given to them by common usage. The expression "resides" means to dwell permanently or for a considerable period of time, to have one's settled or usual

(1) [1951] Ex. C.R. 187.

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abode, or to live in or at a particular place. The expression "ordinarily" means, amongst other things, usually, commonly, and as is normal or usual.

In accordance with the test in *Thomson* v. *Minister of National Revenue* (1), the question whether a person resides or ordinarily resides at a place is one of fact. Amongst the facts to be considered is the original and continuing status of the person and the general mode of his life. Continual and uninterrupted physical presence is clearly not necessary and absence for a large part of a particular tax period does not prevent a person being resident and much less ordinarily resident. Where a person is absent the question of whether his absence interrupts his ordinary residence depends on the nature and purpose of his absence—whether it is to abandon his residence or is extraordinary, exceptional, temporary or accompanied by a sense of transitoriness or of return. Storage of personal belongings, maintenance of banking arrangements, the presence of an abode to which the person is free to come even though he has no proprietary interest, and the existence of family ties are all significant as indicating a retention of residence. Finally, the whole of the person's course of conduct with respect to his absence, including his conduct in returning, may be looked at to determine whether his absence resulted in his ceasing to be resident.

Using the language in its ordinary and popular sense, he ordinarily resided in Canada throughout this time. Canada being the appellant's ordinary residence in 1939, all factors to be considered support the view that he continued to be ordinarily resident in Canada during the period of his service in the forces. These factors demonstrate that his absence was merely temporary and deviatory and was not a change or final departure from his usual and settled mode of life.

The reason for the appellant's absence was that he enlisted for and went on active service in the Canadian forces at the outbreak of the war. An absence for this purpose, rather than giving rise to any inference that the appellant abandoned Canada as the place where he ordinarily resided, gives rise to an inference that Canada

(1) [1946] S.C.R. 209.

was to continue as his place of ordinary residence. Moreover all the other circumstances indicate that Canada continued to be the place where the appellant ordinarily resided. The ties of family between the appellant and Canada, both personal and in business, remained uninterrupted. He made arrangements to preserve, as far as possible, the continuity and pattern of his ordinary life and interests, business and social, in Canada pending his return.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—This is an appeal from the judgment of Angers J. (1) pronounced on June 25, 1951, dismissing an appeal by the appellant from a decision of the Income Tax Appeal Board with respect to his income tax assessment for the year 1946, and disallowing the claim of the appellant that the tax payable by him for that year should be reduced by the sum of $657.

The question to be determined is whether between January 1, 1946 and May 8, 1946, the appellant was "resident or ordinarily resident in Canada" within the meaning of those words as used in section 7(*a*) of the *Income War Tax Act*. That section so far as it is relevant to this inquiry reads as follows:—

> 7A (1): A Taxpayer who
>
> (*a*) not being previously resident or ordinarily resident in Canada during a taxation year becomes resident or ordinarily resident in Canada during the said taxation year, so that he neither resided nor was ordinarily resident in Canada during the whole of the taxation year, may deduct from the tax otherwise payable by him under subsection one of section nine of this Act, a portion of the said tax that bears the same relation to the whole tax as the period in the taxation year during which he neither resided nor was ordinarily resident in Canada bears to the whole taxation year.

The facts are as follows. Before September 2, 1939, the appellant admittedly was ordinarily resident in Canada, living at Ottawa. He was a barrister and solicitor practising in Ottawa in partnership with his brother. He was a bachelor and lived with his parents in Ottawa in circumstances to be mentioned in greater detail hereafter. The appellant was also, at this time, a member of the Non-Permanent Active Militia of Canada. He held the rank

(1) [1951] Ex. C.R. 187.

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Cartwright J.

of major and was in command of a Field Battery. On the outbreak of war he volunteered for active service. He was attested in the forces on September 2, 1939 and was placed in command of a battery. From September 2, 1939, to June, 1946, the appellant was in the Canadian Active Service Force.

On 25th August, 1940, the appellant sailed for England arriving there on 5th September, 1940. While in England, the appellant was married on 22nd February, 1941, in Oxford, England, to a British subject previously domiciled in the United Kingdom. At that time, the appellant was attending the Staff College at Camberley, Surrey, and at the time of his marriage as aforesaid established a home for himself and his wife in a rented furnished house nearby where they lived until mid-May, 1941. At that time, he was attached for training to the 6th British Armoured Division in Cambridgeshire and he rented a furnished flat in Cambridge to which his wife moved. On September 12, 1941, under orders, he sailed from Liverpool, arriving in Halifax on 23rd September, 1941, to take up an appointment with the 5th Canadian Armoured Division at Camp Borden, Ontario. His wife remained in England and in October obtained a lease of another furnished house in Cambridge, "Grange Croft", Grange Road, Cambridge, which the appellant continued to rent until November, 1943. On 10th November, 1941, the appellant, under orders, sailed from Halifax with the 1st Canadian Armoured Brigade for England arriving there on 23rd November, 1941.

From 23rd November, 1941, until July, 1944, the appellant remained continuously in England holding a succession of appointments in the Canadian Army. On 20th January, 1942, his son was born at "Grange Croft". Towards the end of November, 1943, the appellant moved his family from Cambridge to a rented furnished house in Fetcham, Surrey. On 4th May, 1944, his daughter was born in this house.

In July, 1944, the appellant proceeded with Headquarters First Canadian Army to the Normandy bridgehead in France. At about the same time, he moved his wife and two children from Fetcham to a rented furnished house in Lancashire. He maintained his family there until May,

1945, when he moved them to a rented furnished house in Scotland. He maintained his family there until mid-September, 1945, when he moved them back to the South of England to a rented furnished house in Watford, Hertfordshire, where he and his family lived together from mid-September, 1945, until they came to Canada in May, 1946. At the end of June, 1945, under orders of competent military authority, the appellant relinquished his appointment in the Netherlands as Brigadier, General Staff, 1st Canadian Army, and proceeded to England to take up a new appointment, as President of the Khaki University of Canada in the United Kingdom, which he held until the latter part of April, 1946.

During the period from 23rd November, 1941, to the end of April, 1946, the appellant spent all his leave periods with his wife and their children in the United Kingdom at one or other of the places set out above. The appellant, his wife and their children sailed from Southampton on 4th May, 1946, and landed at Halifax on 8th May, 1946.

While the appellant was overseas, the law practice in which he was a partner was carried on by salaried employees of the partnership as his partner was also overseas in the armed forces. Income tax returns were filed in Canada on behalf of the appellant by his father for the taxation years when the appellant was overseas, his father acting under a Power of Attorney from the appellant, the liability to tax being founded on section 9(1) (*d*) of *The Income War Tax Act* reading as follows:—

> 9(1): There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company, ...
>
> * * *
>
> (*d*) who, not being resident in Canada, is carrying on business in Canada at any time in such year;

On the income tax return filed on behalf of the appellant for the year 1940 the question on the form "Address of Present Residence?" was answered "9 Marlborough Ave., Ottawa, Carleton, Ontario (Overseas)". On the returns filed on his behalf for the years 1941 to 1945, both inclusive, this question was answered either "Cambridge, England", "Active Service—England" or "Active Service Overseas".

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Before he left Ottawa, the appellant was a member of the Rideau Club of Ottawa and the Royal Ottawa Golf Club, near Hull, P.Q., and throughout his service in the forces he continued to be a member of these Clubs.

While overseas, the appellant maintained a bank account and a safety deposit box in a bank in Ottawa which were operated on his behalf in connection with his Canadian income and Canadian securities under Power of Attorney given to his father. While overseas the appellant continuously operated a personal bank account in a branch of a Canadian bank in London, England.

Shortly prior to the appellant proceeding with his family to Canada in May, 1946, he requested his father to endeavour to arrange for him the rental of a suitable house in the Ottawa area to which he could bring his family after their arrival and such a rental was arranged for him of a house in Rockcliffe.

Prior to September 2, 1939, the appellant was living at the home of his parents at 9 Marlborough Avenue, Ottawa, as a roomer and boarder at an agreed monthly rate. Under this arrangement, the appellant occupied the bedroom at the rear of the second floor of the house. When the appellant volunteered for active service in September, 1939, these arrangements were terminated and the appellant's civilian clothing and personal belongings were packed away in a box room at 9 Marlborough Avenue. The appellant lived in Government quarters from 3rd September, 1939, with his unit. Shortly after the appellant had terminated his arrangements for living at 9 Marlborough Avenue, his father took over the room which the appellant had occupied and used it as his personal bedroom and dressing room and continued to do so until the year 1946. When the appellant returned to Canada on duty on 23rd September, 1941, he was granted a week-end's leave which he spent as the guest of his parents, occupying the spare guest room at 9 Marlborough Avenue.

When the appellant and his family returned to Canada in May, 1946, they were invited by the appellant's parents to be their guests for a short time at 9 Marlborough Avenue. As a result of this invitation, the appellant and his wife stayed at 9 Marlborough Avenue for a period of approximately one week and occupied the spare guest room. For

the remainder of the month of May, 1946 the appellant and his wife had a holiday at the Seigniory Club at Montebello, in the Province of Quebec. The appellant's two children and their nursemaid were guests of the appellant's father and mother at 9 Marlborough Avenue for approximately three weeks in May, 1946, and occupied two rooms on the third floor. On 1st June, 1946, the appellant and his family went into possession of the house which the appellant had rented in Rockcliffe.

The Income War Tax Act does not contain a definition of the words "resident" or "ordinarily resident" and it is common ground that they should be given the everyday meaning ascribed to them by common usage.

The question whether, as used in section 7(*a*), the words "ordinarily resident" are more or less comprehensive than, or synonymous with, the word "resident" was argued before us but it does not appear to me to be necessary to pursue this inquiry in this case. It has already received attention in *Thompson* v. *Minister of National Revenue* (1).

In my view, giving to the words in question the interpretation most favourable to the respondent which can be given without doing violence to their commonly accepted meaning, it is impossible to say that the appellant was at any time in the period between November 23, 1941 and the beginning of May, 1946, either resident or ordinarily resident in Canada. Throughout such period, in my opinion, he was resident either in the quarters which he was occupying for the time being in the performance of his military duties or in the rented dwelling in which his wife was living for the time being, or perhaps in both of such places, and was neither resident nor ordinarily resident in any other place.

I have not overlooked the argument of counsel for the respondent that, as was pointed out by Kerwin J. in *Thompson* v. *Minister of National Revenue* (*supra*) at page 213, a person may be a resident of more than one country for revenue purposes, that war is an extraordinary occurrence, that the appellant intended to return to Canada after the war and that, therefore, his residence out of Canada during the period of several years mentioned above should be regarded as "extraordinary" and he should be

(1) [1946] S.C.R. 209.

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deemed throughout such period to have been "ordinarily resident" in Canada. For the purposes of this argument, I am willing to assume the continuing intention of the appellant to return, although I would have thought the word "hope" more apt than the word "intention" to describe his probable state of mind in this regard. In my view, however, even if it could properly be said that the residence of the appellant was throughout the period from November 23, 1941 to May 8, 1946 extraordinary, in the sense of being out of the usual course of his life considered as a whole, it would not follow that he had during such period an ordinary residence in Canada; it would rather follow that during the years mentioned he ceased to have anywhere a residence which was ordinary in the corresponding sense.

It has frequently been pointed out that the decision as to the place or places in which a person is resident must turn on the facts of the particular case. Bearing in mind all the facts which are set out above, perhaps in unnecessary detail, and particularly that throughout the period in question and for several years prior thereto the appellant was physically absent from Canada, had therein no dwelling house or other place of abode to which he could as of right return and was maintaining his matrimonial home in the United Kingdom, I am of opinion that he was not at any time in such period resident or ordinarily resident in Canada.

Before parting with the matter I should mention a matter of practice with which counsel requested us to deal. We think that in all appeals from judgments of the Exchequer Court in proceedings by way of appeal from the Income Tax Appeal Board the reasons for judgment given by members of the Board should be included in the Appeal Case filed in this Court.

For the above reasons I would allow the appeal and declare that the appellant is entitled to the deduction claimed. The appellant is entitled to his costs in this Court and in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: *Beament, Fyfe & Ault.*

Solicitor for the respondent: *F. J. Cross.*

LEON AZOULAY .....APPELLANT; 1952

AND *May 21, 22 *Nov. 4

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Abortion—Jury trial—No review of evidence by trial judge.

The appellant, charged with having unlawfully used instruments or other means on the deceased woman with intent to procure her miscarriage, was found guilty of manslaughter. His conviction was affirmed by a majority in the Court of Appeal for Quebec, the dissenting judgment holding that the evidence did not warrant a conviction and that the trial judge failed to instruct properly the jury, by omitting to review the evidence.

Held (Rand and Fauteux JJ. dissenting), that the appeal should be allowed and a new trial directed.

Per Rinfret C.J., Taschereau and Estey JJ.: As a general rule, in the course of his charge a trial judge should review the substantial parts of the evidence and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. Where, as here, the evidence was technical and somewhat involved, it was particularly important to strip it of the non-essentials, and to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and by the defence. Unfortunately, this was not done here, and the explanations and grounds of defence were not adequately put before the jury. There was evidence upon which a jury, properly instructed, could have found the accused guilty, but since it cannot be said that the verdict would necessarily have been the same if the proper instructions had been given, this was, therefore, not a case for the application of s. 1014 (2) of the *Criminal Code*.

Per Rand J. (dissenting): In a case such as here, where the defence was plain and uncomplicated, the absence of a repetition of the few salient facts had not and could not have had the slightest influence on the minds of the jury in reaching their verdict; there was, therefore, no ground for appeal and a fortiori no substantial wrong had been done.

Per Fauteux J. (dissenting): The practical significance which could be attached to the opinions of the experts called for the defence was more dependent upon than promoting the credibility of the appellant's testimony. The jury disbelieved him. The case for the appellant would have been weakened rather than strengthened if the trial judge had dealt exhaustively with the expert opinions.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, Galipeault C.J.A. dissenting, the jury's verdict of manslaughter.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Fauteux JJ.

(1) Q.R. [1949] K.B. 233.

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J. J. Robinette Q.C. and P. B. C. Pepper for the appellant. The issue narrowed down to the proper inference to be drawn from the medical testimony. There is no doubt that the dissent was on a question of law, but should there be, it should be resolved in favour of the accused.

The trial judge having failed to review the evidence for the jury in such a way that they could clearly appreciate the issues involved and the evidence bearing upon each issue, this was a serious non direction amounting to misdirection. *Rex* v. *Boak* (1), *Rex* v. *Hughes* (2), *Rex* v. *Hill* (3), *Rex* v. *Stephen* (4) and *Rex* v. *Arnold* (5).

The trial judge's charge did not, as it should have, adequately put before the jury the accused's explanations and grounds of defence and the evidence in support thereof. Moreover, he should also show the weakness in the Crown's case. *Rex* v. *Kirk* (6), *Brooks* v. *Rex* (7), *Rex* v. *Scott* (8), *Markadonis* v. *Rex* (9), *Wu* v. *Rex* (10), *Rex* v. *West* (11), *Rex* v. *Harms* (12) and *Rex* v. *Gouin* (13).

The circumstantial evidence was far from being inconsistent with any other rational conclusion than that the accused was the guilty person within the rule in *Odge's* case. *Lizotte* v. *The King* (14), *Rienblatt* v. *The King* (15) and *Fraser* v. *The King* (16).

The trial judge erred in admitting gynecological instruments not pertaining to the issues in the case, to the prejudice of the accused. *Rex* v. *Picken* (17).

Henri Masson-Loranger Q.C. for the respondent. In view of the very simple issue involved in this case, namely, was the haemorrhage spontaneous or caused by the appellant, there was no need for the trial judge to review the evidence. The doctors on both sides were in accord. No objection to the charge was made. It would have weakened the appellant's case rather than strengthened it had he

(1) 44 Can. C.C. 225.
(2) 78 Can. C.C. 1.
(3) 82 Can. C.C. 213.
(4) [1944] O.R. 339.
(5) [1947] O.R. 147.
(6) [1934] O.R. 443.
(7) [1927] S.C.R. 633.
(8) [1932] 2 W.W.R. 124.
(9) [1935] S.C.R. 657.
(10) [1934] S.C.R. 609.
(11) 57 O.L.R. 446.
(12) 66 Can. C.C. 134.
(13) Q.R. 41 K.B. 157.
(14) [1951] S.C.R. 115.
(15) [1933] S.C.R. 694.
(16) [1936] S.C.R. 296.
(17) 69 Can. C.C. 61.

done so. There was therefore no prejudice. The jurisprudence cited by the appellant must be distinguished as those were all cases where it was essential to relate the facts to a principle of law i.e., conspiracy. But the review is not necessary in a case of simple denial.

There is here no analogy with the case of *Picken*, since here we have a doctor's office regularly organized.

The circumstantial evidence leads indubitably to the guilt of the accused and to no other conclusion, and this beyond any reasonable doubt.

There was ample evidence to support the verdict and the medical evidence was not contradictory. At the very least, this is a case for the application of s. 1014 (2) of the *Criminal Code*.

The judgment of the Chief Justice and of Taschereau J. was delivered by

TASCHEREAU J.—The accused was charged with the murder of Blanche Lepire, and was found guilty of manslaughter. It is the contention of the Crown that the appellant, for the unlawful purpose of procuring the miscarriage of the deceased woman, used on her instruments, which eventually caused her death. The Court of Appeal (1) confirmed the verdict, Chief Justice Galipeault dissenting. He reached the conclusion that the evidence did not warrant a conviction, and that the trial judge failed to instruct properly the jury, in omitting to review the evidence, so that they could clearly appreciate the issues involved.

As I have come to the conclusion that there should be a new trial, I do not intend to deal with all the details of the evidence. It will be sufficient to say that I do not agree with the learned dissenting judge, that the verdict was unreasonable and unjustified. There was, I think, evidence upon which a jury could convict or acquit, whether they accepted the theory of the Crown, or were left in doubt when the defence rested its case.

On the second point, I agree with the Chief Justice of the Court of King's Bench. The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it

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would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. (*Spencer* v. *Alaska Parkers* (1)). As Kellock J.A. (as he then was) said in *Rex* v. *Stephen et al* (2): "It is not sufficient that the whole evidence be left to the jury *in bulk for valuation.*" The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. Of course, it is not necessary that the trial judge should review all the facts, and that his charge be a minute record of the evidence adduced, but as Rivard, J.A. said in *Vincent* v. *Regem* (3):

Il faut admettre que l'adresse du juge est plutôt brève et que, tant sur les faits que sur les questions de droit, il n'a dit oue l'essentiel, sans développement. Mais la question n'est pas de savoir si le juge a été court; il faut rechercher plutôt *s'il a omis le nécessaire.*

In *Wu* v. *The King* (4), Mr. Justice Lamont speaking for this Court expressed his views as follows:—

There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. *Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto.*

More recently, Mr. Justice Kerwin in *Forsythe* v. *The King* (5), also said:—

However, while the general statement of the law of conspiracy made by the trial judge may be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to Carson's activities was concerned.

In *Rex* v. *Arnold* (6), the Court of Appeal of Ontario ordered a new trial, and Mr. Justice Laidlaw, giving the unanimous judgment of the Court restated the law as follows:—

An accused is entitled to have a trial judge give the theory of the defence to the jury, and it is difficult to conceive of a case where, in doing so, he can refrain from making at least some reference to the

(1) (1905) 35 Can. S.C.R. 362.
(2) [1944] O.R. 339 at 352.
(3) Q.R. (1932) 52 K.B. 38 at 46.
(4) [1934] S.C.R. 609 at 616.
(5) [1943] S.C.R. 98 at 102.
(6) [1947] O.R. 147 at 149.

evidence. Here, I am thoroughly satisfied that there was misdirection to the jury on the subject of consent, and apart from that misdirection I think it was incumbent upon the learned trial judge to do more than simply say to the jury that it was for them to decide whom they believed, without making any reference to the evidence at all.

If any other authority is needed, see *Brooks* v. *The King* (1), *Markadonis* v. *The King* (2), *Rex* v. *Hill et al* (3).

In the present case, the trial judge, after having explained the law to the jury, said:—

> Now, as to facts. I will not comment on them. Both parties have elaborated before you all the arguments for and against the guilt or the innocence of the accused, and of course it is up to you to say, not for me.

He then recapitulated in a few words what the Crown Attorney and Counsel for the defence had said in their addresses, and concluded by saying:—

> Both points of view have been well elaborated by the Defence and the Crown and I shall say no more on facts.

I do not think that this is sufficient. This trial lasted one week, twenty-four witnesses were heard of which twelve for the defence. Three experts, two of which were called by the appellant, gave very elaborate explanations on medical matters, and their respective opinions on the result of the autopsy that was performed on the body of the deceased woman. It was, I think, the duty of the trial judge, in summing up this highly technical and conflicting evidence, to strip it of the non-essentials, and as O'Halloran, J.A. said in *Rex* v. *Hughes* (4) to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permitted. Unfortunately, this has not been done, and the explanations and grounds of defence have not adequately been put before the jury.

I am of opinion that the jury was left in a state of confusion, and I cannot say that after the judge's address, they were in a position to fully appreciate the *value and effect* of the evidence. As I do not think that the verdict would have necessarily been the same if the proper instructions had been given, I believe that 1014 (2) has no application.

I would direct a new trial.

(1) [1927] S.C.R. 633 at 635.
(2) [1935] S.C.R. 657 at 665.
(3) 82 Can. C.C. 213 at 217.
(4) 78 Can. C.C. 1.

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RAND J. (dissenting):—The defence here was plain and uncomplicated: it was that at the moment the accused was about to examine the woman internally for fibromas, a spontaneous process of miscarriage started causing a severance of the placenta from the wall of the uterus and leading to a fatal hemorrhage. The issue was simply whether the rupture was natural or had been provoked artificially by the accused with the intent of bringing about an abortion.

The facts were largely undisputed: only those at the critical moments leading to the severance were in controversy. Four items of internal evidence were considered by the Crown to point to an artificially induced dilatation of the cervix: an abrasion of the cervix; dilation of the cervical canal; the presence of muscular fibre on the detached placenta; and the existence of a burrow along the canal. What was said against this was that, in the presence of fibromas, these conditions could possibly arise in the natural course of dilatation. There were, in addition, surrounding circumstances, presented in large part by the accused, on which little doubt or question could arise.

Behind that facade of conditions and actions was concealed the intent or purpose: was it legitimate or criminal? With what "theory" can we dignify such a simple situation? The trial took a full week and there was much examination of the medical testimony: but in the end, that of the defence reduced itself to what I have mentioned. What could the repetition of the four items have added to the knowledge or appreciation of that issue by the jury? They had listened to a proliferation of questions about them almost at nauseam. They would, most probably, have received a further reference to them from the court with secret impatience; and I have no doubt that the absence of such a repetition had not and could not have had the slightest influence on their minds in reaching their verdict. In such an uncomplicated question, to speak of a "theory" or to require as, virtually, an absolute rule, the recounting of the few salient facts would be to add an artificiality of no value to the machinery of trial. The rule cannot be taken to be absolute in requiring such an exposition; it depends upon the circumstances of each case.

Lazure J., who presided, has had a long and distinguished experience in criminal trials, and in the situation as I conceive it, I must decline to disregard his judgment that the narrow issues and significant facts, with all their implications, were fully and intelligently appreciated by the jury. No objection to the charge was made by the able counsel representing the accused nor was the ground urged here taken in the notice of appeal to the King's Bench.

The rule arises from the necessity that the jury be fully apprised of every aspect of the case; their judgment otherwise would be vitiated. But once that essential condition is satisfied, anything further of the nature suggested here would be a useless impediment. Its value is as a safeguard against misjudging the jury's grasp of the issues and in the impartial examination of controverted, involved or complex matters and their significance. But there are situations in which it can be said with judicial certainty that reiteration is unnecessary; in such cases the verdict is given in disregard of its presence or absence. I take the condition of the rule to be that the statement required must be such that its omission might have affected the verdict: if, as here, it could not have done so, there is no ground for appeal and a fortiori no substantial wrong has been done.

I would dismiss the appeal.

ESTEY, J.:—The appellant, charged with the murder of Mrs. P., was found guilty of manslaughter. His conviction was affirmed in the Court of Queen's Bench, Appeal Side, in the Province of Quebec (1), Chief Justice Galipeault dissenting.

Mrs. P., on August 20, 1947, went to the office of the appellant, a medical practitioner in Montreal, where, because of a haemorrhage caused by the separation of the placenta from the uterine wall, she died.

The Crown contends that the haemorrhage resulted from an attempt on the appellant's part to effect an abortion. The appellant contends that the separation and consequent haemorrhage were due to natural causes.

(1) Q.R. [1949] K.B. 233.

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The Crown called evidence as to events and conversations leading to the examination, the manner in which Mrs. P. was prepared therefor and the circumstances at the office. A pathologist was also called who made a post mortem on the afternoon of the death. He found the cervical canal abnormally dilated in relation to the length of the cervix, abrasions on the cervix, a burrow or groove on the cervical canal and fibres on the placenta, which came from the uterine wall. These factors, viewed as a whole, together with his negative observations in his opinion justified the conclusion that there had been an attempted abortion.

The appellant admitted making an examination of the lungs, heart and abdomen and the taking of a haemoglobin test; that before he had made any internal examination she had commenced to haemorrhage; that in the course of his efforts to stop the haemorrhage he used a speculum, a tenaculum and did some packing. He also gave her Pituitrin and Vitamin K.

The medical evidence is all to the effect that Mrs. P. had been pregnant between five and six months. It is also clear that she had several fibroids upon the wall of her uterus which, because of their size and condition, had been there some time. The appellant was of the opinion that Mrs. P. was in labour when she consulted him on the 20th and that because of the fibroids and consequently diseased and weakened condition of the tissues this separation of the placenta occurred in the course of labour. Moreover, he stated that the fact that she was in labour explained the dilatation of the cervical canal.

Two pathologists were called on behalf of the appellant whose evidence lent support to the view that the dilatation of the cervical canal might have happened normally, particularly if she was in labour. They also expressed the view that in the same circumstances, because of the diseased and weakened condition of the tissues of the uterine wall, the fibres might have separated therefrom with, and remained upon the placenta. As to the abrasions on the cervix and the groove on the cervical canal, these did provide evidence of trauma or injury which might have been caused in the course of the packing.

The learned trial judge clearly and appropriately discussed the relevant law, the certainty that must be established where the evidence is circumstantial and that the jury must be satisfied that the evidence establishes the guilt of the accused beyond reasonable doubt before finding him guilty. In the course of his charge the learned judge stated, in part, as follows:

> Now, as to facts. I will not comment on them. Both parties have elaborated before you all the arguments for and against the guilt or the innocence of the accused, and of course it is up to you to say, not for me.

Again he stated:

> Both points of view have been well elaborated by the Defence and the Crown and I shall say no more on facts.

The authorities contemplate that in the course of his charge a trial judge should, as a general rule, explain the relevant law and so relate it to the evidence that the jury may appreciate the issues or questions they must pass upon in order to render a verdict of guilty or not guilty. Where, as here, the evidence is technical and somewhat involved, it is particularly important that he should do so in a manner that will assist the jury in determining its relevancy and what weight or value they will attribute to the respective portions. It is, of course, unnecessary that the jury's attention be directed to all of the evidence, and how far a trial judge should go in discussing it must depend in each case upon the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial. *Wu* v. *The King* (1); *Brooks* v. *The King* (2); *Picken* v. *The King* (3); *Preston* v. *The King* (4); Blackstone, Vol. 3, ch. 23, p. 375; *The Queen* v. *Coney* (5); *Rex.* v. *Bateman* (6).

Moreover, the defence throughout was that the accused had treated Mrs. P. in a professional and legal manner. This was supported by evidence of the accused as to his own conduct, his professional opinion as to the nature and character of the natural cause of the separation of the placenta and of his efforts to save her life. The evidence of the pathologists, called on his own behalf, somewhat supported his opinion as to the natural cause of the separa-

(1) [1934] S.C.R. 609.
(2) [1927] S.C.R. 633.
(3) [1938] S.C.R. 457.
(4) [1949] S.C.R. 156.
(5) (1882) 8 Q.B.D. 534.
(6) (1909) 2 C.A.R. 197.

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tion of the placenta and the dilatation of the cervical canal. They also expressed their opinions that the abrasions and groove might have been caused by instruments used in the course of packing.

This theory of the defence and the evidence in relation thereto were not placed before the jury in a manner that would assist the jurymen in appreciating the particular facts and circumstances they should consider in determining whether the accused be guilty or not guilty. *Brooks* v. *The King, supra; Rex* v. *Henderson* (1); *Rex* v. *Kirk* (2); *Rex* v. *Arnold* (3).

There was ample evidence upon which a jury, properly instructed, might have found the accused guilty, but it cannot be said that a jury, acting judicially, would necessarily have arrived at that conclusion and, therefore, it is not a case for the application of the provisions of s. 1014 (2) of the *Criminal Code.*

The appeal should be allowed, the conviction quashed and a new trial directed.

FAUTEUX J. (dissenting):—A careful consideration of the record convinced me that the practical significance which the defence expert opinions could have at the end of the case was more dependent upon than promoting the measure of credit the jury would then be ready to attach to the very testimony of the appellant himself. Exonerating possibilities indicated by them could only be of trivial or no value if his relation of the occurrence, considered in the light of the rest of the evidence, was not accepted as truthful. That the jury did disbelieve what he said as to the nature of his intervention is clearly manifested by their verdict. I have reached the conclusion that had the trial Judge dealt with the expert opinions exhaustively, the case for the appellant would have been weakened rather than strengthened. As there will be a new trial, it is not convenient to review the evidence in order to demonstrate the factual premises upon which the above findings are made. One may point out, however, that these conclusions are not inconsistent with but, in some degree, supported by the fact that in the course of his

(1) [1948] S.C.R. 226. (2) 62 Can. C.C. 19.
(3) 87 Can. C.C. 237.

address, the then counsel of the appellant—an able one, as the record shows—rather invited the jury to minimize the value to be attached to expert opinions, the fact that he did not, at the end of the address of the trial Judge, raise any objections as to the omission of the latter to review this or other evidence, the fact that, in the notice of appeal, counsel did not even mention this ground on which the argument before us was centered and which, moreover, is not the one upon which the appeal in the Court below fell virtually to be determined.

I would dismiss the appeal.

Appeal allowed; new trial directed.

Solicitor for the appellant: *P. B. C. Pepper.*

Solicitor for the respondent: *H. Masson-Loranger.*

1952

* May 26
* Oct. 29

THE CITY OF OUTREMONT (*Defendant*) . APPELLANT;

AND

THE (PROTESTANT) SCHOOL TRUSTEES FOR THE MUNICIPALITY OF THE CITY OF OUTREMONT (*Plaintiff*) ..... RESPONDENT;

AND

ÉMILE LACROIX ..... MIS EN CAUSE

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

Mandamus—Municipal law—Refusal by City Council of permit for extension to school building—Area restricted to erection of cottages by by-law—Discretion of Council in cases of schools—Whether by-law applicable—Whether ultra vires*—Charter of City of Outremont, 1915, 5 Geo. V, c. 93, s. 40—By-Law 326, ss. 84, 85—*Cities and Towns Act, *R.S.Q. 1941, c. 233, s. 426.*

By section 84 of By-Law 326 of the City of Outremont, it was provided that only detached or semi-detached cottages shall be erected on certain streets in the City; and by section 85, the Council was given the discretion to "allow the construction of churches, schools and hospitals in any place in the City".

Desiring to enlarge its school building, which had been erected in a prohibited area before the prohibition came into force, the respondent applied to the City for a permit to erect an extension of the school building on two adjoining lots, being also in the area covered by the by-law. The permit was refused by the Council.

Thereupon, the respondent instituted proceedings by way of mandamus against the City for a declaration that the by-law did not prohibit the construction contemplated and, if it did, that sections 84 and 85 be declared *ultra vires* and the permit granted.

The Superior Court held the sections to be valid but that they did not apply in this case. Without passing on the validity of the sections, the Court of Appeal for Quebec held also that they were not applicable in the present instance.

Held, that the appeal should be dismissed since sections 84 and 85 of By-Law 326 of the City of Outremont, even assuming that they were applicable to this case, were *ultra vires* the powers of the City as delegated to it by its Charter.

Firstly, since in the matter of municipal legislation, the corporations have no other powers than those formally delegated by the Legislature, which powers the corporations cannot extend nor exceed; since the City was empowered by its charter to regulate by by-law the nature of the dwellings to be erected within its territory; and since by section 85, the City did not regulate by by-law the erection of the buildings mentioned therein—but on the contrary left the decision ultimately to the discretion of the Council—, the City has exceeded its legislation powers and section 85 is, therefore, *ultra vires.*

* PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Fauteux JJ.

Secondly, since it cannot be said that the City, but for the provisions of Section 85, would have enacted the prohibition in section 84 in such an absolute form, as it is obvious that the City wanted the cases in section 85 treated differently, section 84 must also be considered as *ultra vires*.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and granting the writ of mandamus.

Jean Martineau, Q.C. and *Louis Philippe Gagnon, Q.C.*, for the appellant. It is unfounded in law to say that the *Public Education Act* has priority over the *Cities and Towns Act,* because however important may be the education of the children, the welfare and health of the community as a whole is even more important. Anyway, both parties have repudiated that conclusion of the trial judge. The respondents have the right to choose the site of their school or to enlarge same, but the choice must be made without violating the by-laws of the municipality. *City of Toronto Corp.* v. *Trustees of the Roman Catholic Separate Schools of Toronto* (2).

The argument of one of the judges of the Court of Appeal that an enlargement of a building is not itself a building and that therefore the building that the respondents wanted to erect is not subject to section 84, is not founded in law. As a matter of fact, an addition to a building must necessarily be a building itself. *Wilmot et al* v. *The City of Kingston* (3). The next argument is that the respondents having built their schools before the prohibition, they had a vested right to enlarge it. It is true that the by-law speaks of buildings to be erected. But the purpose of the by-law was not intended to prevent the use of buildings already erected or to force their demolition, but it was to prevent the erection of any further buildings. Therefore, to say that this by-law did not apply to vacant land already owned at the time of its adoption, is to say that the by-law has absolutely no effect. It would prevent cities from enacting zoning and building by-laws. *Presswood* v. *City of Toronto* (4). The Court is asked here by the respondents to go much further than in *Scott* v. *Toronto* (5).

(1) Q.R. [1951] K.B. 676.
(2) [1926] A.C. 81.
(3) [1943] O.W.N. 500.
(4) [1944] 1 D.L.R. 569.
(5) [1945] 3 D.L.R. 478.

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The Legislature made no exception for schools when it gave the appellant the power to enact the by-law. The power to expropriate, which is only a corollary of the right to buy, cannot give the respondents the power to disregard the by-laws.

Aldéric Laurendeau, Q.C. and *Kenneth A. Wilson, Q.C.*, for the respondents. The prohibitions and restrictions contained in by-law 326 of the City do not apply in the present instance. The trustees when it comes to choosing a site for a school are absolute masters. It is their duty to build schools when required. They may be forced to do so by a ratepayer. They have had that faculty and duty since 1866 in virtue of 29.30 Vict., c. 31. And the by-law could have no effect as against the *Education Act*. It cannot be shown that the Legislature wanted and intended to derogate from the *Education Act*.

The respondents have acquired rights. With the existence of a school there exists the right to expand its usefulness.

The trustees act under the direction of the superintendent of education. If the corporation has the right to prohibit the erection of a school on one street, it has the right to do so on all streets. In other words, to prohibit all schools within its boundaries. The same for Churches. Yet the *Education Act* obliges the trustees to erect at least one school in each school district.

The only recourse against a decision of the trustees under s. 236 of the *Education Act* is by appeal to the Circuit Court or the Magistrate's Court and the judgment is final provided the school commission does not exceed its powers. *Commissaires d'écoles de St-Félicien* v. *Hébert* (1), which judgment was confirmed by the Supreme Court (2). Only a ratepayer may take such an appeal and a municipal corporation is not a ratepayer. The same principle was applied to churches where the Bishop decides finally on the site of a church. *Dorval* v. *Œuvre et Fabrique de Saint-Louis de France* (3).

(1) Q.R. 31 K.B. 458. (2) (1921) 62 Can. S.C.R. 174.
(3) Q.R. 72 S.C. 52.

The judgment of the Court was delivered by

FAUTEUX, J.—Ce litige est né des faits suivants. Depuis plus de quarante ans, la corporation intimée maintient et dirige, en la cité d'Outremont, une école sise à l'angle du Chemin de la Côte Ste-Catherine et de l'avenue Pagnuelo. Prévoyant qu'un agrandissement du local serait rendu nécessaire par l'augmentation de la population à desservir, l'intimée achetait, en 1937, deux lots contigus ayant front sur l'avenue Pagnuelo et adjacents au terrain où cette école était érigée.

Notons incidemment qu'au temps de cet achat et depuis 1925, ces deux lots étaient, par règlement de la cité appelante, frappés d'une prohibition d'y construire d'autres bâtisses que des "cottages isolés". Ce règlement, portant le numéro 180, fut abrogé en 1938 pour être, au même temps, remplacé par un autre, portant le numéro 326, depuis lors en vigueur. L'article 84 de ce dernier règlement maintient la prohibition indiquée et l'article 85 donne au conseil de la cité un pouvoir discrétionnaire de permettre ou refuser, en tout endroit de la cité, la construction d'églises, d'écoles et d'hôpitaux.

Ce que l'intimée avait prévu en 1937 s'avéra éventuellement une réalité inéluctable et, en 1940, on dut décider de l'érection de constructions nouvelles sur l'unique emplacement disponible, soit sur les lots ci-dessus. Conformément aux dispositions du Règlement 326, des plans furent préparés et soumis à l'approbation du mis-en-cause, inspecteur nommé à ces fins, suivant le règlement. Éventuellement, l'affaire fut portée devant le conseil de la cité et, finalement, l'approbation des plans et l'émission du permis furent refusés, uniquement à raison de la prohibition établie en l'article 84 et du défaut de l'intimée d'obtenir du conseil la permission que ce dernier pouvait lui donner en vertu de l'article 85. D'où l'action de l'intimée contre l'appelante et le mis-en-cause.

Dans sa requête pour bref de mandamus, l'intimée conclut, entre autres, à ce qu'il soit déclaré que le Règlement 326 ne prohibe pas la construction qu'elle désire ériger sur les lots précités et que si ce règlement, et spécialement les dispositions des articles 84 et 85, devaient être interprétés comme prohibant cette construction, ces dispositions soient déclarées illégales, *ultra vires* et, en l'espèce, sans effet à

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son endroit. On demande, en conséquence, l'émission d'un bref péremptoire de mandamus ordonnant à la cité et au mis-en-cause d'émettre le permis recherché.

La Cour Supérieure décida de la validité des articles 84 et 85 du règlement mais, se basant sur ces dispositions de la *Loi de l'Instruction Publique* (1941 R.S.Q., c. 59), faisant un devoir aux syndics des écoles dans chaque municipalité de choisir et acquérir, même par expropriation, les terrains nécessaires pour les emplacements de leurs écoles, déclara que cette loi primait sur la *Loi des Cités et Villes* et les Règlements de la cité et en conclut que le Règlement 326 n'avait, en l'espèce, aucune application. Avec cette interprétation, l'intimée était libre de procéder à construire sans permis préalable et son action fut renvoyée, mais sans frais.

Les deux parties appelèrent de cette décision. L'appel de la cité fut renvoyé et celui des syndics maintenu. La Cour du Banc de la Reine (siégeant en appel (1)) ne s'est pas prononcée sur la validité des articles 84 et 85 du Règlement 326. Étant unanimes sur la conclusion—sans l'être sur les raisons—que ces articles n'avaient, en l'espèce, aucune application, les membres de cette Cour ont, par jugement formel, fait droit à la requête des syndics, ordonné l'émission d'un bref péremptoire enjoignant à la cité d'Outremont et au mis-en-cause d'accorder, dans un délai imparti, le permis demandé; le tout avec dépens contre la cité. C'est la décision dont la cité demande maintenant la revision.

Étant donné la conclusion à laquelle j'en suis arrivé sur la question de la validité des articles 84 et 85 du Règlement 326, il devient inutile, aux fins du présent jugement, de reproduire et considérer ici les différentes raisons amenant les membres de la Cour d'Appel à conclure à la non application de ces articles. Il est bien évident, en effet, qu'une conclusion différente de la leur sur le point ne pourrait épuiser le débat; d'autant plus que l'application elle-même d'un règlement dépend nécessairement et primordialement de sa validité; question qu'il convient maintenant d'examiner.

(1) Q.R. [1951] K.B. 676.

En matière de législation, les corporationt municipales n'ont de pouvoirs que ceux qui leur ont été formellement délégués par la Législature; et ces pouvoirs, elles ne peuvent ni les étendre, ni les excéder. (*Phaneuf* v. *La Corporation du Village de St-Hughes* (1)).

Les diverses lois de la Législature de Québec, constituant la charte de ce qui s'appelait alors la ville d'Outremont, ont été amendées et refondues en 1915 par une loi intitulée *Charte de la cité d'Outremont* (5 Geo. V, c. 93), aux termes de laquelle la cité devient régie par les dispositions de la *Loi des Cités et Villes*, sauf en ce qu'elles peuvent avoir d'incompatible avec les dispositions de cette charte. Suivant l'article 40 de cette loi de 1915, ainsi que le mentionne le savant Juge en chef de la Cour d'Appel en ses notes:

Le Conseil peut faire, amender et abroger des règlements pour:

1° ...Prescrire dans certaines rues l'architecture, la symétrie ou le genre de maisons à ériger, bâtisses isolées, semi-isolées, en pierre ou en brique solide ou lambrissées ou autres; ...fixer l'endroit que devront occuper, et déterminer la manière de construire des échelles de sauvetage, tuyaux d'égouts, gouttières, et réglementer en général toute construction, reconstruction, réparation et modification de tout bâtiment, et tout ce qui s'y rattache; et empêcher la construction, suspendre l'érection, et pourvoir sommairement à l'abandon, l'isolation, la suppression, la démolition, le déplacement, la réparation ou la modificaiton, aux frais du propriétaire, de toutes bâtisses ou portions d'icelles en contravention avec les règlements de la Cité.

C'est sous l'autorité de telles dispositions que le conseil de la cité entend justifier son droit d'adopter le texte suivant des articles 84 et 85,—contenu au chapitre 4, intitulé "Zonage"—, du Règlement 326.

Art. 84 (*a*) On ne pourra construire sur les rues ou avenues ou sur les parties de rues ou d'avenues ci-après énumérées, que des cottages isolés ..... savoir ..... avenue Pagnuelo.

(b) .....

(c) .....

(d) On ne pourra construire sur les rues ou avenues ou sur les parties de rues ou d'avenues ci-après énumérées, que des cottages isolés ou à demi isolés ..... savoir ..... avenue Pagnuelo.

Art. 85. Nonobstant toutes dispositions au contraire, le conseil pourra, par un vote des deux-tiers, permettre la construction d'églises, d'écoles et d'hôpitaux en tout endroit de la cité.

(1) Q.R. (1936) 61 K.B. 83 at 90.

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Ainsi apparaît-il que si, sur certaines rues de la cité, dont l'avenue Pagnuelo, on a voulu et édicté, par les prohibitions apparaissant en l'article 84, la limitation des constructions à un type particulier, on a manifestement voulu et édicté, par les dispositions de l'article 85, qu'en tout endroit de la cité,—couvert ou non par les dispositions de l'article 84 ou autres, peu importe,—l'établissement d'églises, d'écoles et d'hôpitaux soit laissé à la discrétion du conseil auquel les dispositions de cet article donnent, en dernière analyse et en chaque instance, le droit le plus absolu de permettre ou de refuser la construction. Il apparaît, de plus, de ces dispositions de l'article, que ce droit peut être exercé par simple résolution.

Je ne crois pas qu'on puisse mettre en doute le pouvoir de la cité de légiférer, d'établir par règlements les prohibitions apparaissant à l'article 84, non plus que son pouvoir—écartant, de cette considération, les arguments tirés de la *Loi de l'Instruction Publique* ou autres propres à l'espèce,—de faire ces prohibitions absolues au lieu de pourvoir à une exception pour les cas des églises, écoles et hôpitaux, ainsi qu'on l'a fait par les dispositions de l'article 85. Mais cette exception étant édictée, et le cas de ces établissements particuliers étant spécifiquement régi par les dispositions de cet article, il faut en tenir compte. Ce qu'on attaque et ce qui, en effet, doit être considéré, c'est la validité du règlement tel qu'adopté, et non tel qu'on pouvait l'adopter.

Et ainsi deux questions se posent: 1° La cité peut-elle prétendre avoir, par les dispositions de cet article 85, légiféré, réglementé sur la construction d'églises, d'écoles et d'hôpitaux en déléguant et assujettissant, à la discrétion de son conseil, chaque cas de construction de ces établissements particuliers, pour en disposer par résolution plutôt que par règlement? En somme, les dispositions de cet article sont-elles autorisées par la Législature ou *ultra vires* des pouvoirs donnés à la cité? 2° Si, pour aucune raison, les dispositions de l'article 85 doivent être déclarées *ultra vires* et, en conséquence, retranchées du règlement, peut-on raisonnablement conclure que le conseil aurait adopté le texte actuel des dispositions de l'article 84 sans y adjoindre celles de l'article 85?

La première question. Sur le principe de l'existence et des limites du pouvoir des corporations municipales en matière de législation, a déjà été citée, plus haut, la cause de *Phaneuf* v. *La Corporation du village de St-Hughes.* Le texte précédant immédiatement cette référence est pris au jugement même de Sir Mathias Tellier, alors Juge en chef de la province. En plus de cette cause, on peut signaler les décisions suivantes, à titre d'illustration de l'application de ce principe:

La Corporation du village de Ste-Agathe des Monts v. *Reid* (1). Dans cette cause, la Cour de Revision déclarait *ultra vires* un règlement prohibant l'érection de certains moulins, à moins d'avoir préalablement conféré avec le conseil, en avoir obtenu la permission; le conseil devant déterminer l'endroit de l'établissement de ces moulins. Rendant le jugement de la Cour, Sir Melbourne Tait, alors Juge en chef adjoint, déclarait:

> It is not really a by-law at all, but a declaration that the council may permit the erections referred to in art. 648 upon such conditions as it may think proper to make at any particular meeting. The rights of those who may desire to erect such manufactories or machinery are left uncertain, and it appears to me this so-called by-law is drawn contrary to the elementary principles upon which an ordinance of that kind ought to be made.

Dans *Baikie* v. *City of Montreal and another* (2), M. le Juge Chase Casgrain, se basant sur l'autorité de cette décision de la Cour d'Appel dans *Phaneuf* v. *Corporation du village de St-Hughes,* affirmait à la page 78:

> A by-law which would discriminate, or allow the municipality or its governing body to discriminate between citizens, would be *ultra vires* and illegal.

Dans *The Town of St. Louis* v. *Citizens Light and Power Co.* (3), la Cour d'Appel, à la page 41, déclare:

> L'expression, "peut faire des règlements pour l'éclairage", qui se trouve dans l'article 616, laisse au conseil la discrétion d'exercer ou de ne pas exercer le pouvoir que la loi lui donne, mais cette discrétion ne s'applique pas au mode à suivre dans l'exercice de ce pouvoir. Aucun texte n'autorise le conseil à procéder par résolution.

Dans la cause de *City of Verdun* v. *Sun Oil Co. Ltd.* (4), la Cour d'Appel déclarait *ultra vires* cette partie d'un règlement de la municipalité relative à l'érection de stations

(1) Q.R. (1904) 10 R. de J. 334.
(2) Q.R. (1937) S.C. 77.
(3) Q.R. (1904) 13 K.B. 19.
(4) Q.R. [1951] K.B. 320.

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d'essence, accordant au conseil de la cité un pouvoir d'accorder ou de refuser, à discrétion, la permission d'établir tels établissements. Cette décision fut confirmée par un jugement unanime de cette Cour (1). A la page 229, on lit ce qui suit relativement au règlement en litige:

> The mere reading of section 76 is sufficient to conclude that in enacting it, the City did nothing in effect but to leave ultimately to the exclusive discretion of the members of the Council of the City, for the time being in office, what it was authorized by the provincial Legislature, under section 426, to actually regulate by by-law. Thus, section 76 effectively transforms an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution a right which, untrammelled in the absence of any by-law, could only, in a proper one, be regulated.

A mon humble avis, en édictant les dispositions de l'article 85, le conseil de la cité a excédé les pouvoirs de législation que lui a conférés la Législature. On n'a pas réglementé sur ces cas qu'on a soustraits à l'opération de l'article 84. On s'est attribué le droit d'en disposer, chacun individuellement, suivant la discrétion, l'arbitraire des membres du conseil pouvant alors être en office. On n'a, de fait, défini aucun principe pouvant gouverner l'exercice de cette discrétion. On a, enfin, excédé les limites de l'autorité reçue de la Législature en s'arrogeant de décider par résolution ce qu'on devait régir par règlement. Ce n'est pas ce que l'article 40 de la Charte de la cité, ou ce que l'article correspondant de la *Loi des Cités et Villes* (R.S.Q. 1941, ch. 233, art. 426) autorisent; et je doute qu'aucune loi de la Législature permette—en pareille matière—aux membres d'un conseil municipal de paralyser avec une telle discrétion et aussi fondamentalement l'exercice du droit de propriété. Les dispositions de cet article 85 sont donc *ultra vires*.

La deuxième question. En principe, un règlement, nul en partie, l'est totalement. La *Loi des Cités et Villes*, comme le *Code municipal*, d'ailleurs, prévoient qu'un règlement municipal peut être cassé, "en tout ou en partie". Comme le fait remarquer M. le Juge Rivard dans *Compagnie Électrique du Saguenay, Ltée*, v. *Corporation du Village de St-Jérôme, et St. Jérôme Power Ltd.* (2), il faut donner à ces expressions une portée conforme à la doctrine exposée par les commentateurs du droit public en matière

(1) [1952] 1 S.C.R. 222. (2) Q.R. (1932) 52 K.B. 305 at 321.

de règlement municipal. Le savant Juge réfère particulièrement à l'extrait suivant de McQuillin, Law of Municipal Corporations, 2e édition, vol. 2, n° 862:

> It is essential that the parts upheld form, independently of the invalid portion, a complete law in some reasonable aspect, so that it may be fairly concluded that the Council would have enacted it without the invalid part ... The test is: Has the legislative body manifested an intention to deal with a part of the subject-matter covered, irrespective of the rest of the subject-matter? If such intention is manifest, the subject-matter is separable, otherwise not.

Il me semble évident que sans la présence des dispositions de l'article 85, la cité n'aurait pas donné une forme aussi absolue aux prohibitions édictées en l'article 84 puisque, comme déjà indiqué, on a manifestement voulu, par les premiers mots de l'article 85, traiter séparément du cas des églises, écoles et hôpitaux et soustraire ces cas à l'opération de toutes autres dispositions, y compris celles de l'article 84. De toutes façons, il suffit de ne pouvoir affirmer que, sans les dispositions de l'article 85, les dispositions de l'article 84 eussent été couchées en cette forme absolue. L'article 84 doit subir le sort de l'article 85 et, comme lui, être considéré *ultra vires*. Et pour cette raison, assumant même que les articles 84 et 85 s'appliqueraient à l'espèce, la cité ne peut les opposer, comme elle l'a fait, à la demande de la corporation intimée.

Je rejetterais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the Appellant: Sauvé, Gagnon & L'Heureux.

Solicitors for the Respondent: Wilson & Home.

REPORTER'S NOTE: On December 17, 1952, the City of Outremont moved for a re-hearing before this Court and on December 22, 1952, the following judgment was rendered by the Court:

"Sur la requête de la Cité d'Outremont demandant de suspendre l'effet du jugement rendu par cette Cour le 29 octobre 1952 et d'accorder une ré-audition de l'appel de la Cité:—Assumant qu'il soit loisible à la Cité de demander la ré-audition, la Cour est d'opinion qu'il n'y a pas lieu d'accorder cette requête; le point soumis ayant été considéré aux fins du jugement déjà rendu et les arguments

apportés par la Cité, au cours de l'audition de la requête, ne pouvant affecter la conclusion à laquelle la Cour en est arrivée sur le mérite de l'appel. La requête est rejetée avec dépens."

Motion dismissed with costs.

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*Dec. 3, 4
*Dec. 15

RENE DUPUIS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Illegal possession of cigarettes—Admissibility of statement made by accused—Whether warning should always be given.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec, quashing the appellant's acquittal and ordering a new trial.

J. Guy Blanchette and *J. L. Peloquin* for the appellant.

Roland Dugré Q.C. and *Benoit Turmel* for the respondent.

THE COURT:—We agree with the members of the Court of King's Bench (Appeal Side) all of whom decided that the trial judge came to the conclusion that the statement made by the appellant at Richmond was not free or voluntary because he, the trial judge, considered that irrespective of all the circumstances it was necessary that the appellant should have been previously warned. This is contrary to the law as laid down by this Court in *Boudreau* v. *The King* (1) and, therefore, there was a right of appeal by the Crown from the acquittal.

On the basis of the evidence on the voir dire that appears in the record, there is nothing to indicate what the trial judge would have done as to the admissibility of the statement if he had not misdirected himself. The appeal should therefore be dismissed so that a new trial may be had.

Appeal dismissed.

Solicitor for the appellant: *J. G. Blanchette.*

Solicitors for the respondent: *R. Dugré and B. Turmel.*

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*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Fauteux JJ.

(1) [1949] S.C.R. 262.

THE QUEEN (RESPONDENT) .....APPELLANT; 1952

AND *Mar. 10, 11, 12

TREVELYN SPENCE (SUPPLIANT) .....RESPONDENT. *Oct. 7

AND

THE QUEEN (RESPONDENT) .....APPELLANT;

AND

IVAN BRADSHAW (SUPPLIANT) .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Master and Servant—Negligence of Servant—Scope of authority —Scope of employment—Soldier receiving unauthorized order—Duty to obey—Liability of Crown—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c). The Militia Act, R.S.C. 1927, c. 132, as amended by 1947 (Can.) c. 21, ss. 14, 20, 69(2), 115, 117 and 138.

In an action for damages arising out of the collision between a taxicab and an army truck owned by the Crown and driven by a soldier of the Royal Canadian Armoured Corps (Reserve), who on the order of his commanding officer was using the truck to convey a civilian baseball team, Cameron J., in the Exchequer Court, held that the accident was solely due to the negligence of the soldier; that the truck was used contrary to army regulations and that the commanding officer had no authority to use it for such purposes. He found further that the soldier was on duty and that it was within the scope of his duties to drive military vehicles when directed to do so by his commanding officer and not open to him to question such an order; and that as the soldier at the time of the accident was a servant of the Crown acting within the scope of his duties or employment, the principle of *respondeat superior* applied and the Crown was therefore liable for the damages sustained.

On appeal to this Court the finding of negligence was not questioned but the Crown contended that under the relevant legislation, army regulations and orders, the commanding officer had no authority to make use of the truck for the purposes described, and that while the soldier was under a duty to obey the lawful orders of his superior officer, the order in question was an unlawful one and that consequently in driving the truck pursuant thereto he was not acting within the scope of his duties or employment.

Held: (Rand and Locke JJ. dissenting), that in the circumstances of the case, the soldier was acting within the scope of his duties or employment.

Per: Kellock J. Under the circumstances of the case, there was nothing to indicate that the order was an unlawful order. It was therefore the duty of the soldier to obey. *Keighly* v. *Bell* 4 F & F 763 at 790, applied.

Per: Estey J. The commanding officer was authorized to promote recruiting. It was part of his duty to direct the use of Army vehicles for military purposes, including that of recruiting. In issuing the transport work

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

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ticket authorizing the use of the vehicle here in question he misconstrued the regulations, but this issue was so closely associated with that authority which it was his duty to exercise that it cannot be said that in doing so he acted without the scope of his employment. Neither could it be said of the sergeant to whom the transport work ticket was issued, nor of the driver, who received the instructions from him. *Dyer* v. *Munday* [1895] 1 Q.B.D. 742 at 746; *Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716 at 737; *Percy* v. *Corporation of the City of Glasgow* [1922] A.C. 299 at 306; *Goh Choon Seng* v. *Lee Kim Soo* [1925] A.C. 550 and *Lockart* v. *C.P.R.* [1942] A.C. 591, applied.

Per: Cartwright J. In the circumstances of the case it was the soldier's duty to obey the order and in doing so he was acting within the scope of his duty. *Irwin* v. *Waterloo Taxi-Cab Co. Ltd.* [1912] 3 K.B. 588. He did not know his commanding officer had no right to give him the order nor could it be said on the evidence that as a reasonable man he should have known. *Evans* v. *Bartlam* [1937] A.C. 473 at 479; *Hodgkinson* v. *Fernie* (1859) 11 C.B.N.S. 415 at 421.

Per: Rand J. (dissenting): It was not within the scope of the authority of the commanding officer, directly or indirectly, to give a lawful order which could make the driving of the truck an act of the soldier within the course of his duties. A campaign for recruits was authorized and the means was assumed to be in the commanding officer but its scope could not extend to the violation of express regulations dealing with the use of equipment by which he was bound. The trip was an act of an extra-service nature and there was nothing before the Court to warrant the conclusion that, since the trip would involve the expense of conveyance, a bus could be hired on behalf of the Government, nor that in the face of the regulations cited, the truck could be used for such a purpose. *Irwin* v. *Waterloo Taxi-Cab Co. Ltd., supra,* on which the Court below relied, distinguished. There the servant was bound to obey, here the only order the soldier was bound to obey was a lawful order. The special character of military relations might justify his obedience but that did not make the act done that of the Crown. If the commanding officer himself had driven the truck, he would not have bound the Crown, nor could he engage the Crown's responsibility by ordering a subordinate to do the same act.

Per: Locke J. (dissenting): The use of the Army truck to carry the baseball team was contrary to the Army Regulations and the commanding officer had no authority to authorize its use for such purpose. The general instructions given him to recruit could not be construed as authorizing the carrying on of such activities by means forbidden by Army Orders. The obligation of the soldier who drove the truck under *The Militia Act* and the King's Regulations and Orders was to obey lawful orders only. In acting in accordance with an order not lawfully given, he was not acting within the scope of his duties or employment within the meaning of s. 19(c) of the *Exchequer Court Act* (*Bourton* v. *Beauchamp,* [1920] A.C. 1001; *Moore* v. *Donnelly,* [1921], 1 A.C. 329 applied). The scope of the duties and employment of the soldier could not be extended by his mistaken understanding as to what they were (*Wardley* v. *Enthoven* (1917) 86 L.J.K.B. 309).

APPEAL by the Crown from two judgments of the Exchequer Court of Canada, Cameron J. (1), allowing the suppliants' Petition of Right to recover damages because of the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

W. R. Jackett Q.C. and *K. E. Eaton* for the appellant. The trial judge erred in holding that the driver, Ryan, was acting within the scope of his duties or employment as a servant of the Crown at the time of accident. Ryan was not engaged on any business of the Crown in the right of Canada. The transportation of a baseball team was wholly unconnected with the business activities of the Government of Canada. *Poulton* v. *London & Southwestern Ry. Co.* (2); *Halparin* v. *Bulling* (3); *Battistoni* v. *Thomas* (4); *Dallas* v. *Hinton* (5). The Crown is not liable for what is done in the course of an undertaking which is not part of the Crown's business merely because some of the participants are servants of the Crown for other purposes and because there may be an indirect benefit from the undertaking. *Offerdahl* v. *Okanagan Centre Irrigation & Power Co.* (6). If Ryan received an "order" to go on a trip, it could not have been obeyed by him as a military order, since under the *Militia Act*, s. 69(2) as enacted by 1947 (Can.) c. 21, s. 22, he was not subject to laws, regulations and orders relating to the Canadian Army at the time it was communicated to him because: (i) he was not then on active service, (ii) it was not issued during a period of annual training or drill under the Act, (iii) it was not issued while he was on military duty, in the uniform of his unit or within any place used for the purposes of the Canadian Army, and (iv) it was not issued to him during any drill or parade of his unit at which he was present in the ranks or as a spectator nor was it issued to him when he was going to or from the place of the parade. When obeying an "order" not given within the limits laid down by this provision, Ryan was not acting within the scope of his duties or employment as a member of the Canadian Army. The order he received could not operate to extend such scope beyond the statutory limits

(1) [1950] Ex. C.R. 488.
(2) (1867) 2 Q.B. 534.
(3) (1914) 50 Can. S.C.R. 471.
(4) [1932] S.C.R. 144.
(5) [1938] S.C.R. 244.
(6) [1937] 4 D.L.R. 405.

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established by s. 69(2). Cases such as *Irwin* v. *Waterloo Taxi-Cab Co.* (1); *Smith* v. *Martin* (2); *Risdale* v. *S.S. Kilmarnoch* (3), apply only where the orders are such, as by terms of the servant's employment, he was bound to obey. They do not apply to an order requiring an inferior servant to do something outside the scope of his employment whether or not the inferior servant was aware of the limits imposed by the employer on the employment. *Gaskell* v. *St. Helen's Colliery Co.* (4).

The baseball club's trip was arranged by Reid probably as Director of the Prince Edward Island Department of Physical Fitness and certainly was not arranged by or on behalf of the Crown in the right of Canada or the Canadian Army. He could not as commanding officer of the Regiment have directed the Knights of Columbus ball team to take the trip nor have instructed their manager as such regarding the trip. His *ex post facto* justification of the use of the military vehicle on the ground that the trip was a recruiting activity is not borne out by the facts.

The trial judge erred in holding that Ryan was operating the military vehicle pursuant to an order given him as a member of the armed forces. Reid said the work ticket was issued to "enable" Ryan to proceed with a ball team to Souris and return and that he gave Ryan no other orders. Sergeant Charles Ryan said that Reid told him there was a trip for a baseball team and that he told the driver Harrison Ryan, where he was to pick it up and his destination. On the face of it, none of these arrangements had anything to do with the Canadian Army and none of the men who went on the trip gave evidence that at the time they thought that they did. Sergeant Ryan knew nothing of a recruiting campaign. In any event it was outside Driver Ryan's duties or employment to operate a military vehicle on a trip prohibited by regulations respecting the operation of such vehicles. It did not fall within the permitted use of vehicles to transport service personnel to sports fields because the persons being transported were not "service personnel" and because the trip was to a place more than twenty miles distant and no special authority had been obtained therefor.

(1) [1912] 3 K.B. 588.
(2) [1911] 2 K.B. 775.
(3) [1915] 1 K.B. 503.
(4) [1934] 150 L.T.R. 506.

It was not permitted by the Regulation providing for transportation of "prospective army recruits" because the persons transported were not being transported as "prospective army recruits" and their transportation had not been authorized in the prescribed manner. The trip was not authorized by the special provision concerning the transportation of the Royal Canadian Cadet Corps because the persons being transported were not being transported as cadets and were not being transported in connection with a "duly authorized parade or training activity." The Regulations made by the Quarter Master General pursuant to s. 11 and Appendix VI of the King's Regulations and Orders, made by the Governor in Council under s. 139 of the *Militia Act*, limit the scope of employment of members of the armed forces operating military transport. *Whelan* v. *Moore* (1); *Knowles* v. *Southern Ry. Co.* (2); *Bourton* v. *Beauchamp* (3); *Moore* v. *Donnelly* (4). The regulations restricted the scope of Ryan's employment and it is immaterial whether he was aware of them. *Wardle* v. *Enthoven & Sons Ltd.* (5); *Cartwright* v. *Shell-Mex & B.P. Ltd.* (6). The front cover of "Regulations for Military Operated Vehicles, 1947" require that "this pamphlet must be carried at all times by every qualified driver of a military operated vehicle irrespective of rank . . ." The prohibitions made the trip something outside of Ryan's employment and not merely an unauthorized way of doing some work he was appointed to do. Compare *Goh Choon Seng* v. *Lee Kim Soo* (7) and *Lockart* v. *C.P.R.* (8).

Even if Ryan can be regarded as having acted pursuant to a military order he was not at the time of the accident acting within the scope of his duties or employment as a servant of the Crown because his services were loaned or transferred, for the purpose of the trip, either to the Knights of Columbus ball team, the Provincial Department of Physical Fitness, Reid, or some other person or authority other than the Crown in the right of Canada. Salmond on

(1) (1909) 43 Ir. L.T. 205.
(2) [1937] A.C. 463.
(3) [1920] A.C. 1001.
(4) [1921] 1 A.C. 329.
(5) (1916) 10 B.W.C.C. 79.
(6) (1932) 25 B.W.C.C. 650.
(7) [1925] A.C. 550.
(8) [1941] S.C.R. 278; [1942] A.C. 591 at 599.

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Torts 10 Ed. 86-7; *Donovan* v. *Laing* (1); *Bull & Co.* v. *West African Shipping Agency* (2); *Century Insurance Co.* v. *Northern Ireland Road Transport Board* (3).

D. L. Mathieson Q.C. and *G. R. Foster* for the respondents. The only point in issue is whether the trial judge was correct in finding that at the time of the accident Corporal Ryan, the admitted servant of the appellant was acting within the scope of his duties or employment within the meaning of the *Exchequer Court Act,* as amended, s. 19(c), as alleged by the respondents in the Petitions of Right. The respondents submit that the trial judge was correct in confining his inquiry to the ascertainment of the scope of Corporal Ryan's duties or employment in order to determine the jurisdiction of the Court and in holding that "while Reid committed a breach of the regulations regarding the use of military vehicles . . . . such breach did not narrow the scope of Ryan's duties or employment". His decision was based on the common sense principle that a soldier in Ryan's position must give implicit obedience to the orders given him by his commanding officer in the ordinary matters of the service, except where such orders are clearly contrary to law. The evidence clearly establishes that Brigadier Reid as Corporal Ryan's commanding officer gave the order to make the trip in the normal manner, that is by issuing a transport work ticket and by passing this order to Corporal Ryan through the sergeant in charge of transport. No evidence was submitted to show that on receipt of this order Corporal Ryan knew it was contrary to regulations, or, in fact, that Corporal Ryan had any knowledge of the regulations. Reid as commanding officer was obviously designated by the appellant as one authorized to give orders on its behalf. In exercising that authority he ordered Ryan to make the trip as a military driver, an order which by its nature Ryan would have the right to assume as coming under the authority of his commanding officer. It was therefore his duty as a soldier to obey. The trial judge was correct in applying to the facts of this case, *Irwin* v. *Waterloo Taxi-Cab Co. Ltd.* (4); Charlesworth on Negligence at p. 50.

(1) [1893] 1 Q.B. 629.
(2) [1927] A.C. 686.
(3) [1942] A.C. 509.
(4) [1912] 3 K.B. 588.

If the jurisdiction of the Court depends not only on the scope of Corporal Ryan's duties or employment but also on Brigadier Reid's, then the respondents submit that the appellant is still liable, despite the breach of the regulations by Brigadier Reid, because he was engaged in a matter incidental to and arising out of the business of the appellant. It is not disputed that the latter did an act which his master, the appellant, had not authorized, in permitting the army truck to make the journey without first obtaining the proper consent under the regulations. However the act was so connected with his duty to encourage recruitment, an act which the appellant authorized, that it may rightly be regarded as a mode—although an improper mode—of doing that act, and the appellant remains liable. *Goh Choon Seng* v. *Lee Kim Soo* (1); *Limpus* v. *The General Omnibus Co.* (2); *Salmond on Torts* 10 Ed., 90; *Bayley* v. *Manchester* (3).

It was urged on behalf of the appellant that Corporal Ryan could not be said to be the servant or agent of the appellant acting within the scope of his duties or employment because he was at all relevant times the servant or agent of the Knights of Columbus working for them and under their control. The burden of proof rests on the appellant, and this burden is a heavy one. *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.* (4). Not only is the burden a heavy one but the presumption is all against there being such a transfer. *Century Insurance Co.* v. *Northern Ireland Road Transport Board* (5); *Nicholas* v. *F. J. Sparks & Son* (6); *Chowdhary* v. *Gillot* (7). Not only have the appellants failed to discharge the burden of proof and overcome the presumption but on the contrary the evidence clearly establishes that the appellant retained control over its admitted servant, Corporal Ryan. See also *Jones* v. *Scullard* (8).

In the *Mersey Docks* case, *supra,* Lord Porter at p. 17 points out that where both a mechanical device, in this case the army truck, and its driver are both loaned the inference is that the servant remains the servant of the general

(1) [1925] A.C. 550 at 554.
(2) 7 L.T. (N.S.) 641 at 644.
(3) (1872) L.R. 7 C.P. 420.
(4) [1947] A.C. 1 at 10.
(5) [1942] 1 All E.R. 491 at 496.
(6) 61 T.L.R. 311.
(7) [1947] 2 All E.R. 544.
(8) [1898] 2 Q.B. 565 at 574.

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employer. See also *Jones* v. *Scullard, supra.* If therefore the vehicle and Corporal Ryan were loaned to the Knights of Columbus the presumption is against Corporal Ryan being transferred because in the words of Lord Wright in the *Century Insurance* case, *supra,* at p. 497, "he was bound to have regard to paramount directions given by the respondents (the permanent employers) and was to safeguard their paramount interests."

It was established that Corporal Ryan was paid by the appellant for the performance of his duties as a military driver on the day in question, and it was found as a fact by the trial judge that he was "undoubtedly on duty that day", therefore there can be no dispute that the appellant was the only person with power to dismiss him, and therefore retained control of his servant. No evidence was adduced to show that Ryan, either expressly or impliedly, consented to being transferred to the Knights of Columbus, and the absence of such consent implies that he remained the servant of the appellant. *Mersey Docks* case, *supra,* per Lord MacMillan at p. 14. Nor was it shown Ryan was working with the Knights in response to any request from them or under any agreement between them and the appellant. *Clelland* v. *Edward Lloyd Ltd.* (1). The evidence as a whole, and the findings of fact by the trial judge, point conclusively to the fact that only "the use and benefit" of Corporal Ryan's work could be considered as transferred but that Corporal Ryan at all times remained the servant of the appellant.

RAND J. (dissenting):—I am unable to agree that it was within the scope of the authority of Col. Reid, directly or indirectly, to give a lawful order which could make the driving of the lorry an act of the corporal within the course of his duties as a member of the 17th Reconnaissance Regiment, Reserve, Armoured Corps.

The original arrangement had been that a baseball team from Charlottetown, which the regiment sponsored, should go to Souris, but for some reason this could not be carried out; and Col. Reid, in order not to disappoint the community of Souris, which he thought might do harm to recruitment there, arranged to send another sponsored by

(1) [1938] 1 K.B. 273.

the Knights of Columbus. Both of these teams played in a local baseball league, and the players included members of the cadet corps of one of the city schools, affiliated with the regiment.

Undoubtedly a campaign for recruits to the regiment was authorized and encouraged, and an area of discretion in means was assumed to be in the Officer Commanding; but its scope could not extend to the violation of express regulations by which he was bound. There were such regulations that dealt with the use of equipment, and they took their character from the underlying separateness of army action from civilian action, a separateness amounting to the creation, in some respects and to some degree, of a relation analogous to a military imperium. Basically, army action of any sort is confined to army personnel and equipment: civilians are excluded; but this has necessarily given way, under the impact of modern developments, to a widening scale of interrelation between the army and civilians, either as private individuals or as public; and what is to be decided is whether the steps taken were within or beyond the range of what could reasonably be said to have been authorized for recruiting purposes.

Relevant rules are to be found in a compilation of "Regulations governing Military Operated Vehicles, 1947," published in December of that year but effective at the time of the accident. For instance, there is s. 22 which, in part, reads:—

> Military transport vehicles may be used to transport service personnel to sports fields, playgrounds and recreational centres, subject to the following conditions:—
>
> * * *
>
> (*d*) Under no circumstances will civilians or persons other than service personnel be transported.

S. 25(*a*) provides:—

> Civilians will not be transported in military vehicles except under the following circumstances:—
>
> * * *
>
> (*d*) Where adequate educational, shopping or entertainment facilities do not exist for dependents of officers and other ranks at units outside urban areas and public transportation is not available from unit boundaries, the Officer Commanding a Command may authorize the use of Service transport not required for other duties. Transport authorized shall carry dependents only between the unit and the nearest public transportation, or the nearest facilities, whichever is the closer.

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Paragraphs (*a*), (*b*) and (*c*) deal with civilians employed in the Department of National Defence, civilian contractors or their employees engaged on work for the Department, and civilian official visitors, lecturers, members of committees acting for or in association with the Department, etc.

Ss. 27 and 28 provide:—

> Members of the Royal Canadian Cadet Corps may be permitted to ride in military transport vehicles when required to do so in connection with a duly authorized parade or authorized training activity.
>
> * * *
>
> As the transportation of cadets in a military vehicle at any other time is not authorized, should the cadet be injured or killed while being transported other than on a parade or in the course of training as set out above, sections 73 to 80 inclusive of the Regulations for the Cadet Services of Canada, 1942, would not apply to provide compensation and medical treatment as set out therein. The liability of the Department in such a case would be merely that of the owner of a vehicle to a gratuitous passenger.

Now the team did not make the trip as cadets nor as substitutes for cadets, nor was it in any sense a cadet or service activity such as is contemplated either by the *Militia Act* or the regulations. The trip was an act of an extra-service nature, of which the most that can be said is that it was promoted by the Commanding Officer for the indirect purpose mentioned. That being so, the act was either within or beyond the scope of the officer's authority: there is no room for the suggestion of carrying out an authorized act in a forbidden manner.

The trip would necessarily involve the expenses of the conveyance: could they be incurred, say, by hiring a bus on behalf of the Government? There is nothing before us either express or by implication of any sort or description to warrant the conclusion that they could be, nor that, in the face of these regulations, the lorry could be used for such a purpose. Voluntary recruitment has for generations been the object of local inducement and encouragement; but, so far as they have not been private, they have always been by way of military displays or advertisements in which the authorities preserved an exclusively military action. If the Commanding Officer could send a private baseball team over 50 miles in a military lorry as a military proceeding, I see no limit to the kind of activity, whether of

sports, dancing, music, dramatics, or any other mode of arousing the interest and enthusiasm of young people, that could be resorted to in a similar manner. Such an extension of governmental action must find its authority in something more specific than the informal approval by general officers of stimulation to local enlistment.

Cameron J. found against the Crown on the ground that since the corporal was bound to execute the orders of the Commanding Officer, the act of driving was within the course of his employment. He founded himself on the case of *Irwin* v. *Waterloo Taxicab Company Limited* (1). There a taxi driver carried out the instruction of the General Manager of the business in driving him to see private friends, not on the business of the company. The driver had no reason to believe that the trip was not properly authorized, and it was made in a manner indistinguishable from the ordinary course of his work. But it was agreed that the driver was under a duty to obey the direction and to make the trip, and the Court of Appeal held the company liable for his negligence during the course of it.

The decision raises the question whether, if the General Manager himself had taken over the wheel and had driven the automobile on the same errand, the company would have been liable: if not, how the General Manager could raise the liability of the company through an order to the driver I find it difficult to see. In this I assume that the General Manager's authority extended so far as to enable him, if on an occasion he saw fit, and in the course of his employer's business, to drive the car himself. Moreover, there does not appear to have been any prohibition against the General Manager being a passenger, subject of course to the payment of the regular fare.

The fact that the servant there was bound to obey the order given him distinguishes the case from this. Here, the only order the corporal was bound in law to obey was a lawful order. It may be that, in his own interest, he was quite justified in obeying it and he would incur no discipline or responsibility for so doing; and it is clear that the special character of military relations necessitates such

(1) [1912] 3 K.B. 588.

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a justification except where the order is patently illegal. But that does not make the act done the act of the Crown. If Col. Reid himself had driven the lorry, he would not, in my opinion, have bound the Crown even though he could have done so in the course of admittedly military purposes. If that is sound, how he could engage the Crown's responsibility by ordering a subordinate to do the same act I am quite unable to appreciate.

I would therefore allow the appeal and dismiss the action with costs throughout if they are demanded.

KELLOCK J.:—Negligence on the part of the driver of the military vehicle here in question being no longer in question, the determination of this appeal depends solely on whether or not that negligence occurred while the driver was "acting within the scope of his duties or employment" within the meaning of s. 19(*c*) of the *Exchequer Court Act*. Mr. Jackett relies upon the regulations to which he referred in support of his contention that the vehicle could not, at the relevant time, be considered as having been engaged upon any business of the Crown. The evidence of Colonel Simmons, called on behalf of the Crown, furnishes, however, an additional standpoint from which this appeal must be considered.

According to this witness, during the period when the event here in question took place, both the Reserve and Active forces of the Canadian Army were in the "throes" of recruiting; "the war had finished in 1945 and we were stepping up the Reserve Forces and Permanent Forces."

With respect to the regulations as to the use of military vehicles, the witness said: "Certain things are taken for granted, that we could use a vehicle for recruiting." In particular he testified:

> Q. I believe you told my friend on cross-examination that there was nothing within your knowledge in these regulations to prohibit the use of a military-operated vehicle for recruiting? Is that what you said?
>
> A. Yes.
>
> Q. Well, not authorizing the use of one of these vehicles for recruiting purposes, would a Commanding Officer still be subject to the limitations of the use of that vehicle imposed by these Regulations?
>
> A. Not necessarily. If it is agreed or authorized that the—there is nothing in these Regulations which says a vehicle cannot be used for a purpose, and if it is agreed that it is a recruiting purpose, the vehicle can be used, and it would be quite all right, naturally.

With respect to the regulations themselves, the Crown relies in the first place upon Order 4558 of June 7, 1944, and particularly upon para. 3, which limits the use of army vehicles to "official purposes." The interpretation of this order is not unaffected by paras. 1 and 2 from which it appears that the order arose out of the then existing shortage of gasoline "in order to achieve economy." In my opinion, the use of a vehicle for recruiting purposes, particularly in the light of the evidence of Colonel Simmons, would be a use for an "official" purpose, and the commanding officer, to whom was committed the duty of recruiting his regiment up to its establishment, would of necessity have to judge as to what use would or would not be proper for such purpose, in the absence of some express provision with which any proposed use would be in conflict.

Colonel Reid considered that in what he directed he was carrying out his instructions with respect to increasing the strength of the regiment under his command. In the methods adopted by him to that end, he necessarily had a considerable discretion. If, therefore, there could be found a direct prohibition as to the use of transport vehicles in connection with recruiting, the question would arise as to whether disobedience would limit the "sphere of the employment" or merely amount to "a direction not to do certain things, or to do them in a certain way within the sphere of the employment;" *Plumb* v. *Cobden* (1), per Lord Dunedin at 67. If it were necessary to decide that question, I should say that the sphere of employment was not affected by the disobedience, if any, of Colonel Reid, and that, therefore, the particular regulations to which we were referred, notably with respect to the use of military vehicles for the transport of "service personnel for recreational purposes," the transport of "civilians employed by the Army," "prospective recruits" and cadets, do not assist the appellant.

If there were doubt as to whether or not this should be considered to be the right result, there would still be, in my opinion, a further question, namely, as to the duty of the driver of the vehicle when the order from Colonel Reid was given to him.

(1) [1914] A.C. 62 at 67.

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In *Keighly* v. *Bell* (1), Willes J. expressed himself thus:

> I believe that the better opinion is, that an officer or soldier, acting under the orders of a superior—not being necessarily or manifestly illegal—would be justified by his orders.

It is obvious that the object with which an order is given can determine its lawfulness. An officer going on military duty orders a soldier to fetch his horse. This would be a valid order. If, however, the officer wanted his horse to go hunting or to take an ordinary ride for pleasure, this would take the order out of the category of "lawful" commands.

The authors of the *Manual of Military Law,* 1929 edition, p. 18, express the view that

> So long as the orders of the superior are not obviously and decidedly in opposition to the law of the land, the duty of the soldier is to obey and (if he thinks fit) to make a formal complaint afterwards.

A similar view prevails in the United States. In Davis on "The Military Law of the United States," a former Judge Advocate General, in speaking of "lawful" orders of a superior officer, says at p. 381:

> If a question arises with respect to their legality, and the order is not on its face clearly and obviously in contravention of law, it is the duty of the inferior to resolve such doubt in favour of obedience, relying for justification on the form of the order so received and obeyed.

In my opinion, the law is sufficiently stated for the purposes of the case in hand by Willes J. above. Even in time of peace, military discipline could not otherwise be maintained.

If Colonel Reid in good faith, as he did, considered in giving the order here in question that he was carrying out his duty as commanding officer of the regiment in connection with the current effort to bring it up to strength, it is impossible to say that the Corporal who received the order to drive the vehicle should have considered he had received an unlawful order.

With respect to s. 117 of the *Militia Act,* R.S.C. 1927, c. 132, it may be that illegality in fact would constitute a defence to any proceeding under that section, but I do not think that that section establishes the proposition that illegality in fact is sufficient to establish that a soldier, in carrying out a command of a superior officer, is not acting

(1) (1866) 4 F. & F. 763 at 790; 176 E.R. 781 at 793.

within the scope of his duties or employment within the meaning of the *Exchequer Court Act*, if the order is not "necessarily or manifestly" illegal.

I would dismiss the appeal with costs.

ESTEY J.:—The suppliants Bradshaw and Spence, respectively owner and driver of a taxicab, were awarded damages against Her Majesty in the Exchequer Court for injuries suffered when the taxicab collided with an Army truck upon a highway between Charlottetown and Souris, Prince Edward Island, about 1:30 on the morning of July 24, 1947.

The learned trial judge found that Corporal Ryan's negligent driving of the Army truck was the sole cause of the collision and no appeal is taken therefrom.

The Army truck was, at all times material hereto, in possession of the 17th Prince Edward Island Reconnaissance (RECCE) Regiment, a reserve unit of the Canadian Army then under the command of Lieutenant Colonel Reid. Corporal Ryan was a member thereof. As such, for the purpose of determining the liability of Her Majesty in this action, both Lieutenant Colonel Reid and Corporal Ryan are deemed to be servants of the Crown (*Exchequer Court Act*, S. of C. 1923, c. 25 s. 50A). The essential issue is, therefore, whether Corporal Ryan, at the time the injuries were suffered, was acting within the scope of his employment within the meaning of s. 19(*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34).

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> * * *
>
> (*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.

Lieutenant Colonel Reid, with the intention of promoting recruiting, arranged for a ball game between the Regiment-sponsored RECCE junior team of Charlottetown and a local Souris team to be played at Souris on July 23, 1947. The RECCE team, for some reason, could not make the trip and Lieutenant Colonel Reid arranged that the Knights of Columbus, another junior team that played in the same league with the RECCE team at Charlottetown, would substitute. He directed their transportation in an Army

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truck and the injuries here claimed for were suffered while the Army truck was transporting the ball team and its supporters back to Charlottetown.

As Commanding Officer, Lieutenant Colonel Reid was authorized to promote and was at all times material hereto promoting recruiting. As one witness stated, the Regiment was then in the "throes of recruiting." There were no regulations dealing with recruiting and it must follow that as Commanding Officer it was his duty to exercise his discretion in the development of a programme that he might deem applicable and effective in the area allotted to him. As Lieutenant Colonel Rogers, then second in command, deposed:

> The policy of the Regiment in regard to recruiting was we were given certain areas in Queen's and King's counties, in which we were permitted to recruit, and we were to use the means at our disposal to interest young lads into joining the Reserve Army.

As part of the recruiting programme Lieutenant Colonel Reid concluded that good will should be maintained between the Army and the civilian population and had, as a consequence, upon different occasions transported the regimental band for entertainment. As he states, they were told at all times "to co-operate with civilian people." He accordingly arranged a ball game at Souris with a view to demonstrating to the young men that the Army was interested in many activities including sport and thereby to add to their interest in the Army. In all this he was not serving any purpose of his own or any ulterior or other purpose inconsistent with his position and duty to promote recruiting. (Whatever suggestion was made to the contrary was not established by the evidence.) Even if it be admitted he was in error, the evidence justifies no other conclusion but that he believed he was promoting recruiting and acting within the scope of his authority.

A servant may, of course, while purporting to act for his master, do so in a manner that is outside the scope of his employment, but the conduct here in question is not sufficiently far removed to justify such a conclusion. The learned trial judge did not go further than to suggest "it is difficult to agree with his opinion that the game actually played by the Knights of Columbus team had anything to do" with the subsequent enlistments from Souris. That,

however, is far from saying that Lieutenant Colonel Reid was not, in arranging the game, acting within the scope of his employment in the promotion of his recruiting programme.

The learned trial judge did find that the direction to use the Army truck for the transportation of this ball team "was contrary to the regulations and that Colonel Reid had no authority to use it for such purposes," and continued:

> I do not question his good faith in the matter. At the time he was busily engaged in an effort to secure recruits for his regiment, and doubtless thought that an exhibition baseball game, between a team sponsored by the Regiment and the young men of Souris, would assist in recruiting.

With the greatest possible respect, it would appear that in the foregoing sufficient weight has not been given to the distinction between the field of actual authority and the scope of employment. Lord Esher gives expression to this distinction when he states:

> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable. *Dyer* v. *Munday* (1).

This difference is again emphasized in Story on Agency, s. 452:

> * * * he (the principal) is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. *Bright & Co.* v. *Kerr* (2).

The foregoing statement of the learned author has been repeatedly quoted, particularly in *McGowan & Co. Ltd.* v. *Dyer* (3); *Lloyd* v. *Grace, Smith & Co.* (4); *Percy* v. *Corporation of City of Glasgow* (5). See also Willes J. in *Bayley* v. *Manchester, Sheffield,* and *Lincolnshire Ry. Co.* (6).

In *W. W. Sales Limited* v. *City of Edmonton* (7), it is pointed out that the mere fact the agent's act may constitute a criminal offence does not necessarily take it outside

(1) [1895] 1 Q.B.D. 742 at 746.
(2) [1939] S.C.R. 63 at 70.
(3) (1873) L.R. 8 Q.B. 141 at 145.
(4) [1912] A.C. 716 at 737.
(5) [1922] 2 A.C. 299 at 306.
(6) (1872) L.R. 7 C.P. 415 at 419.
(7) [1942] S.C.R. 467.

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the scope of his employment. Mr. Justice Hudson, delivering the judgment of the majority of this Court, stated at 471:

> Here the servants were "not on a frolic of their own." They were in fact doing work which was intended to be of service to their master and was in fact closely connected with acts which they were specifically instructed to do.

Where it was contended that because the conduct of the servant in repossessing a bedstead constituted a criminal assault he was, therefore, acting beyond the scope of his employment, Lord Esher stated:

> The question, therefore, for the jury was whether Price was employed to get back the bedstead, and did the acts complained of for the purpose of furthering that employment, and not for private purposes of his own * * * * *Dyer* v. *Munday supra* at 746.

The same view is adopted in *Goh Choon Seng* v. *Lee Kim Soo* (1), where, although the servant committed an act of trespass, that did not take his conduct outside the scope of his employment.

Limpus v. *The General Omnibus Co.* (2), was regarded by Compton J. at 643

> as a case of improper driving and not a case in which the servant did anything altogether inconsistent with the discharge of his duty to his master and out of the course of his employment—a fact upon which, it appears to me, the case turns.

The appellant cited among other authorities *Halparin* v. *Bulling* (3), *Battistoni* v. *Thomas* (4), and *Dallas* v. *Home Oil Distributors Limited* (5). The servant in all of these cases had left his master's business and was proceeding toward the attainment of a purpose of his own. The case of *Poulton* v. *The L. & S.W. Ry. Co.* (6), was also cited. There the conduct of the servant was ultra vires the master, which raised questions not relevant hereto, as there is no question of ultra vires in the instant case.

Section 50A of the *Exchequer Court Act* creates a relationship of master and servant between Her Majesty and a member of the Army. It thereby imposes a liability upon Her Majesty equal to that of the member of the Army for damage negligently caused by the latter while acting within

(1) [1925] A.C. 550.
(2) (1863) L.T.N.S. 641.
(3) (1914) 50 Can. S.C.R. 471.
(4) [1932] S.C.R. 144.
(5) [1938] S.C.R. 244.
(6) (1867) L.R. 2 Q.B. 534.

the scope of his employment. *The King* v. *Anthony* (1). The phrase "scope of employment," because it must so largely depend upon the circumstances in each case, has generally been conceded to be incapable of precise definition. The foregoing authorities do indicate that it is wider than the field or scope of actual authority and that the purpose of the servant and the fact that he is not acting in a manner inconsistent with his employment may be factors in determining scope of employment. Further assistance may be found in a consideration of the remarks of Willes J. in *Barwick* v. *English Joint Stock Bank* (2), where he states:

> In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

Quoted with approval in *Lloyd* v. *Grace, Smith & Co. supra,* at 733. See also *Hamlyn* v. *Houston & Co.* (3).

In *Lockhart* v. *C.P.R.* (4), their Lordships of the Privy Council adopted the statement of Salmond on Torts, 9th Ed. p. 95, 10th Ed. p. 89:

> But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it * * * On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case, the servant is not acting in the course of his employment, but has gone outside of it.

It was the duty of Lieutenant Colonel Reid to direct, within the meaning of the regulations, the use of Army vehicles for military purposes, including that of recruiting. It is unnecessary to recite the regulations which were placed in evidence, as it must be conceded that a study of them leads to the conclusion that, in the promotion of his recruiting programme, Lieutenant Colonel Reid had not the authority to authorize the use of this Army truck to transport a civilian baseball team from Charlottetown to Souris.

(1) [1946] S.C.R. 569.
(2) (1867) L.R. 2 Ex. 259.
(3) [1903] 1 K.B. 81 at 85.
(4) [1942] A.C. 591.

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At the time he considered that because he was doing this in aid of recruiting that it was for an official purpose and, therefore, permissible within s. 20 of the regulations, which reads, in part:

> 20. Military transport vehicles are to be used for official purposes only. * * * *

The problem here presented is not whether Lieutenant Colonel Reid exceeded his authority, but did he act outside the scope of his employment? He was serving no other purpose or interest in all that he did but that of his master and his conduct was not so far removed from the acts he was authorized to perform as to justify a conclusion that he was not, at all times, engaged in his master's undertaking. Upon the whole of the evidence, Lieutenant Colonel Reid, whose duty it was to direct these vehicles within the meaning of the regulations, upon this occasion misconstrued them, but even then his direction was so connected with those directions he was authorized to give that within the view expressed by Salmond and adopted by the Privy Council in *Lockhart* v. *C.P.R., supra* he was, in directing the use of this truck, acting within the scope of his employment.

Lieutenant Colonel Reid followed the usual routine of his Regiment and issued a Transport Work Ticket authorizing this trip. It was given to Sergeant Ryan who was in charge of the Army trucks. Sergeant Ryan communicated with his brother, Corporal Ryan, and as a result the latter, who was qualified to drive Army vehicles, proceeded to the garage and received his instructions. The truck was serviced and made ready for the trip by Sergeant Ryan. Corporal Ryan received, in the regular way, Army pay covering this trip. Both Sergeant Ryan and Corporal Ryan would know that the Regiment was in the throes of a recruiting campaign and if they had asked any question with regard to the purpose of this trip they would have been told it was in promotion of recruiting. Throughout, all three parties were acting within the scope of their employment at the time the injury for which damages are here claimed occurred.

In my opinion the appeal should be dismissed.

LOCKE J. (dissenting):—The learned trial judge has found that the use of the Army truck to carry the Knights of Columbus baseball team to Souris and return on the day in question was contrary to regulations and that Colonel Reid had no authority to use it for such purposes, conclusions with which I respectfully agree. The general instructions given to the officer commanding the unit to endeavour to obtain recruits for his unit cannot be construed as authorizing the carrying on of such activities by means forbidden by Army orders.

There remains the question as to whether Corporal Ryan, who was driving the truck and whose negligence has been held to have caused the accident, was at the time acting "within the scope of his duties or employment" within the meaning of that expression in subsection (*c*) of s. 19 of the *Exchequer Court Act*, R.S.C. 1927, c. 34.

Colonel Reid was at the time the officer commanding the 17th Prince Edward Island Reconnaissance Regiment. Other than his statement that this was a Reserve unit of the Armoured Corps and the fact that it was not at the time undergoing its annual drill or training and had not been placed on active service, there is no evidence of its status. For the Crown the King's Regulations and Orders of 1939 were tendered in evidence and admitted, with the consent of counsel for the respondent, from which it must be taken that these were the general regulations and orders which applied to members of this unit at the time of the occurrence in question. By Order 1 the Reserve Militia, of which the unit apparently formed part prior to the amendments to the *Militia Act* enacted by c. 21 of the Statutes of 1947, was organized in the manner defined by Appendix 10 which declared that the organization of the Reserve Militia was authorized subject to regulations prescribed by the Governor in Council under s. 16 of the *Militia Act*. The reference to s. 16 is to the Act as it appeared as c. 41, R.S.C. 1906. In the revision of 1927 it appeared as s. 14.

By the amendment of 1947 the designation of the various military forces of Canada as Militia was altered and all the military forces of Canada other than the Royal Canadian Navy, the Royal Canadian Air Force and the Reserves thereof were named the Canadian Army, divided into the

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active force consisting of that portion that is on continuous full time military service, such other military units then existing which had been theretofore constituted and such other units as might thereafter be named and authorized by the Minister under the provisions of s. 20 of the Act as amended. The Reserve Militia mentioned in Order 1 and Appendix 10 of the 1939 King's Regulations and Orders is not mentioned by name. Upon the evidence in the present record, a unit such as the Prince Edward Island Reconnaissance Regiment was maintained and continued as a reserve unit of the Canadian Army and this was its status at the time in question.

This being so, the question as to whether Corporal Ryan was under any duty to obey the order of the commanding officer of the unit to drive the truck at that time is not free from doubt. According to Regulation No. 9 which forms part of Appendix 10 to the King's Regulations and Orders, drill and training for the members of such units is voluntary. Regulation 11 declares that the Government does not undertake to provide the Reserve Militia, except when called out on active service, with any equipment, and they are not entitled to transportation, subsistence, pay or allowances, except while on active service. The oath taken by every officer and man on joining such a unit, in addition to containing an oath of allegiance to His Majesty, includes the oath to "well and truly serve His Majesty in the Reserve Militia of Canada under the terms and conditions laid down in the law and the regulations duly made from time to time in that behalf." Corporal Ryan's regiment, as has been stated, was neither on active service nor undergoing its annual drill or training, nor had the service he was called upon to perform by the order of Colonel Reid transmitted to him by Sergeant Ryan anything to do with the annual drill or training of the unit under the provisions of the Act. It is difficult to conclude, therefore, that when, according to the regulations, attendance at drill or training was voluntary and Corporal Ryan, according to Regulation 12, was not entitled to any pay except while on active service, he was under any obligation to obey an order to drive the baseball team to Souris, if these were the regulations then in force in regard to his unit.

While the regulations thus applicable to the unit contained these provisions, s. 115 of the Act provided a penalty for:—

> Every officer and man of the Militia who, without lawful excuse, neglects or refuses to attend any parade or drill or training at the place and hour appointed therefor, or who refuses or neglects to obey any lawful order at or concerning such parade, drill or training.

This section remained unalterated by the amendment of 1947 other than by striking out the word "militia" and substituting the words "Canadian Army" which, by the defining section, included a reserve unit such as this. The question is perhaps affected by s. 69 of the *Militia Act*, as enacted by the 1947 amendment, which includes a provision that all officers and men of the Canadian Army shall be subject to "all laws, regulations and orders relating to the Canadian Army" when, inter alia, they are within any armoury or other place where arms, guns, ammunition or other military stores are kept since, while the order to take the truck from Charlottetown to Souris and return was communicated to Sergeant Ryan by Colonel Reid by telephone and he received the work order which authorized the use of the vehicle elsewhere, Corporal Ryan took delivery of the truck and received at least part of his instructions from Sergeant Ryan at an armoury. There appears thus to be a conflict between these sections of the *Militia Act* and the regulations affecting Reserve units such as this. In view of the fact that the regulations were clearly authorized by section 14 of the statute, as it was before the amendment, it may well be contended that the words "Canadian Army" in section 115, as amended, should be construed as applicable to units other than those of the Reserve Militia which were affected by the regulations contained in Appendix 10 to the King's Regulations and Orders. I find it unnecessary to come to a conclusion on the point, in view of the opinion that I have formed that in any event Corporal Ryan owed no duty to obey an order to do something prohibited by the regulations.

The truck or lorry driven by Ryan had been issued to the 28th Light Anti-Aircraft Regiment and, according to Colonel Reid, it had been "loaned" to him for the purpose of making this trip. The regulations for the employment of military vehicles at the time provided that transport

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vehicles were to be used for official purposes only and, while by Regulation 22 they might be used to transport service personnel to sports fields, play grounds and recreation centres, this was permissible only in the case of properly authorized and organized military sports and, in the case of these, the use of transport for such purposes, for distances in excess of twenty miles, was allowed only on the authority of the Quartermaster General at Army Headquarters or the general officer commanding of the command concerned, and its use for carrying civilians or persons other than service personnel was prohibited. The vehicle in question was not being used for official purposes at the time of the accident nor for the purpose of transporting service personnel to authorized or organized military sports: the distance between Souris and Charlottetown is fifty-three miles and permission to use the truck for a journey of this extent had neither been asked nor granted. If it be assumed for the purpose of argument that Corporal Ryan was obligated by the terms of his enlistment and the obligations imposed upon him by the *Militia Act* and the King's Regulations and Orders to obey an order of the commanding officer of the unit, communicated to him in an armoury, when such unit had neither been placed on active service nor was engaged in its annual drill or training under the provisions of the *Militia Act*, his only obligation was to obey a lawful order.

The oath required of Ryan on admission to the Reserve Militia under Regulation 15 of Appendix 10 of the King's Regulations and Orders was to serve under the terms and conditions laid down in the law and the regulations duly made from time to time in that behalf. The penalties authorized by the *Militia Act* for disobedience are for the failure or refusal to obey any lawful order, not any order which a superior officer may see fit to give. While, as pointed out by Hudson, J. in *Dallas* v. *Home Oil Distributors Limited* (1), the question as to whether a given act of an employee is within the scope of his employment, in the sense in which that phrase is used for the purpose of determining the employer's liability to third persons, is strictly not the same question as to whether an injury received by an employee was an injury received in the

(1) [1938] S.C.R. 244 at 252.

course of his employment for the purpose of applying the Workmen's Compensation Act, nevertheless judicial reasoning in respect of the latter class of questions may be valuable and illuminating. In *Bourton* v. *Beauchamp* (1), where a claim was made under the Workmen's Compensation Act of 1906 by reason of the death of a miner killed in doing an act prohibited by statutory regulation under the Coal Mines Act 1911, it was held that the deceased in disobeying the statutory regulation was acting outside the sphere of his employment and that, consequently, his death was not caused by an act arising out of or in the course of his employment. To the same effect is *Moore* v. *Donnelly* (2). The reasoning applied in arriving at the conclusions of the House of Lords seems to me applicable in the present matter and accordingly that in performing an act forbidden by the regulations Corporal Ryan was not "acting within the scope of his duties or employment" within the meaning of subsection (*c*) of s. 19 of the *Exchequer Court Act*. The learned trial judge considered that the decision of the Court of Appeal in *Irwin* v. *Waterloo Taxicab Co. Ltd.* (3), should be applied in the circumstances of the present case but, with respect, I am unable to agree. In that case, Bird, the driver of the taxicab had been instructed to obey orders given to him by Black, the general manager of the taxicab company, and at the time of the accident he was complying with an order which, as shown in the judgment of Buckley L.J., he was by the defendant's directions bound to obey. In the present matter, the obligation of the soldier is limited by the statute and the regulations to obedience to lawful orders. The decision in *Irwin's* case does not, therefore, seem to me in point. If it were it would be necessary, in my opinion, to decide whether the case was rightly decided, a debatable question, to my mind.

It may be said that if officers and men of the Canadian Army were entitled to question the validity of orders given to them by their superiors, it would be destructive of military discipline. This argument was advanced in *Heddon* v. *Evans* (4), where an action was brought against an officer who had sentenced a soldier to fourteen days'

(1) [1920] A.C. 1001.
(2) [1921] 1 A.C. 329.
(3) [1912] 3 K.B. 588.
(4) (1919) 35 T.L.R. 642.

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confinement to barracks for conduct which was said to be to the prejudice of good order and military discipline, the plaintiff contending that the officer imposing the punishment had exceeded his jurisdiction. McCardie J. pointed out that the compact or burden of a man who entered the Army, voluntary or not, was that he would submit to military law, not that he would submit to military illegality; that he must accept the Army Act and Rules and Regulations and Orders and all that they involved, since these "expressed his obligations and announced his military rights." Dealing with the argument that if such actions were permitted it would injuriously affect the discipline of the Army, he said that he would not think this was so since he could not think that discipline would be the less readily exerted or the less loyally accepted if it were subjected at all times to the limitations created by the military law itself. Even if the contrary were so, I think this would not affect the matter to be here decided, which is the determination of a question of law depending upon the construction to be given to the regulations and the statutes. In *Keighly* v. *Bell* (1), a military officer claimed damages from his commander for false imprisonment, malicious prosecution and libel. Willes J. in the course of the argument, in referring to the contention of the defendant that what he had done in the matter had been authorized or approved by his superiors, said in part (p. 790):—

> I hope I may never have to determine that difficult question, how far the orders of a superior officer are a justification. Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual war—at all events, as regards enemies, or foreigners—and, I should think, even with regard to English-born subjects of the Crown, *unless the orders were such as could not legally be given.* I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders.

Later, in delivering judgment, he said in part (p. 805):—

> If it were necessary to state any principle on which it would be competent to me to decide such a case, it would be that a soldier, acting honestly in the discharge of his duty—that is, acting in obedience to the orders of his commanding officers—is not liable for what he does, unless it be shown that the orders were such as were obviously illegal. He must justify any direct violation of the personal rights of another person by showing, not only that he had orders, but that the orders were such as he was bound to obey.

(1) [1866] 4 F. & F. 763; 176 E.R. 781.

The statement first above quoted appears to me on the face of it to be simply *obiter* and neither of the passages appear to me to deal directly with the question to be decided here, as to whether obedience to an unlawful order lies within the scope of the duties of a soldier.

I am further of the opinion that the matter is not affected by the fact that Corporal Ryan may not have been aware of the true extent of the duty imposed upon him by the terms of his employment, by the *Militia Act* and by the King's Regulations and Orders and may have thought that he was in duty bound to obey the order in question. To impose liability upon the Crown the conditions of the section of the *Exchequer Court Act* must be met. I am unable, with respect for contrary opinions, to understand how the scope of his duties and employment could be extended by his mistaken understanding as to what they were (*Wardle* v. *Enthoven* (1)).

I would allow this appeal and direct that the action be dismissed with costs throughout if they are demanded.

CARTWRIGHT J.:—This is an appeal from two judgments of Cameron J. whereby it was adjudged that the suppliants Spence and Bradshaw were respectively entitled to recover damages in the amounts of $10,318.85 and $750, resulting from a collision which occurred on the 24th of July, 1947 between a taxi-cab, owned by Bradshaw and operated by Spence, and an army truck, the property of the appellant, driven by Corporal H. W. Ryan.

The learned trial judge found on conflicting evidence that the sole cause of the collision was the negligence of Corporal Ryan and neither this finding nor the assessment of damages was questioned before us.

In the statement of defence in each case it is admitted that at the time of the collision "a motor vehicle, the property of His Majesty the King, as vested in the Minister of National Defence, was being driven by one Corporal Harrison W. Ryan, No. F403452, a servant of His Majesty the King in the employ of the Royal Canadian Armoured Corps (Reserve)" but it is pleaded that Corporal Ryan, at the time of the collision, was not acting within the scope of his duties or employment. The question for determination is whether or not he was so acting.

(1) [1917] 86 L.J.K.B. 309.

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The relevant facts for the purposes of this appeal may be briefly stated as follows:

At the time of the collision Corporal Ryan was a non-commissioned officer in the Canadian Army and a member of the 17th P.E.I. Reconnaissance Regiment with Headquarters at Charlottetown. This regiment did not form part of the active force and Corporal Ryan was not on full-time military service. The Commanding Officer of this regiment was Lieutenant-Colonel Reid. The vehicle in question was a 60-cwt. truck which had been issued to the 28th Light Anti-Aircraft Regiment. The Commanding Officer of that regiment had loaned the vehicle to Lieutenant-Colonel Reid and counsel for the appellant did not argue that Lieutenant-Colonel Reid did not have the lawful custody of the vehicle or that he would not have been entitled to use it for any lawfully authorized military purpose connected with the regiment under his command.

Lieutenant-Colonel Reid testified that he had received orders, which were not in writing, to do all that he could to build up the strength of his unit by securing recruits from an area which included Souris, a small town about fifty-three miles from Charlottetown, that he thought that it would tend to encourage recruiting if he arranged an "exhibition" baseball game between a team of young men at Souris and a team sponsored by his regiment and composed of members of the Queen's Square School Cadet Corps which was affiliated with his regiment and that, with this end in view, he made arrangements for such a game, intending to transport the Cadet Corps team from Charlottetown to Souris in an army truck. For reasons which do not appear the Cadet Corps team was unable to play this game. Lieutenant-Colonel Reid considered that the failure to send a team after the game had been arranged would have a bad effect on the purpose which he was seeking to accomplish, that is to encourage recruiting, and made arrangements that a team sponsored by the Knights of Columbus and which was in the same league as the Cadet Corps team should make the trip to Souris and play the game in place of the last mentioned team.

He accordingly instructed Sergeant Ryan, a member of his regiment who was at the time on full-time military service to call in Corporal Ryan and to instruct him to make the trip. A "Transport Work Ticket" authorizing the trip was made out, was signed by Lieutenant-Colonel Reid and was given by him to Sergeant Ryan. On Corporal Ryan arriving at the armoury in response to the call which he had received, Sergeant Ryan handed him the "Transport Work Ticket", which showed on its face that the trip to be taken was from Charlottetown to Souris, and ordered him to pick up the Knights of Columbus team, to drive them to Souris and, after the game and such entertainment as had been arranged for the visiting team were over, to drive the team back to Charlottetown. It was on the return trip that the collision occurred.

It was proved that Corporal Ryan was an experienced driver and that "he had standing orders", which expression was explained to mean that he had the permanent status of a duly qualified driver of army vehicles. On previous occasions when Corporal Ryan had been called upon by his Commanding Officer to drive an army vehicle he had been paid out of the public treasury and he was to be so paid for the trip in question.

These being the facts, it would seem clear that the order to make the trip was given to Corporal Ryan at a time while he was upon military duty and within an armoury and that it was his duty to obey it provided it was a lawful order. This follows from Sections 69(2) and 117 of the *Militia Act*, R.S.C. 1927, c. 132 as amended by 1947, 11 George VI, c. 21, sections 22 and 34(1). The relevant portions of these sections provide as follows:—

69(2) Officers and men of the Active Force and members of the permanent staff of the Canadian Army shall at all times be subject to all laws, regulations and orders relating to the Canadian Army *and all other officers and men of the Canadian Army shall be subject to such laws, regulations and orders.*

* * *

(*c*) at any time while upon military duty . . . . or within any armoury * * * *

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117. Every officer and man of the Canadian Army who disobeys any lawful order of his superior officer * * * shall incur a penalty * * * *

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Indeed, I did not understand counsel for the appellant to argue that if the order had been to drive the truck for some purpose authorized by the relevant regulations it would not have been Corporal Ryan's duty to carry it out.

The main argument on behalf of the appellant is that under the relevant legislation, regulations and orders, Lieutenant-Colonel Reid had no authority to make use of the truck for the purpose described, that, while Corporal Ryan was under a duty to obey the lawful orders of his superior officer, the order given to him was unlawful and that consequently in driving the truck pursuant to such order he was not acting within the scope of his duties or employment.

The learned trial judge found that Lieutenant-Colonel Reid was acting throughout in good faith and in the belief that he was entitled to use the truck as he did but that he was mistaken and that under the relevant orders he had no authority to use the truck for this purpose and committed a breach of the regulations regarding the use of military vehicles in so doing. The learned trial judge was, however, of opinion that Corporal Ryan was acting within the scope of his duties or employment, that it was his duty to drive army vehicles in accordance with the orders which he received from his superior officers, that this was what he was doing at the time of the collision and that consequently the appellant is liable for the damages resulting from his negligent driving.

Counsel for the respondents seeks to support the judgment on the grounds stated by the learned trial judge but he also argues that Lieutenant-Colonel Reid was entitled to use the truck for the purpose mentioned. He submits that the only order or regulation properly proved, and in any case the only one having relevance, was that contained in Exhibit B, Order No. 4558 said to have been issued by the Quartermaster General, and that the only provision in such order which has a bearing on the case at bar is the sentence:—"Army vehicles are to be used for official purposes only." He then argues that Lieutenant-Colonel Reid's purpose was an official one, that he had been ordered to do everything in his power to encourage recruiting, that, in view of section 138 of the *Militia Act*,

it is unimportant that he had no written orders to this effect and that the encouragement of recruiting, having been ordered, became an official purpose. He submits that as, so far as the record discloses, the regulations are silent as to how this purpose should be carried out it must be taken to be left to the reasonable discretion of the Commanding Officer concerned. In support of this view counsel made reference to the evidence of Lieutenant-Colonel Simmons, called by the appellant. This officer stated that his duties included general supervision over the operation of military vehicles in the charge of the various units in the Eastern Command, reserve force and active force, although the primary responsibility for the use of such vehicles rested with the Officer Commanding each unit. Colonel Simmons said in part:—

> You are asking a simple question, "could a vehicle be used for recruiting purposes", and I would say "yes". My answer would be "yes".

Of course, these officers could not by their evidence relieve the court of its duty to construe the relevant regulations but, as I understand it, their evidence was not tendered for this purpose but rather to show what orders were in fact received and what practice was actually followed in a matter not expressly dealt with in the regulations, i.e., the encouraging of recruiting. It is clear that if accepted, the argument that Lieutenant-Colonel Reid was authorized to use the vehicle for the purpose mentioned and was giving a lawful order to Corporal Ryan when he ordered him to drive the truck as he did, is sufficient to dispose of the appeal in favour of the respondents. I do not find it necessary to pass finally upon this argument and will only say that the question appears to me to be a doubtful and difficult one.

For the purposes of this appeal I will assume, without deciding, that the learned trial judge was right in holding that Lieutenant-Colonel Reid did not have authority to send the truck to this particular destination and for this particular purpose. The question then is whether, on this assumption, Corporal Ryan was acting within the scope of his duties or employment at the time of the collision, for it was his negligence which caused injury to the suppliants.

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The effect of the conflicting views put forward may be summarized as follows. For the appellant it is urged that the duty of Corporal Ryan was limited to driving army vehicles for such purposes as might be authorized by the relevant statutes, regulations and orders in force at the time of the accident, that since, *ex hypothesi*, driving the truck to Souris for the purposes mentioned was not authorized by such regulations his act in driving it there fell outside the scope of his duties and that the fact that he was ordered by Lieutenant-Colonel Reid to drive the truck to Souris is irrelevant as Corporal Ryan's duty did not include obedience to the orders of his Commanding Officer unless they were lawful. For the respondents it is argued that the duty of Corporal Ryan, who was admittedly on the day of the accident a servant of the Crown, was to drive army vehicles, that it was no part of his duty to decide to what places or for what purposes such vehicles should be driven but that as to this he was to obey the orders given to him by his superior officers, provided that such orders were not *ex facie* unlawful and (perhaps) provided further that the orders were not such as a reasonable man in Corporal Ryan's position should have realized were unlawful.

I have reached the conclusion that in the circumstances of this case it was Corporal Ryan's duty to obey the order which he received and that in driving the truck to and from Souris in obedience to that order he was acting within the scope of his duty. This view appears to me to be supported by the Judgment of the Court of Appeal in England in *Irwin* v. *Waterloo Taxi-cab Company, Limited* (1), relied upon and followed by the learned trial judge. In that case one Bird was employed by the defendant Taxi-cab Company to drive its taxi-cabs. He was instructed by his employer to obey the orders of the General Manager, Black, and to drive the cabs as directed by him. Black ordered Bird to drive one of the taxi-cabs on what was clearly as between Black and the Company a frolic of his own but it was found that this fact was not known to Bird and that the circumstances were not such that he ought reasonably to have known it. While so driving Bird

(1) [1912] 3 K.B. 588.

negligently struck and injured the plaintiff. It was held that the Company was liable for Bird's negligence although it is, I think, clear from the judgments that had Black himself been driving the Company would not have been liable. We were not referred to any subsequent decision in which this judgment has been doubted and with respect I agree with it.

In the case at bar I think it clear that Corporal Ryan did not know that Lieutenant-Colonel Reid had no right to give him the order which he gave nor do I think that it can be said on the evidence that as a reasonable man Corporal Ryan should have known this. I have already indicated that, even after having had the advantage of hearing a full and able argument on the question, I am doubtful as to whether or not Lieutenant-Colonel Reid was authorized to give the order in question. It was not proved that any of the regulations or orders relied upon by the appellant as prohibiting Lieutenant-Colonel Reid from giving such an order had in fact been brought to Corporal Ryan's attention or had been published in such a manner that it became his duty to be aware of their contents. I do not think that there is any presumption that he knew their contents. In this connection reference may be made to the words of Lord Atkin in *Evans* v. *Bartlam* (1).

> For my part I am not prepared to accept the view that there is in law any presumption that any one, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

It appears to me that to hold that it was not within the duty of Corporal Ryan to obey the order given to him in this case by his superior officers would tend to bring about a condition of confusion. I cannot assent to the proposition that where a non-commissioned officer or man whose duty it is to drive army vehicles receives from his Commanding Officer an order, not obviously unlawful, to drive a vehicle to a particular place and for a particular purpose he must, before obeying the order, conduct an inquiry of his own as to whether the order is lawful.

(1) [1937] A.C. 473 at 479.

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In *Hodgkinson* v. *Fernie* (1), in his charge to the jury at page 421, Cockburn C.J. said:—

> There would be an end to all subordination, military or naval, if the officer subordinate in command were to take upon himself to decide upon the merits of the order, before he obeyed it.

This charge was approved on a motion for a new trial by a court consisting of Cockburn C.J. and Creswell, Crowder and Willes JJ.

In the case at bar counsel for the appellant does not suggest that Corporal Ryan should have questioned the merits of the order he received. The suggestion is that he should have questioned its legality. But where there is nothing on the face of an order or in the surrounding circumstances to indicate that it is unlawful the effect of holding that the subordinate should question its legality before obeying it would, I think, result in no less confusion than would permitting him to decide upon its merits.

We are not called upon in this case to consider the duty of a soldier who receives an order, in fact unlawful, in such circumstances that he ought reasonably to know it is unlawful and I wish to make it clear that I do not intend to decide anything in relation to such a situation.

For the reasons given by the learned trial judge on this branch of the matter and for the reasons set out above I am of opinion that these appeals should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. R. Varcoe.*

Solicitors for the respondents: *Bell and Mathieson.*

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(1) (1867) 2 C.B.N.S. 415.

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60663—2½

CONTRACT—*Contracts — Commercial — Agreement to supply engines to complete orders—Whether letters of request for engines were orders—Claim for rectification—"Orders"—Admissibility of oral evidence.* The appellant and the respondent were agents for the sale of Chrysler marine engines in British Columbia. On January 26, 1949, the respondent agreed to surrender its franchise and to sell its stock of engines and accessories to the appellant; it was also agreed that the appellant would supply the respondent "with the necessary Chrysler engines to complete the orders shown on the attached list". No such list was attached to the agreement. The parties met again the following day and the respondent, after showing some of its import permits, wrote to the appellant: "As agreed in our meeting yesterday, we are listing below orders we have on hand . . ." This list was compiled from letters from fishing companies, dated in 1948, and setting out an estimate of the number of engines they would need for the 1949 season and expressing the hope that the respondent would be able to deliver them as and when required. The particulars of equipment and accessories were not set out in the letters. With these letters, the respondent was able to obtain the necessary import permits to bring the engines in from the United States. After supplying some engines, the appellant refused any further delivery unless the respondent produced firm written orders obtained on or prior to January 26, 1949. In an action for breach of contract, the appellant pleaded, inter alia, that it had agreed to supply the engines to enable the respondent to fulfil only bona fide orders, and counterclaimed for rectification of the contract. The trial judge accepted the evidence of the respondent that there had been no discussion as to the type of orders, and accordingly there could be no rectification and found that the appellant had in no way been deceived by the respondent. This judgment was affirmed by a majority in the Court of Appeal for British Columbia. *Held* (Rand and Cartwright JJ. dissenting), that since the letters were not orders within the meaning of that expression as used in the agreement no breach had been shown, and therefore the appeal should be allowed and the cross-appeal dismissed. *Per* Estey J.: The evidence adduced supports the contention that a latent ambiguity was raised that justified the examination of the surrounding circumstances to determine the intent and meaning of the word "orders" as used in the contract. But this, however, did not permit the reception in evidence of declarations from representatives of the customers, setting forth their intention with respect, to the meaning and purport of these letters. That intention, as in written instruments generally, must be determined by the court upon a construction of the language adopted by the parties to express their intention. The letters were estimates of customers requirements

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and not orders for engines to be delivered in the future. If the respondent intended them as orders, it should have disclosed it, or made their contents known to the appellant in such manner that it would have understood respondent's meaning and intention. Per Locke J.: The documents upon which the respondent must rely as constituting orders are the letters from certain customers prior to the agreement; and the word "orders" in the agreement cannot be construed as including these letters. The respondent's pleadings do not assert that by custom in the trade or otherwise the word "orders" should be construed otherwise than in accordance with its commonly accepted meaning, namely, a direction to make, provide or furnish anything at the responsibility of the person ordering. Oral evidence of those customers as to what they intended to convey by their letters was inadmissible; in the absence of any ambiguity in the language employed and in the state of the pleadings, the question of interpretation was for the trial judge. The letters were by their very terms simply estimates of the requirements of the companies during the coming season, and not a direction or request, to supply goods, or an offer capable of acceptance. *Per* Rand and Cartwright JJ. (dissenting): In view of the impossibility of recission and the completely executed consideration, the only issues open would be fraud and warranty. The former has been disposed of by the vindication of the respondent; the latter must arise as a conclusion of intention to be drawn by the court from the letters, but there is nothing in them that would justify that. There was no reason to affirm when there was no question of what was in mind or of any undisclosed matter. The appellant was willing to supply those engines, and the technical difference between orders and what the letters involved was not of such a nature as would deprive the appellant of something of which it sought assurance. Furthermore, the word "orders" as used embraces the commercial commitments contained in the letters. CANADIAN ATLAS DIESEL ENGINES CO. LTD. v. MCLEOD ENGINES LTD.... **122**

2.——*Contract—Sale of steam shovel without certificate of inspection—Whether sale null* ab initio*—Whether tender of certificate before judgment was sufficient—Pressure Vessels Act, R.S.Q. 1941, c. 177, s. 12, as amended.* By a written contract, the appellant sold to the respondent a used pressure vessel, namely, a steam shovel. Pursuant to its undertaking, the appellant made delivery at the respondent's sand pit. Subsequently, the respondent sought, by his action, the annulment of the sale on the ground that the shovel had been sold and delivered without the certificate mentioned in s. 12 of the *Pressure Vessel Act* (R.S.Q. 1941, c. 177 as amended), which provided that no such vessel "shall be again commercially